Whitmore Lecture 2013

Forewarned and Four-Armed – Administrative Law Values and the Fourth Arm of Government

address by

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Sydney

[1] I am indebted to Dr Jeannine Purdy for her considerable contribution to the preparation of this paper. However, responsibility for the views expressed, and any errors, is mine.

Introduction

I am greatly honoured to have been invited to join the illustrious ranks of those who have delivered the annual Whitmore lecture.

Before we begin the proceedings, however, I would like to acknowledge and pay respect to the traditional owners of the land on which we meet – the Gadigal people of the Eora Nation. It is upon their ancestral lands that this Court is built.

The extraordinary career of Professor Harry Whitmore, in whose honour this lecture series has been named, and his contribution to the fields of administrative law and public administration have been well chronicled by previous speakers in the series, many of whom had the benefit of extensive personal acquaintance with Professor Whitmore. It would be presumptuous of me to attempt to improve upon their various summations of his career and contribution, especially given my own very limited contact with Professor Whitmore.

Despite having only met Professor Whitmore briefly on one occasion, like all practitioners of administrative law in Australia, I have nevertheless been profoundly influenced by his work at a number of levels. For decades his writings constituted the seminal expression of administrative law principle in this country, and the text which he co-authored was the primer for generations of Australian law students.

At a more personal level, he was indirectly responsible for me getting a number of jobs. About six months after being admitted to practice, I was appointed to a position as a research officer with the newly created Administrative Review Council (ARC), which was chaired by the then President of the Administrative

Appeals Tribunals (AAT), Justice Gerard Brennan (as Sir Gerard then was). The ARC and AAT were of course both emanations of the Kerr and Bland Committees, upon which Professor Whitmore served.

I later moved from the ARC to become the inaugural director of the Review Section at the Department of Immigration and Ethnic Affairs - a section which was specifically created to deal with the new regime for review of administrative decisions of which Professor Whitmore was one of the principal architects. Of course, nobody in the department at that time had any inkling of the profound effect which the new regime was to have upon the activities of the department, nor as far as I am aware, did anybody predict the pivotal role which the judicial review of migration decisions was to have upon the development of administrative law in Australia. In those days, prior to the proclamation of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act), most of our work concerned what I would describe as the "export" side of the department's activities, particularly representing the Minister in proceedings before the AAT concerning deportation orders made in respect of people who would have been entitled to permanent residence in this country but for their commission of a significant criminal offence or offences. Students of the history of the AAT will be aware that in the early years of the Tribunal, the migration jurisdiction provided fertile soil for the development of important principle, in cases like *Drake*[2] and *Pochi*.[3] At that time, the legislation required that the Tribunal be constituted for such cases by a presidential member, all of whom were judges of the Federal Court. For a young lawyer, it was very interesting to see senior and experienced judges grapple with the distinctions

[2] *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409; (1979) 24 ALR 577.
[3] *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41; (1980) 31 ALR 666.

between merits review, in which they were engaged in the AAT, and judicial review, with which they were much more familiar.

Years later, following my return to private practice, I was appointed a member of the ARC and later served as its president. At that time I was also chairman of the Law Reform Commission of Western Australia (LRCWA). In that capacity I encouraged the Attorney General of the day to provide the Commission with a reference on the judicial review of administrative decisions. I assumed responsibility for the preparation of the Commission's report on the reference, which was presented to government in late 2002. Perhaps predictably the report recommended the enactment of State legislation along the lines of the ADJR Act, which was, of course, another part of the architecture for administrative review designed by Professor Whitmore and others. At the time the report was published by the then Attorney General of Western Australia, he announced that the government had considered and accepted its recommendations, and that legislation would be prepared accordingly. As far as I could see, this was an Australian record for speedy acceptance of the recommendations of a Law Reform Commission.

I was, of course, gratified by the speedy acceptance of the report by government. However, my celebrations were premature. I seriously underestimated the strength and efficacy of bureaucratic opposition to reform of this kind.[4] The nature of that opposition was succinctly encapsulated by Sir Anthony Mason in the inaugural Whitmore lecture when he observed:

[4] In fact the LRCWA had previously considered judicial review of administrative decisions and, after a 15 year inquiry, in 1986 recommended a reform of procedures for judicial review and a requirement that administrative decision makers give reasons (LRCWA, *Judicial Review of Administrative Decisions: Procedural Aspects and Rights to Reasons* (1986)). When the WA Inc Royal Commission reported in 1992 it recommended that an Administrative Decisions (Reasons) Bill be drafted as a matter of urgency (LRCWA, *30th Anniversary Reform Implementation Report* (2002) 86-88).

