A response to the 2013 Whitmore Lecture address by The Honourable Wayne Martin AC, Chief Justice of Western Australia

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Introduction

The growth in the complexity of regulation, in the discretionary powers of public officials and in the size of Executive government, particularly in the 20th century, led to a growing realisation by the Executive and Legislative Branches that new structures and powers were needed to ensure appropriate conduct and administrative practice in the public sector, i.e. the integrity of government. No longer could the Executive Branch remain largely self-regulating.

Since the 1970's each jurisdiction in Australia has established a range of bodies to join auditors general in ensuring the integrity of government, including ombudsman, anti-corruption commissions, police complaints bodies, information commissioners and the like. These new bodies were charged with responding to citizen's complaints about administrative conduct and decisions, allegations of corruption involving public officials, and so on. This trend was reflected in many other Westminster systems.

As many of these integrity type bodies were designed and intended to operate independently of Executive government, several did not think it appropriate that they be seen as part of the Executive Branch. To signal their independence from the Executive and their relationship with Parliament, in many Westminster systems Ombudsman in particular have been seen as 'officers of the Parliament' – either explicitly through statute[1] or Constitution,[2] or implicitly by the general recognition of that close relationship.[3] This was seen as enhancing the ability of the Parliament to keep the Executive accountable.

The 'officers of Parliament' approach might not be such a good fit for integrity type bodies that have jurisdiction over the Parliament and/or MPs (e.g. in anti-corruption commissions and auditors general). For the same reason there are problems in seeing integrity type bodies (in that capacity) as 'officers of the Court' if they have jurisdiction over the courts and/or judicial officers (e.g. in NSW the ICAC, Auditor General and Judicial Commission). This has led to concern about ways to ensure integrity bodies have sufficient guarantees of independence to ensure they are adequately able to perform their functions. This in turn has led to consideration of the place of integrity bodies in the structure of government.

It has been argued by various commentators in recent years[4] that consideration should be given to the concept that there is, or should be, another branch of government – the Integrity branch of government. What these commentators are suggesting is that there should be a fourth branch – the 'Integrity' branch. The role of the agencies within that Branch would be to ensure proper practice on the part of the organisations within the other branches of government. The integrity branch concept is only one of the theories put forward by such commentators, with other theories being the 'national integrity system' and 'expanded concept of admin justice system'[5]. While 'fourth branch' attracts more attention and stimulates more debate, it is the harder to explain theoretically.

The 2013 Whitmore Lecture

The Hon Wayne Martin AC, Chief Justice of Western Australia, discussed the issue of the fourth branch of government in his 2013 Whitmore Lecture. Chief Justice Martin was the third Australasian Chief Justice to deliver a paper addressing this issue, following in the footsteps of now former Chief Justice Spiegelman of the NSW Supreme Court[6] and The Rt Hon Dame Sian Elias, Chief Justice of New Zealand[7]. Chief Justice Spiegelman's paper triggered the current debate in Australasia, arguing that an Integrity Branch of government would incorporate the various agencies that have been established to ensure the integrity of government, possibly including such agencies as the Auditor General, Independent Director for the Public Prosecutions, Corruption Commissions, Ombudsman, Statutory Integrity Commissioners as well as ad hoc

commissions of inquiry. He went further to suggest that possibly such a branch of government could be seen as incorporating the integrity functions of the Judiciary. In a 2010 paper Chief Justice Elias supported the overall concept of the fourth branch as well as the idea that possibly the courts could properly be located within that grouping.

Chief Justice Martin's paper, entitled *"Forewarned and Four-armed – Administrative Law Values and the Fourth Arm of Government"*, appeared to take a very different view to the concept of an integrity branch of government. A large focus of this paper was a criticism of the legislative framework for integrity agencies in Western Australia and an allied criticism of how some of their functions have been exercised. The paper also contains general criticisms of the notion of an 'integrity branch'. My main purpose in this response is to analyse that general direction of Chief Justice Martin's paper. In doing so I also critique some of the Chief Justice's assessment of the WA integrity framework and legislation to point out that some of the criticisms are misconceived. Having said this, I concede that some of Chief Justice Martin's criticisms are well made.

Chief Justice Martin argued in his paper that calls over recent years for integrity agencies to be considered to be a fourth branch of government are unjustified and should be treated with considerable caution. While the Chief Justice clarified his position in a later address to the Australasian Study of Parliament Group Conference (ASPG) in October 2013, the Whitmore lecture appeared to suggest that that the historical arrangements and relationships between the three traditional branches of government have remained adequate to ensure an appropriate balance between those branches and to ensure appropriate levels of integrity in each. In his ASPG address, Chief Justice Martin stated:

> *"As I stated in my original address [the Whitmore Lecture] the integrity agencies have an important role to play in contemporary Australia. I did not mean to suggest that our fundamental* constitutional structures had been undermined or were in imminent danger of collapse as a result of the establishment of these agencies by Parliament. Both individually and in combination these agencies *perform very important public functions and discharge very important responsibilities.*
>
> *Rather, my purpose was to draw attention to the need to carefully think through any departures from traditional constitutional structure with a view to ensuring that integrity agencies did not themselves become instruments of oppression. My purpose was to stimulate thought and perhaps even debate on the need to give careful and principled consideration to the mechanisms of accountability and transparency which are applied to the so-called watchdog agencies, so that the public, and the elected representatives of the public can not only have confidence that these agencies are acting appropriately and within the bounds of the jurisdiction conferred upon by the Parliament, but will also have sufficient information available with respect to the operation of those agencies to make the assessments and form the views which are an essential component of the operation of a liberal democracy such as ours."*

The starting premise

The Whitmore lecture sparked considerable concern across Australian integrity agencies that their purpose and the value they add to our system of government had been misunderstood and unfairly devalued.