> "Let there be no mistake about this. There was very strong bureaucratic opposition to the Kerr Committee recommendations. The mandarins were irrevocably opposed to external review because it diminished their power. Even after the reforms were in place, Sir William Cole, Chairman of the Public Service Board, and Mr John Stone, Secretary of the Treasury, were implacable opponents of the reforms."[5]

In accordance with the decision of the then government, a number of drafts of legislation giving effect to the recommendations of the LRCWA were prepared. However, none were ever presented to the Parliament and my various attempts to attract the interest of successive governments in undertaking long overdue reform in this area have been to no avail.

If I might be permitted a slight digression for personal reminiscence, I had no reason to be surprised by the difficulty of achieving reform in these areas. I had firsthand experience of the bureaucratic culture of which Sir Anthony spoke when I worked with the ARC in 1977. One of the major projects on which I worked involved the identification of classes of decision which should be excluded from the operation of the ADJR Act entirely, or from the obligation to provide reasons for decision imposed by s 13 of that Act. I provided support to a committee of the Council which worked arduously on the project. Meetings were held with senior officers, usually secretaries or deputy secretaries, of most major Commonwealth departments. There was a recurrent theme to the representations which we received. They were to the effect that while the virtue of the legislative reform and its potential to significantly enhance the quality and fairness of administrative decision making by other agencies of government was acknowledged and indeed applauded, there were nevertheless particular features of the decisions made by their department which necessitated

[5] The Hon Sir Anthony Mason AC KBE, 'The Kerr Report of 1971: Its continuing significance' (Inaugural Whitmore Lecture, 19 September 2007) 2.

exemption from the new regime. The response of the ARC committee to representations of this kind was poetry in motion. The ever urbane and charming Justice Michael Kirby, then chair of the Australian Law Reform Commission, would beguile our guests with deference to their knowledge and experience which bordered on the obsequious. Once the supplicants had been lulled into a false sense of security, their arguments would be demolished politely but firmly by one or more of the "hard men" of the committee - perhaps Justice Brennan or Sir Clarrie Harders, or Roger Gyles QC. Once they came to appreciate that resistance was pointless and that their cause was lost, Justice Kirby would usher our guests to the door with words of consolation and sympathy. As a result of that process, there were initially very few exemptions from the operation of the ADJR Act, although the range of exemptions has increased over time, notably in the migration area.

The need for transparency

It is time to address the topic of this paper. It is pertinent to do so by repeating a passage from *Freedom in Australia* which was written by Professors Whitmore and Campbell, being a passage cited by Justice McColl in the 2010 Whitmore lecture. It is in the following terms:

> "The most pernicious of official attitudes is secrecy. Ministers and officials have developed a firm attitude that the general public are not entitled to know anything about what they are doing - even if their actions vitally affect the rights of citizens both individually and collectively."[6]

Later in this paper we will see how many (but not all) of the so-called integrity agencies which it has been suggested might collectively form a fourth branch of

[6] E Campbell and H Whitmore, *Freedom in Australia* (1966), 271 cited in Justice Ruth McColl AO, 'Freedom of Information - a new paradigm' (2010 Whitmore Lecture, 15 September 2010) 3.

government lack transparency. The cloak which shrouds the activities of many of those agencies stands in stark contrast to long-standing and entrenched traditions of transparency 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. 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.

Might I beg your indulgence for one more personal reminiscence? When I was at school and attending chapel, we were very often required to incant the well-known Anglican prayer "Lord, save us from a hasty assurance that we are wiser than our fathers". The burden of this paper is to politely suggest that proponents of a fourth branch of government might do well to heed that call for divine assistance.

The integrity function of government

Over the last decade or so much has been written on what have come to be characterised as the "integrity" functions of government. Those writings coincide with a proliferation of the various agencies which perform functions grouped under the heading of "integrity". It will be necessary in due course to try to provide meaning to what has been described as an "amorphous, complex and value-laden concept"[7]. For the moment it will suffice to identify some of the agencies which are commonly regarded as performing these functions.