Part of the problem was that the case put forward in the paper appears to be based on what could be described as a false premise – that the historical arrangements or relationships between the existing three branches of government are still adequate to ensure an appropriate balance between the executive, legislative and judicial branches. Such a view would not appear to recognise that there has been a radical, and still ongoing, shift in these relationships over the past hundred years or so, primarily due to changes in the powers and functions of the executive branch. These changes

include the massive increase in government regulation of all aspects of the life of its citizens, involving an almost exponential growth in the number and complexity of statutes and regulations introduced each year. This has lead to an associated increase in the size of the public sector and to the scope for discretionary decision-making by public officials.

Some changes have been made by the Parliament to the way it attempts to keep the executive branch accountable (for example through the greater use of Parliamentary committees to scrutinise various aspects of government activity), and administrative review type tribunals have been established in most Australian jurisdictions to provide avenues for the merits review of various administrative decisions. However, in practice neither of these changes has proven sufficient to address the implications of the growth of executive power and discretion.

At one point in the paper the question is asked:

> *"Why are agencies of this kind proliferating? Why has the WA Parliament, in common with Parliaments in many other Australian jurisdictions, felt the need to create a plethora of watchdogs…"* [p.9].

With respect, possibly a more relevant question might have been to ask why Parliaments across the world have seen the need to establish such bodies? In contemplating in particular why the WA government may have seen the need to establish certain integrity agencies, Chief Justice Martin notes that:

> *"Perhaps it is because opportunities for people aggrieved by government agencies to seek redress through the judicial branch of government are restricted by cost, complexity and the intimidating nature of legal proceedings"* [p.9].

In a 2006 paper Chief Justice Martin commented that Australia's legal system *"…is the Rolls Royce of justice systems, but there is not much point of having a Rolls Royce in the garage if you can't afford the fuel to drive it anywhere. You can sit in it, polish it, admire it, boast about it, lend it out to rich friends or hire it out to people who can afford to drive it, but you can't use it for its basic purpose, which is to get you from A to B"*[8]. Coming to an Ombudsman, FOI/GIPA commissioner or anti-corruption commission on the other hand costs complainants nothing.

This has in fact been one of the primary stated reasons put forward for the establishment of ombudsman across the Australian jurisdictions, i.e. the recognition that the courts were not an accessible and adequate avenue for a person aggrieved by an administrative decision. I think it important to pause here to note that while this reason has commonly been put forward to justify the establishment of ombudsman, in practice redress through the judicial branch had always been limited to issues of legality, not issues of propriety, reasonableness or fairness.

This issue has been highlighted in two papers delivered by Chief Justice Elias in recent years. In a paper published in 2013[9], Chief Justice Elias noted:

> *"Administrative justice is today the work of many hands. An emphasis on judicial supervision misses the point that modern administration, which is characterised by openness and fair process, is substantially the work of the other branches of government*[10]. *De Smith in his pioneering text famously said of judicial review that it 'is inevitably sporadic and peripheral'*[11]. *And, in reality, the courts are not where administrative justice is usually obtained".*

The Chief Justice went on to note that *"…in reality, judicial review is not often the best mechanism for securing administrative justice"*. The issue had previously been highlighted in no uncertain terms by Chief Justice Elias in a 2010 paper:

"It is easy to forget how new modern administrative law is. …The new administrative state caught the legal system flat-footed.

In 1961 Kenneth Culp Davis, the American public lawyer, expressed shock at the torpor of the English law and the unwillingness of the courts of the period to enquire into serious injustice in administrative process[12]*."*

Noting that this applied equally in New Zealand, Chief Justice Elias went on to note:

"It was no doubt in part a response to the abdication of responsibility by the courts that far-sighted politicians and public servants in New Zealand proposed the appointment of a Parliamentary Commissioner to promote good administration and to stand between the citizen and the government apparatus".

Chief Justice Elias referred in her paper to views expressed by Sir William Wade in 1980 that the courts: [D]*eclined to apply the principles of natural justice, allowed ministers unfettered discretion where blank-cheque powers were given by statute, declined to control the patent legal errors of tribunals, permitted the free abuse of Crown privilege, and so forth"*[13] Chief Justice Elias went on to reflect on her experience in legal practice in the 1970's:

"As someone who practiced in what would now be called the area of 'human rights' at the beginning of the 1970's, I can say that it takes great effort to look back and remember how bad things were. 'Human rights' happened overseas. The people I acted for were accorded scant dignity by both the system of administration and the justice system of the day. There was, for example, little protection of the law for those in custody. Intervention in the personal lives of citizens was intrusive and often brutally complacent: … It was a time of expansive police powers and largely unfettered administrative discretion."

"The office of the Ombudsman, then, was a response to the failure of other systems of control and accountability and arose directly out of the popular dissatisfaction with administrative injustice."

When introducing the Ombudsman Bill into the NSW Parliament in August 1974, the Hon J Maddison, Minister of Justice, noted that"… the government believes that in the view of the ever increasing degree of complexity within the public administration area, there is justification for the establishment of an ombudsman in this state"[14]. Two days later the Minister expanded on the reasons that had led the government to introduce the Bill:

"Certain social political factors in the twentieth century make more readily understandable the demands for the appointment of ombudsmen. These features are to be found in New South Wales today. First, there has been the emergence of legislation regulating to a far greater extent than ever before the relationship between the individual and the state. … Indeed our society is bound by masses of regulations which are made by way of statutory authority contained in Acts".

Referring to the growth in discretionary power vested in public officials, the Minister noted that the questions often asked were: "Has the discretion been properly exercised? Have all factors been taken into account? Have extraneous factors been considered which should have been ignored?. The Minister went on to note:

"If an appeal exists to a higher authority, in some cases considerable expense is involved in the citizen pursuing his appellate rights. If no appeal exists from such a decision there is a demand – rightly so, in my opinion – to have an independent person examine the basis of the decision"[15]

The Minister concluded that:

> *"…there is a need for an independent official who will approach in a consistent way, having regard to justice and the merits of each individual case, complaints made to him on administrative decisions"*

In a paper presented to a seminar on "*Ombudsman Through The Looking Glass*" in 1985[16], Professor John Goldring, then Head of Law School at Macquarie University, noted that the members of the Kerr Committee (established to consider the jurisdiction of the Commonwealth superior court to review administrative decisions) had concluded that:

> *"…the main defect of the existing legal rules was a lack of any formal means of reviewing administrative decisions on substantive, as opposed to procedural, grounds. Although the role of the common law courts in administrative matters had been growing to cope with demands made by an increasingly interventionist and corporatist state, the common law rules and procedures governing administrative law, both in England and in the various parts of Australia, remained much as they were in the very different situation prevailing when Dicey wrote 'Introduction to the Study of the Law of the Constitution", a work which has since dominated the way in which common lawyers conceive of administrative law. The common law rules looked to procedure, not substance. As recently as 1982, Lord Scarman said 'judicial review [of administrative action] is concerned, not with the decision, but with the decision-making process'[17]."*

Looking at the nature and scope of the powers and methodologies available to courts and integrity agencies, it is quite clear that in practice there are very significant limitations on the ability of the courts to ensure the integrity of either the executive or the legislature. For example:

- The statutory and common law powers of the courts to scrutinise the conduct of public officials have not kept pace with the growing power of the executive, the ever increasing complexity of public administration, or the changing expectations of the public about the standards of probity expected of public officials. For example, a number of the categories of conduct incorporated into the definitions of corrupt conduct in the legislation establishing anti-corruption agencies or universally accepted by ombudsman as being maladministration or wrong conduct are unknown to the law (such as those referring to the acceptance of gifts and benefits, the failure to properly manage conflicts of interests, inappropriate accessing of confidential information, inappropriately refusing access to official information, lack of transparency in decision –making, and the like). Another limitation on the jurisdiction of adjudicative type bodies is that they generally don't review the exercise of decisions made under executive (non-statutory) power, or under contracting out arrangements[18].

- Unlike the majority of integrity agencies, the courts have no 'own motion' powers authorising them to intervene or commence action to scrutinise suspected misconduct by public officials. As noted by Chief Justice Elias in her 2011 paper, the courts cannot "self-start" and are "*…bound by the dispute that the parties bring before [them] and by the way they have shaped it…[they] can decide only cases properly constituted under technical rules governing causes of action and procedure*". Speaking about Ombudsman, Chief Justice Elias saw their ability to "self-start" as "*critical to the ability of the office to promote good administration. Eliminate systemic problems and fix injustice"*[19]. The normal ways in which the jurisdiction of the courts is enlivened to scrutinise such conduct are unlikely to be utilised in the case of allegations concerning the conduct of government Ministers, MPs or even public officials where this could embarrass the government of the day.

- Integrity agencies have far more effective powers to establish the facts, including the powers necessary to inquire fully and without unnecessary formality into a disputed matter or maladministration complaint, for example:

- their powers to investigate any matter of concern within their jurisdictions of their 'own motion';
- their powers to inspect premises and to require the production of documents and other things;
- their inquisitorial approach to the questioning of witnesses; and
- a more flexible approach to the rules of evidence.

As Professor John McMillan, Australian Information Commissioner, pointed out in his presentation to the Australian Study of Parliament Group Annual Conference in 2013[20.]

> *"According to conventional theory, there is a three way division of functions between the parliament (as law maker), the executive (to administer the laws) and the judiciary (to hold the executive to account through adjudicating individual disputes about the legal correctness of administrative decision making).*
>
> *There is no direct place in this theory for the new oversight bodies. Clearly they do not fit within the parliamentary or judicial branches, so the tendency is to classify them as executive branch agencies. But this is equally problematic. The oversight bodies are different to executive departments, in terms of their role and statutory independence. They chiefly examine the legality and propriety of executive actions, not implement government policy or administer government programs.*
>
> *The inescapable reality is that the doctrine of separation of powers no longer provides an accurate picture of how scrutiny and accountability of government action occurs. In frank terms, the role of courts is not as extensive or prevalent as conventional theory would suggest. The task of resolving people's disputes with government, and in the process holding the executive government to account, is now extensively discharged by independent bodies other than courts".*

A number of the advantages of matters being addressed by ombudsman as opposed to courts were identified by the Quebec Public Prosecutor back in the 1970's when he wrote:

> *In contrast, because he has no coercive power and can only render opinions which he hopes will be shared by the authorities, and because his investigations are informal, direct and private, the Ombudsman can easily be more available, eliminate all formalities, complete files on his own, discuss solutions freely and, finally go beyond specific cases if necessary to influence administrative policy or even the regulation or legal text concerned. The Ombudsman has certainly not the powers of a court since his action is more or less comparable to that of a conscience but in a way he can go further and, in any case, he does not seek to fill the same need*[21.]