[7] Dr A J Brown, 'Putting Administrative Law Back into Integrity and Putting Integrity Back into Administrative Law' (Paper presented at Australian Institute of Administrative Law Forum No 53, Gold Coast, June 2006) 33 cited in L Burton and G Williams, 'The Integrity Function and ASIO's Extraordinary Questioning and Detention Powers' (2012) 38(3) *Monash University Law Review* 1, 24.

Many of these agencies have different names in different Australian jurisdictions. It is convenient to choose one jurisdiction as an example, and characteristically parochial of me, as a Western Australian, to choose my home jurisdiction.

In Western Australia there are now a considerable number of statutory agencies reporting directly to Parliament which most obviously perform functions characterised as integrity functions. They include at least the following (with the relevant enabling legislation):

Auditor General - *Auditor General Act 2006* (WA)

Ombudsman - *Parliamentary Commissioner Act 1971* (WA)

Information Commissioner - *Freedom of Information Act 1992* (WA) (FOI Act)

Public Sector Commissioner - *Public Sector Management Act 1994* (WA) (PSM Act)

Inspector of Custodial Services - *Inspector of Custodial Services Act 2003* (WA)

Corruption and Crime Commission - *Corruption and Crime Commission Act 2003* (WA)

Parliamentary Inspector of the Corruption and Crime Commission - *Corruption and Crime Commission Act 2003* (WA)

Commissioner for Children and Young People - *Commissioner for Children and Young People Act 2006* (WA)

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, each ostensibly zealously guarding the perimeters of its designated area of responsibility, alert and ready to bark loud enough to wake the neighbours in the event that anything untoward should occur within those perimeters? And, perhaps most importantly of all, what mechanisms are in place to prevent those watchdogs from savagely attacking innocent visitors who happen to be within the perimeters of their guarded territory?

As we will see, the answer to the latter question is that there appear to be few mechanisms which operate effectively to keep these metaphorical watchdogs on a leash. The answers to the earlier questions are not obvious. Why has there been such contemporary enthusiasm for new forms of investigation and inquiry? Perhaps the legislators are responding to a perception of public dissatisfaction with the operations of government. The predecessors of two of these agencies were established following the recommendations of the WA Inc Royal Commission.[8] Perhaps it is a response to the fact that ministerial responsibility, in the sense of personal accountability for departmental failings is, in contemporary Australia, all but a dead letter. Perhaps it is because opportunities for people aggrieved by government agencies to seek redress through the judicial branch of government are restricted by the cost, complexity and the intimidating nature of legal proceedings.

Changes in inquiry practice

In an attempt to resist further speculation, I will try to illustrate this point by reference to changes in practice with respect to investigations and inquiries

[8] The Public Sector Standards Commissioner and the Anti-Corruption Commission.

taking, parochially again, some recent examples from my home State. In 2010 the PSM Act was amended to include a division which empowers the Public Sector Commissioner to conduct a review "in respect of part or all of the functions, management or operations of one or more public sector bodies",[9] or "a special inquiry into a matter related to the Public Sector"[10] or to "investigate the activities of any public sector body".[11] The distinction between a review, a special inquiry and an investigation is not at all clear from the terms of the legislation.[12] What is however clear is that in the case of either a special inquiry or investigation, the inquirer or investigator is given various powers specified in both the Act and in a schedule to the Act, including a power to enter the premises of a public sector body, to require the production of documents, to summon and examine witnesses under oath, and to require witnesses to produce books or documents.[13]

The provisions of the Act governing the exercise of these powers, and the procedure to be followed when undertaking a review, special inquiry or investigation are sparse indeed, especially by comparison to the *Royal Commissions Act 1968* (WA) and the body of law and practice that has developed in relation to Royal Commissions. Apart from specifying that a special inquirer must act independently,[14] with equity and good conscience,[15]

[9] PSM Act, s 24B(1).
[10] PSM Act, s 24H(1)(a).
[11] PSM Act, s 24(1).
[12] Currently, for example, the Attorney General has "requested the Public Sector Commission to undertake a review of the Equal Opportunity Commission and its regulatory framework, report upon its achievements and recommend options for reform". The decision on the role of the Equal Opportunity Commissioner will be made at the completion of the review. (K Emery, 'Champion of equality stands down', *The West Australian* (5 June 2013)).
[13] PSM Act, s 24I and Schedule 3. Some of these key powers are also available to the Commissioner when conducting a review - see, for example PSM Act, s 24D.
[14] PSM Act, s 24J(2).
[15] PSM Act, s 24J(3).

and that persons may be represented at a special inquiry by a legal practitioner or other agent (without expressly conferring a right to such representation), the Act leaves the procedure to be followed to be determined by the special inquirer. There is no statutory prescription of any form of transparency in relation to the conduct of the inquiry. While there is nothing prescriptive in the *Royal Commissions Act* relating to the publication of reports, there is a well developed expectation that the report of such a Commission will be tabled in Parliament. The PSM Act only requires that a report of a review or special inquiry be provided to the Public Sector Commissioner, and to the Minister if it was initiated by the Minister. The traditional transparency and public accountability which attends the activities and report of a Royal Commission become optional when the powers of inquiry created under the PSM Act are utilised. Perhaps the observations of Professors Whitmore and Campbell with respect to "the most pernicious of official attitudes" have a contemporary resonance.

Since the PSM Act was amended in 2010, four special inquiries have been announced under the Act; each in response to a direction from the relevant Minister. One was an inquiry into the sexual abuse of children resident at government hostels for children attending public schools in regional Western Australia. Its subject matter is very similar to the Royal Commission appointed by the Commonwealth to inquire into the sexual abuse of children entrusted to the care and supervision of institutions. Because the State inquiry was conducted under the PSM Act, its terms of reference were necessarily constrained, compared to those which might have been available if a Royal Commission had been appointed. The Special Inquirer sought and obtained advice from the Solicitor General of Western Australia with respect to the ambit of his terms of reference. That advice was published as an appendix to his

report.[16] The advice was to the effect that the power to conduct a special inquiry was to be exercised for the purpose of the functions of the Public Sector Commissioner, which are concerned with the promotion of the efficiency and effectiveness of the Public Sector, the management and administration of the Public Sector, assessing whether public sector standards have been complied with, and planning for the future management and operation of the Public Sector. Accordingly, the response of bodies and officers outside the Public Sector to allegations of sexual abuse at the hostels was beyond the scope of the inquiry. Because the Police Force and local government do not fall within the definition of "Public Sector" under the Act,[17] the response by police officers or local councillors to the allegations of sexual abuse was beyond the scope of the inquiry.[18]

Further, as I have observed, the procedure to be followed was entirely within the province of the Inquirer, uninhibited by the traditions of transparency and accountability which attend Royal Commissions. In fact, the inquiry was conducted by a retired member of my court very much in accordance with the traditions of a Royal Commission, and with similar degrees of transparency, and I certainly do not mean to suggest that this mechanism was adopted by government in this instance with a view to concealing the facts or the evidence from public scrutiny. But I am left to wonder why it was thought advantageous to use this form of inquiry instead of a Royal Commission.

On two other occasions special inquiries were appointed to inquire into the response to bushfires - one which occurred on the perimeter of the southern

[16] The Hon Peter Blaxell, *St Andrew's Hostel Katanning: How the System and Society Failed our Children* (2012) Appendix 2, 41.
[17] PSM Act, Schedule 1.
[18] Except insofar as their actions related to the response of public officials who fell within the scope of the PSM Act. See note 16, 42.

suburbs of Perth in February 2011,[19] and another which occurred near Margaret River in November 2011.[20] Again, it is noteworthy that in recent times fires have been the subject of Royal Commissions in both the Australian Capital Territory and Victoria, although it must be conceded that those fires had a much greater impact and effect than the fires investigated in Western Australia, in respect of which there was, fortunately, no loss of life. Interestingly, the inquiry into the bushfire near Perth resulted in recommendations concerning police and local government which, according to the legal advice provided by the Solicitor General, would at least arguably have been beyond the scope of the Inquirer's powers.

The fourth occasion upon which the power has been exercised was for the purpose of conducting an inquiry into the dealings of government with a private contractor appointed to manage a large hospital campus on the fringe of the Perth metropolitan area.[21] That inquiry was conducted by a senior health administrator without public hearings and without the degree of transparency which would normally attend a Royal Commission. The Inquirer directed that all public sector bodies and employees were to keep confidential the names of all witnesses, the transcripts of evidence and submissions made to the inquiry with the express intention that any documents recording any of this information be inaccessible under the FOI Act. According to the advice given by the Solicitor General to which I have already referred, as the conduct of non Public Sector agencies was beyond the scope of an inquiry authorised by the PSM Act, there must have been limits upon the extent to which the conduct of the private

[19] M J Keelty AO APM, *A Shared Responsibility: The Report of the Perth Hills Bushfire February 2011 Review* [sic] (2011).
[20] M J Keelty AO, *Appreciating the Risk: Report of the Special Inquiry into the November 2011 Margaret River Bushfire* (2012).
[21] Professor Bryant Stokes AM, *Peel Health Campus: Contract Management and Clinical Outcomes* (2013).

company operating the hospital could have been lawfully investigated by the Inquirer, although the impact of that operator's conduct upon patient treatment and outcomes was presumably a matter of great public interest, at least in the affected region.