In fairness it needs to be noted that Chief Justice Martin recognised in his paper that there are "significant limitations upon the efficacy of judicial review as a mechanism for the supervision of administrative action" [p.23], noting that:

> *"Generally and perhaps simplistically speaking, the courts can only intervene if the decision-maker or administrative agency has exceeded the jurisdiction conferred by the legislature. Errors within jurisdiction are beyond the scope of judicial scrutiny or intervention"* [p.23].

The complexity of the integrity environment

It appears to me that the views expressed in the paper do not appear to adequately address the complexities of what is in practice a complex integrity agency environment, which includes a range of bodies with very different roles and powers.

While there has been a mass of research and academic discussion about the roles, functions, procedures, etc of the courts and Parliaments over the years, the same cannot be said in relation to integrity agencies. This sets a challenge for the Australian integrity agencies, collectively, to convey a better understanding to the community about their reasons for existence, roles, powers, operational methodologies, interrelationships with other aspects of government, etc.

In relation to the roles of integrity agencies, while some such bodies are indeed avenues of review for people aggrieved by administrative decision-making (such as ombudsman, information commissioners and inspectors of custodial services), others have a largely quasi-law enforcement type role of uncovering crime, corruption, fraud, etc (e.g. anti-corruption/crime commissions). Different again would be auditors general who are neither avenues of review of administrative decision-making nor quasi-law enforcement bodies.

At the risk of over-simplification, in relation to their public sector jurisdictions:

- the primary focus of ombudsman is on authorities and officials who do not perform their official duties reasonably, appropriately or in accordance with applicable legal obligations,
- the primary focus of anti-corruption/crime commissions is on officials who engage in activities fundamentally opposed to their public duties, and
- the primary focus of auditors general is on compliance with applicable financial regulations and accounting standards.

One of the main arguments put forward for establishing ombudsman type bodies (certainly across Australia at least) has been to provide an accessible avenue of redress for citizens aggrieved by administrative decision-making. On the other hand, one of the primary reasons commonly given (or at least implied) for establishing anti-corruption commissions has been the realisation that established policing and judicial institutions have been found largely ineffectual in uncovering the evil of corruption in the public sector.

In relation to the powers of integrity agencies, combining the powers of the very different bodies into one list is very misleading. For example, ombudsman type bodies have none of the listed law enforcement type powers such as recording private conversations pursuant to listening device warrants, intercepting telecommunications, executing search warrants, covert searches, controlled operations, initiating proceedings for the recovery of money, prosecuting persons, establishing assumed identities, effecting arrests, etc. In relation to these same powers, it is important to note that the exercise of each is subject to judicial supervision and the jurisdictions, conduct and/or findings of a wide range of integrity/watchdog bodies have been subject to judicial review on numerous occasions over the years.

The paper makes reference to a practical obstacle to the establishment of an arguable case for judicial review being the absence in many States of a general entitlement to a statement of reasons in respect of decisions made by State administrative decision-makers. I have not carried out a comprehensive review of integrity agency legislation across Australia[22], however certainly the NSW Ombudsman is required to give statements of reasons for decisions to decline complaints, discontinue investigations, or find maladministration. If this is not the case in other jurisdictions, or in relation to other integrity bodies, the lack of any such entitlement is an issue for the relevant

Parliament to address. Certainly when given the opportunity to hold that the giving of reasons was an integral part of procedural fairness, the Australian courts have failed to do so[23]. For many years it was effectively left to ombudsman to be the main advocates for the giving of reasons for administrative decisions

At another point in the paper there is the statement that "*...the legislature has the responsibility of making laws, and the courts have the responsibility of enforcing them. To my way of thinking, all other institutions must be subordinate to those vital components of our system of government*"[p.21]. I am not aware that any of the proponents of the concept of a fourth branch of government have advocated, or even suggested, any such change to the status quo.

Understanding of the roles of integrity agencies

Chief Justice Martin further argued that the various integrity agencies established in the Australian jurisdictions over the past 40 years are acting beyond their remit, lack transparency, etc.

The provisions of the relevant statutes that the paper must be referring to as setting out "*standards of conduct*" are not enunciated in a form that is easily operationalised and applied by the agencies concerned. These terms are intentionally broad brush and generally phrased in the negative and provide little practical operational guidance as to what conduct is expected of public officials. Some of the roles of many integrity agencies, in particular but not limited to ombudsman and anti-corruption agencies, include:

- recommending what action should be taken to rectify or mitigate identified problems, to punish persons responsible (in appropriate circumstances), and in the case of ombudsman that any relevant law should be reconsidered or practice varied, and

- providing practical advice and guidance as to the standards of conduct expected of public officials.

To be able to perform these roles, integrity agencies need to give advice and guidance that goes beyond: 'don't act contrary to law'/'comply with legal obligations'; 'don't act unreasonably'/'avoid conduct that is unreasonable''; 'don't act corruptly'; 'act honestly'; etc. The guidance given by those agencies is not based on 'idiosyncratic notions', but on decades of practical experience, both their own and the experience of like bodies from around the world, in identifying the causes of maladministration and corruption and the most practical and effective ways to address the outcomes and prevent reoccurrence.