It is, of course, up to the executive arm government to determine whether there should be an inquiry into alleged misconduct and, if so, whether it should take the form of a Royal Commission.[22] Considerations of time and cost may quite properly influence those decisions. However, when some form of inquiry less than a Royal Commission is directed by the Minister, or initiated by the Public Sector Commissioner, the effect upon the lawful ambit of the inquiry, the procedure by which it will be conducted, including its transparency, and the rights of witnesses and persons under investigation may be significant.

The integrity branch of government

The notion that various agencies performing functions characterised as integrity functions should be regarded as combining to form a fourth branch of government is generally attributed to Professor Bruce Ackerman arising from an article published in 2000.[23] Closer to home it is a proposition thought to have been given much impetus by an important lecture delivered by Chief Justice Spigelman in 2004.[24] However, I am not so sure that the Chief Justice was advocating the notion of an additional branch of government, but rather was drawing attention to the integrity functions performed by various agencies of

[22] Although the Public Sector Commissioner also has a discretion to initiate a review, special inquiry or investigation independently of any direction by the Minister (PSM Act, ss 24B, 24H, 24).

[23] Bruce Ackerman, 'The New Separation of Powers' (2000) 113(3) *Harvard Law Review* 633, 691-693. Ackerman also called for a "regulatory branch", a "democracy branch" and a "distributive justice branch", in addition to an independent court system, to constrain "the centre", a democratically elected house which selects government and enacts legislation.

[24] The Hon James Spigelman AC, 'The Integrity Branch of Government' (The first lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law, Sydney, 29 April 2004).

government, including the recognised branches of government constituted by the Parliament and the courts. Much of the paper is directed to the integrity functions performed by those institutions, and the paper concludes by suggesting that there was "utility in identifying the common function performed by the institutions" to which reference was made, rather than by advocating the recognition of a separate and discrete branch of government.

The paper does draw a characteristically colourful analogy with a branch of the Chinese Imperial Civil Service which was regarded by Western scholars as analogous to a branch of Roman administration known as the "censorial" branch of government. As Spigelman CJ points out, civil officials in the Chinese branch of government wore an embroidered breast patch displaying:

> "a legendary animal called an Hsieh-chih which could detect good from evil and, allegedly, could smell an immoral character from a distance, whereupon the Hsieh-chih would leap upon the person and tear him or her to pieces."[25]

It seems that some subsequent writers have regarded the mythical Chinese animal as an admirable metaphor for the integrity branch of government. For my part, if it is any form of metaphor for those agencies, it is a source of great alarm. The characteristic of the metaphor is intuitive savagery. Significantly missing is any specification of any standard or criterion for discriminating good from evil, an absence of reliable evidence, procedural fairness or reasons for the destruction of the person intuitively assessed to be evil. If the so-called "integrity agencies" have any of these characteristics, innocents falling within their purview are in serious trouble!

Nevertheless, the notion that there is, or should be, a fourth branch of government grouping together the various agencies performing what have come

[25] Note 24, 1. It will be observed that my metaphor of the savage watchdog is not original.

to be characterised as integrity functions has now gained a measure of acceptance, to the point where it is included within the curriculum taught by reputable law schools.[26]

The powers of integrity agencies

The Hon James Wood has conveniently listed the powers commonly conferred upon various integrity agencies he identified.

- Search and seizure under statutory warrants
- Requiring the production of documents and things pursuant to notice
- Requiring the production of statements of information pursuant to notice
- Recording private conversations pursuant to listening device warrants
- Intercepting telecommunications pursuant to warrants
- Conducting physical surveillance
- Using tracking devices
- Accessing information held by a wide variety of government agencies, such as Austrac, the Australian Tax Office, gaming and racing regulatory authorities and many other government bodies
- Accessing police records including criminal records
- Conducting covert searches
- Entering public premises to inspect and take copies of documents
- Conducting coercive interrogations under oath, in which the right of freedom from self-incrimination is suspended
- Conducting controlled operations and carrying out integrity tests
- Conducting hearings either in public or in private which are not bound by the rules of practice or evidence
- Obtaining injunctions restricting the conduct of persons under investigation
- Initiating proceedings for the recovery of the proceeds of serious crime-related activities and for the confiscation of the property of those who are engaged in such activities
- Making assessments and forming opinions which may be published as to whether misconduct or corrupt conduct has occurred

[26] See the course outline for the unit "Government Accountability - Law and Practice" at the University of Western Australia (UWA Handbook 2013).

- Making recommendations as to whether consideration should be given to prosecution or disciplinary action in relation to affected persons
- Prosecuting persons for contempt or for interference with the legitimate investigations and activities of these agencies or for disobedience to their lawful requirements
- Disseminating information to other law enforcement agencies and to bodies such as the Australian Taxation Office for potential investigation or prosecution or for the recovery of moneys properly due to the State
- Creating significant data banks of intelligence on individuals which are protected by secrecy obligations but which are available for future use
- Arranging witness protection and the establishment of assumed identities
- Effecting arrests
- Reporting on potential promotions.[27]

As the Hon Mr Wood observes:

> "These powers extend well beyond the scope of legally acceptable criminal investigations and sometimes they are called upon in aid of joint task forces or of investigations conducted by other law enforcement agencies in a way which is potentially capable of abuse."[28]

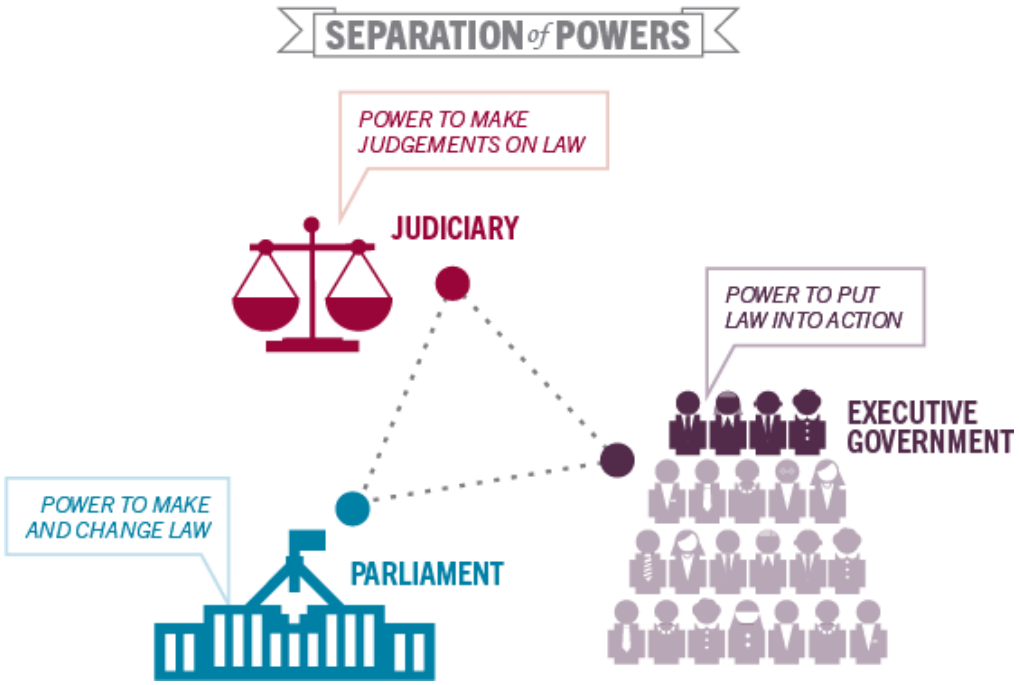
So, there can be little doubt that contemporary Australian agencies performing integrity functions have the strength and powers of the mythical Hsieh-Chih. That observation does nothing to allay my sense of alarm.

From triangles to Greek temples and birds' nests

Relationships between the three recognised branches of government have been established over centuries, on occasions with a degree of trauma, and are well known. The diagram below is from the Commonwealth Parliamentary

[27] The Hon James Wood AO QC, 'Ensuring Integrity Agencies have Integrity' (2007) 53 *AIAL Forum* 11, 12.
[28] Note 27.