To take one example, one of the common causes or manifestations of maladministration and corrupt conduct is the failure to identify, prevent or properly manage conflicts of interests. A range of integrity agencies have put considerable effort into the development and promulgation of detailed advice relating to the prevention and management of conflicts of interests. The paper argues that integrity agencies only have a limited scope in their discretion in the formulation of standards of conduct expected of public officials. Given that 'conflicts of interests' is not a term explicitly referred to in most, if not all, integrity agency legislation, if the argument in the report is correct those bodies would be unable to hold public officials to account for failures to avoid, disclose or properly manage conflicts of interests.

The member agencies of the WA ICG have different, but often either overlapping or related jurisdictions. The establishment of these bodies, in some cases over several decades (as with the establishment of similar bodies in other Australian jurisdictions), can best be described as an ad hoc and incremental process. Any reading of the relevant legislation would indicate that there has been little attempt over that time to effectively harmonise the legislation that establishes each (or

the other legislation under which some have various powers or duties), for example to clarify jurisdictions, address overlapping jurisdictions, ensure there are no significant gaps in coverage. In these circumstances it would appear that the intention of the ICG to promote "*...policy coherence and operational coordination...*" and "*...operational cooperation and consistency...*" in the operations of its member agencies, is entirely sensible and commendable.

I note that Victoria has a similar situation with its integrity bodies, with the Ombudsman, Auditor-general and the IBAC Commissioner cooperating on integrity investigations.

Transparency

Chief Justice Martin expressed a concern in his paper that many integrity agencies lack transparency, stating:

> "*The opacity which characterises the activities of many of these agencies stands in marked contrast to the very values of transparency and accountability which they espouse as characterising integrity itself" [p.7].*

With respect, in my opinion the real issue here isn't transparency per se, but accountability. Transparency is just one mechanism for ensuring proper accountability to the Parliament, the government of the day, and the public at large. Other accountability mechanisms include oversight by the courts (either generally or in relation to the exercise of certain powers[24]), by other integrity agencies (either generally or in relation to specific functions[25]), Parliamentary Committees and Inspectors. What is an appropriate level of oversight of an integrity body will vary in each case depending on its powers and role. For example, bodies that can intercept telecommunications, conduct covert surveillance, or carry our controlled operations warrant greater scrutiny (at least in relation to the exercise of those powers[26]) than bodies that have no such powers.

Other transparency type mechanisms that are in place in relation to integrity agencies are the obligations to:

- make an annual report to Parliament,
- not uncommonly to be oversighted by a Parliamentary committee27
- give reasons for decisions to decline complaints or discontinue investigations,
- provide copies of reports to individuals and organisations the subject of investigation, and often to complainants, outlining the findings of those investigations and giving reasons justifying the findings and recommendations in those reports,
- publish their policy documents on the web (in a number of jurisdictions), and
- be audited by the Auditor-General.

Transparency of course is not an absolute. The degree of transparency that is appropriate for a public sector agency, or any particular function of a public sector agency, will depend on the nature of the function(s) of the agency. In drafting the relevant legislation, the Parliaments of each jurisdiction have recognised that there are functions that can only be effectively carried out in secret. For example, particularly in relation to corruption there is an operational imperative of confidentiality in many cases if an investigation is to be effective. While it is standard practice in adversarial court proceedings to require full disclosure between the parties and for witnesses to be questioned in public, this is not necessarily appropriate in the case in inquisitorial

proceedings, and rightly so given their purpose i.e. getting to the truth. There are also privacy implications that need to be considered in the context of what is an appropriate level of transparency for an integrity agency.

Even where integrity agencies are subject to access to information legislation, there are generally relevant exemptions they can rely on in most cases to refuse access to information that could prejudice an investigation or the protection of informants, whistleblowers, witnesses, etc. Further, there are occasions where the reasons given for a decision (or in some cases the mere acknowledgement that relevant documents exist to which access is refused) could significantly impact on an investigation.

The paper notes that:

> *"The cloak which shrouds the activities of many of those agencies stands in stark contrast to long-standing and entrenched traditions which characterise the activities of the courts and the parliaments which have been responsible for the maintenance of the integrity of government for centuries longer than the more recently-created aspirants to membership of a new branch of government"* [at p.7].

The reason 'many of those agencies' were established in the first place was the realisation that the courts and parliaments were structurally incapable of ensuring the integrity of the public sector in the modern age. Further, while it may be true to say that court proceedings are generally transparent, police investigations preceding criminal matters coming to a court would not have been, and the deliberations between each and every party to any court proceedings and their legal advisors would have been completely opaque!

Interpretation of key provisions of integrity agency statutes

The Chief Justice further argued that the various integrity agencies established in the Australian jurisdictions over the past 40 years are acting beyond their remit. With respect, various views expressed in the paper appear to be based on a misinterpretation of key provisions of WA integrity agency statutes in particular.

The Chief Justice quotes the definition of 'integrity' formulated by the WA Integrity Coordinating Group (the ICG), which is in the following terms:

"Integrity means earning and sustaining public trust by:

- serving the public interest
- using powers responsibly, for the proper purpose and in the manner for which they were intended
- acting honestly and transparently, making reasoned decisions without bias by following fair and objective processes
- preventing and addressing improper conduct, disclosing facts without hiding or distorting them
- not allowing decisions or actions to be influenced by personal or private interests'

While stating that no suggestion was being made that objection should be taken to any particular component of this definition or the enunciated qualities of public administration, the paper goes on to state:

> *It is … of some concern to me that these agencies have banded together to promulgate definitions of conduct and standards of behaviour which are separate and distinct from the language used in the statutes creating their agencies, and which defines their separate jurisdictions*" [p.39].

While improving the 'integrity' of the public sector is effectively one of the prime 'raison d'être' of the agencies that make up the ICG (and is one of the stated aims of the CCC Act), there is no statutory definition of 'integrity' in any of the statutory instruments that establish those agencies. In the above quoted definition of 'integrity', the member agencies of the ICG were attempting to pull together the principles or objectives underlying their mandates into the overarching statement as to what they see as the meaning of the concept of 'integrity'. In itself this definition has no legal standing or effect other than as a generalized statement of the standard of conduct the ICG agencies believe public officials should aspire to.

It is argued in the paper that the member agencies of the ICG have "…promulgate[d] definitions of conduct and standards of behaviour which are separate and distinct from the language used in the[ir] statutes…". The Chief Justice then went on to state that these agencies "…must apply ***standards of conduct stipulated in the statutes which create them,*** *rather than possibly* ***idiosyncratic notions of public purposes and values.****"*[p.40, emphasis added].

Apart from the fact that any such standards are produced to guide conduct and decision-making by individuals and organisations within the jurisdiction of member agencies of the ICG (and therefore compliance is not mandatory), there are at least three fundamental problems with this statement.

Firstly, there are no 'standards of conduct' set out in the statutes establishing the member agencies of the ICG. Using the *WA Corruption and Crime Commission Act 2003* (the CCC Act) and the WA *Parliamentary Commissioner Act* 1971 (the PC Act) as examples, the only provisions that describe conduct are actually the provisions that define the jurisdiction, discretion and/or powers of the CCC and Ombudsman. These provisions were never intended to enunciate or stipulate standards of conduct, and are not drafted in sufficient detail to be used for this purpose. For example, the relevant provisions of the PC Act refer to: conduct that is '***…contrary to law'; 'unreasonable, unjust, oppressive***, or ***improperly discriminatory***'; conduct taken for an '…***improper purpose*** *or on* ***irrelevant grounds****, or on the taking into account of* ***irrelevant considerations***'; '…***reasons*** *for the decision were not, but should have been given*'; conduct *'based wholly or partly on a* ***mistake of law or fact***'; or simply *'was* ***wrong***'. The relevant provisions of the CCC Act relate to the definition of 'misconduct', which is defined to include where a public officer: '…***corruptly*** *acts or corruptly fails to act…*'; '…***takes*** *advantage of the public officer's office or employment … to obtain* ***benefit*** *for himself or herself or for another person or to cause* ***detriment*** *to any person'; '…engages in conduct that -…* ***adversely affects,….the honest or impartial performance*** *of the functions of a public authority or public officer…*'; the '*…performance of …functions in a manner that is* ***not honest or impartial***'; '*…a* ***breach of trust***…'; or '…***misuses*** of information or material…'.

A good example that highlights the fact that these provisions were clearly never intended to be, and cannot in practice be, used as 'standards of conduct' is the category of action/conduct in the PC Act: "*was wrong*" (in the NSW Act "*otherwise wrong*"). The word "*wrong*" by itself does not stipulate or even suggest a standard of conduct. To be of the opinion that the action/conduct of a person or body was "*wrong"*, an ombudsman would need to be in a position to give reasons that objectively justify/explain that view, presumably based on "*… notions of public purposes and values*".

Secondly, various statutes contain provisions that might possibly be able to be interpreted as 'standards of conduct' that can be applied by relevant integrity agencies, other than the statutes that create them. In the WA context examples of such statutes would include, the *Public Sector Management Act 1994* (including the public sector principles and the codes of ethics and codes of conduct made under that Act), the *Public Interest Disclosures Act 2003* (including the specification of categories of conduct covered by that Act and the standards of conduct established by the Public Sector Commissioner), the *Local Government Act 1995* (including Part 5, Divisions 6-9)[28]. In the NSW context, while the Ombudsman is created under the *Ombudsman Act 1974,* he has powers and functions under a wide range of statutes including the *Community Services (Complaints, Reviews and Monitoring) Act 1993*, *Police Act 1990, Public Interest Disclosures Act 1994, Surveillance Devices Act 2007, Law Enforcement (Controlled Operations) Act 1997,* etc.

Thirdly, there is little effective difference between the definition of integrity and the relevant language used in the statutes that establish the member agencies of the ICG. The paper does not set out any examples as to where the definitions and language referred to differ. A comparison of the "*...notions of public purpose and values"* set out in the integrity agencies definition of 'integrity' with the provisions presumably being referring to as the 'standards of conduct' stipulated in their statutes, demonstrates that most are simply a rephrasing of those so called 'standards of conduct'.

Probably the main point of difference would be the reference in the definition to "*serving the public interest*". While not specifically referred to in either the ombudsman or CCC statutes, this is an obligation referred to in the report of the WA Inc. Royal Commission as being one of the two fundamental principles[29] and assumptions upon which representative and responsible government is based, i.e. that "[t]*he institutions of government and the officials and agencies of government exist for the public, to serve the interests of the public.*[30]. The Royal Commission noted that this principle (the 'trust principle') '*...expresses the condition upon which power is given to the institutions of government, and to officials, elected and appointed alike*'. Later in its report, it noted that '[g]*overnment is constitutionally obliged to act in the public interest.*'[31] This mirrored a statement made in a 1987 judgment of the NSW Supreme Court, Court of Appeal that '*...governments act, or at all events are constitutionally required to act, in the public interest*',[32] and a statement made in a 1981 judgment of the High Court of Australia that '*...executive Government...acts, or is supposed to act, ... in the public interest*'.[33] In fact the first three dot points, at least, of the ICG definition of integrity largely mirror the administrative law principles of acting in the public interest, acting in good faith, avoiding bias and providing procedural fairness.

Imagery

Reference is made in the paper to certain stylised diagrams used by certain commentators to describe the integrity landscape in an attempt to depict the relationships between the various players that have a role in the national integrity system.

In his paper Chief Justice Martin takes issue with the ways in which the relationships between the "so-called" integrity branch of government and the other branches of government have been depicted diagrammatically (i.e. the stylised 'Greek temple' and the 'Birds Nest'), with the author noting that the diagrams in question "*... exacerbate my increasing sense of alarm*". The Chief Justice found it "*disconcerting*" that the "*pillars labelled 'legislature and 'judiciary' are given an equal role and prominence to other pillars, such as those entitled 'watchdog agencies', 'media' and 'private sector'*". The author found it difficult "*...to see any sense in which the private sector or the Ombudsman, for example, should be regarded as having an equal role in the maintenance of national integrity as, say, the judiciary and the legislature*".

While I find this assessment somewhat challenging, I think Chief Justice Martin makes a reasonable point in his criticism of the temple and the birds nest. Nevertheless, the diagrams can be understood as conveying the idea that responsibilities for ensuring integrity and respect for the rule of law now rest on a variety of bodies and mechanisms (not just courts). Viewed in that light, the diagrams are not meant to be a radical new alternative to separation of powers.

Each of the organisations, or groupings of organisations, referred to in the models play quite different roles in relation to 'national integrity'. Some have a role in relation to the public sector, some in relation to the private sector and some in relation to both. Some have ongoing integrity related roles (e.g. anti-corruption commissions, ombudsman and audit offices) and some intermittent roles (e.g. Parliaments and the courts). For some integrity issues are a primary focus of their work (e.g. anti-corruption commissions, ombudsman and audit offices), for others it is just one of many (e.g. Parliaments and the courts). While the Parliaments do indeed have the make laws and the courts can enforce them, neither of these roles can be effective in ensuring integrity without the integrity agencies whose job it is to identify breaches of those laws, and where appropriate to collect the evidence needed to enable the courts to perform their function. In a 2007 paper[34] the NSW Ombudsman, Bruce Barbour, expressed the view that "*...the work performed by an Ombudsman is best described as complimenting rather than competing with that of courts and tribunals*".

In practice, the vast majority of the work of integrity agencies that ensures integrity does not require the intervention or involvement of the courts. This is particularly so in relation to their advisory and prevention type functions and their roles in relation to integrity issues not involving illegality (e.g. ethical issues such as conflicts of interests). In these circumstances, the Parliament or the judiciary are but two of the many organisations that have a significant role to play in ensuring 'national integrity'.

The stylised diagrams do not purport to be a perfect representation of the structures and systems they portray. One might just as easily question the depiction of justice using a blindfolded woman brandishing an offensive weapon who appears to be ignoring the evidence!

Conclusions

This paper is a response to the views expressed by Chief Justice Martin in the 2013 Whitmore Lecture. It is important to address those views to counter any perception that the integrity agencies in the various Australian jurisdictions might not be appropriately independent, impartial, open, transparent and acting in the public interest. Should any such perception gain currency, it would impede their ability to achieve the often quick, informal and extremely important results that are seen every day. This is not to say they should be immune to criticism and questioning. After all, they should be held to the same standard they apply to others. But there should always be a strong foundation and evidence for such criticism.

The content of the lecture can also be seen as an indication that the Australian integrity type agencies may have collectively failed to adequately inform the Australian community about the valuable role they play in ensuring the integrity of government at all levels across all jurisdictions. This includes information about why they were established, their roles, powers, operational methodologies, interrelationships with other aspects of government, how they are held accountable, and so on.

NSW Ombudsman, Bruce Barbour discussed this issue in his address to the 2007 AIAL National Conference[35] in the following terms:

> *I would like to discuss an area in which I believe we may be failing: public perception and understanding of our role, and the impact we make. As part of the National Integrity Systems*

> *Assessment completed by Griffith University and Transparency International in 2005, public sector agencies in NSW were asked to rank the relative importance of the State's integrity agencies. Our office was ranked first out of 23 listed organisations. Courts were ranked sixth, and the Administrative Decisions Tribunal eighth. Despite this level of public sector recognition, many within the community still think of my office as merely a complaints hotline, if they have any knowledge of us at all!*

He went on to note:

> *While it is encouraging that the public sector recognises our impact, the same level of understanding does not seem to have passed into the general community. I find this frustrating, as a greater level of public understanding of the scope of our work would lead to increased public confidence and an even greater opportunity to bring about change.*

Integrity agencies may have assumed their roles and value to the community had been clearly demonstrated by their record of achievements over the years. Such an assumption is unlikely to be valid, as the community, particularly now in the one hour news cycle, have very short memories. If the call were ever to go out, 'What have the integrity agencies ever done for us?'[36], the only rejoinder likely to be effective would be to be able to quickly point to evidence about what they have done recently. These bodies need to work very hard to explain their role, demonstrate how they add value, and to inform the community about the ways they themselves are held accountable. If they don't there is a very real risk that criticism, however unwarranted, will stick.

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1. E.g., s.11(2), *Ombudsman Act 2001* (Queensland).

2. E.g., s.94E, *Constitution Act 1974* (Victoria).

3. E.g., the formal title of the WA Ombudsman is "*Parliamentary Commissioner for Administrative Investigations*".

4. E.g.: Commonwealth Ombudsman Annual Report, 2006-07 (at Ch 8); John McMillan, *Future Directors – The Ombudsman*, Address to AIAL National Administrative Law Forum, Canberra, July 2005;Victorian Ombudsman Annual Report, 2005 (at p 8); Transcript of Public Accounts and Estimates Committee Inquiry into a Legislative Framework for Victorian Statutory Officers of Parliament, 8 February 2006; Stuhmcke, A. & Tran, *The Commonwealth Ombudsman – An Integrity branch of government*, AltLj Vol 32:4 December 2007 (at p.233).

5. For example Prof John McMillan**,** *Commonwealth Oversight Arrangements - Re-thinking the Separation of Powers,* Presentation to the Australian Study of Parliament Group Annual Conference, Perth, October 2013.

6. *Judicial Review and the Integrity Branch of Government*, address by the Hon JJ Spiegelman AC, Chief Justice of NSW to the World Jurist Association Congress, Shanghai, 8 September 2004; JJ Spiegelman, *The Integrity Branch of Government*, Quadrant Magazine Law, July 2004, Vol. XLVIII Number 7-8.

7. "*Life Beyond Legality",* address by The Rt Hon Dame Sian Elias, Chief Justice of New Zealand to the Australian/New Zealand Ombudsman Association, Wellington, 6 May 2010.

8. The Hon Wayne Martin, CJ, *Bridging the Gap*, address to the National Access to Justice and Pro Bono Conference, 12 August 2006.

9. National Lecture on Administrative Law: 2013 National Administrative Law Conference, Elias s., C.J., (2013) 74 AIAL Forum, at p.5

10. The footnote in the published paper reads: "*As scholars such as Carol Harlow and Richard Rawlings have stressed, arguing that a judicial review-centred conception of public law provides a partial picture only*"

11. SA de Smith, "*Judicial Review of Administrative Action*" (Stevens, 1st ed, 1959) 1.

12. Kenneth Culp Davis, "*The Future of Judge-Made Public Law in England: A Problem of Practical Jurisprudence*" (1961) 61 Colum L Rev 201.

13. HWR Wade, "*Constitutional Fundamentals*", Stevens & Sons, London, 1980, at 62

14. Hansard, Legislative Assembly, 27 August 1974, at p 666.

15. Hansard, Legislative Assembly, 29 August, at p773

16. Goldring, J, "*The Ombudsman and the new Administrative Law*", paper presented to the "*Ombudsman through the Looking Glass*" seminar at the Australian National University, 7 September 1985.

17. *Chief Constable of North Wales v Evans* [1982] 1 WLR 1155, at 1173

18. See Prof John McMillan, *'Ten Challenges for Administrative Justice',* (2010) 61 AIAL Forum 23

19. "*Life Beyond Legality",* address by The Rt Hon Dame Sian Elias, Chief Justice of New Zealand to the Australian/New Zealand Ombudsman Association, Wellington, 6 May 2010.

20. Professor J McMillan, "*Commonwealth Oversight Arrangements – Re-thinking the Separation of Powers"*, Australian Study of Parliament Group Annual Conference, Perth, October, 2013

21. Marceau, L. "*1973 Report (Quebec)* 66", cited by Kenneth Keith in "Judicial *Control of the Ombudsman?*", (1982) 12 VUWLR 299, qt 321.

22. Like the author of the paper - see the qualification on p.36

23. The NZ courts have recognised the duty of statutory decision-makers to give reasons as an aspect of procedural fairness.

24. For example in relation to search warrants, use of listening devices, telecommunications interception.

25. For example, the NSW Ombudsman is subject to oversight, either generally or in relation to the exercise of specific functions, by the Auditor General, ICAC, Information and Privacy Commission, Anti-Discrimination Board, the Parliamentary Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission)

26. Where such powers are given to integrity agencies they are subject to scrutiny by a separate integrity agency, such as the ombudsman

27. At one point in his paper the Chief Justice notes that s.34(4) of the NSW *Ombudsman Act 1974* requires the Ombudsman to request that evidence he is to give before his Parliamentary Committee be taken in private is incorrect. In fact that subsection provides that the obligation only arises if the evidence to be given by the Ombudsman would disclose information obtained from a public authority or other person who has informed the Ombudsman that the information is confidential. This has in practice been a very unusual occurrence.

28. A similar situation exists in each Australian jurisdiction.

29. The other fundamental principle was: 'It is for the people of the State to determine by whom they are to be represented and governed'.

30. In Volume 1, Chapter 1, at 1.2.5.

31. In Volume 1, Chapter 1, at 3.1.5

32. Per McHugh JA in *Attorney General (NT) v Heinemann Publishers Pty Limited* (1987) 10 SLWLR 86 (at p.191) – the Spycatcher Case.

33. Mason J in *Commonwealth of Australia v John Fairfax and Sons Ltd & Ors* (1981) ALJR 45 (at p.49).

34. Barbour, B., *The Impact of External Administrative Law Review: Courts, Tribunals and Ombudsman*, AIAL National Conference, Canberra, June 2007

35. See above

36. To paraphrase the classic line from the Monty Python movie "*The Life of Brian*"