Education Office[29] (in case the placement of the judiciary at the apex is seen as presumptuous!)



These relationships involve systems of checks and balances which prevent any one branch of government acquiring absolute or uncontrolled power. In Australia too, of course, these relationships are also underpinned by the Constitution of the Commonwealth, the terms of which remain within the control of a majority of the population, and to varying degrees by the Constitutions of the States.

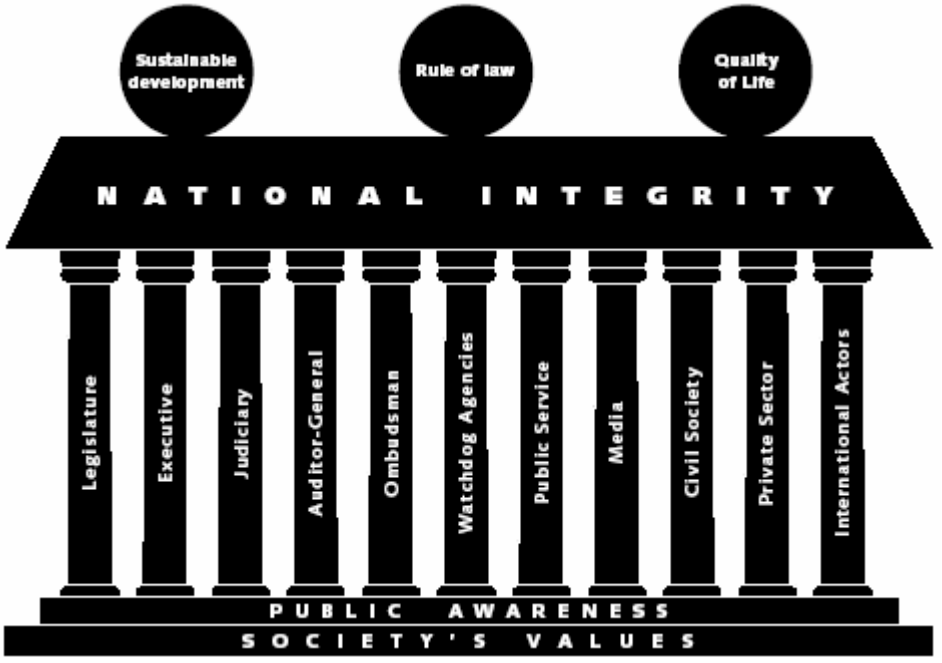
The emergence of a class of agencies characterised as integrity agencies, and the proposition that they should collectively be regarded as a distinct branch of government, poses two relationship issues. First, what is the nature of the relationships between the various agencies classified as integrity agencies, and second, if they comprise a distinct branch of government, what are the

[29] Parliamentary Education Office, *Fact Sheet - Separation of Powers: Parliament, Executive Judiciary* (2012).

relationships between that branch and the other branches of government, and do they disrupt the long-established systems of checks and balances between the existing branches of government? The first issue concerning the relationships between the integrity agencies *inter se* will be considered in detail below under the heading "Accountability".

The relationships between the so-called integrity branch of government, and its constituent agencies, and the other branches of government have been depicted diagrammatically by a number of authors. Those diagrams exacerbate my increasing sense of alarm.

Dr A J Brown has drawn attention to a stylised Greek temple purporting to depict the relationships between agencies embodying integrity values prepared some years earlier by Mr Jeremy Pope.[30]



As Dr Brown notes, the author of the diagram, Pope, describes:

[30] Dr A J Brown, 'Putting Administrative Law Back into Integrity and Putting the Integrity Back into Administrative Law' (2007) 53 *AIAL Forum* 32, 33-34 citing J Pope (ed) (2000) *Confronting Corruption: The Elements of a National Integrity System* (2nd ed).

> "the pillars are interdependent but may be of differing strengths. If one pillar weakens, an increased load is thrown onto one or more of the others. If several pillars weaken, their load will ultimately tilt … crash to the ground and the whole edifice collapse into chaos."[31]

Dr Brown describes the image as capturing a concept of "mutual accountability".

It is reassuring that a marble bearing the words "rule of law" is at the apex of the diagram. More disconcerting is the proposition that 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". It is difficult for me 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. The proposition that each of these pillars is "mutually accountable" is disturbing. I am unable to see any sense in which the judiciary is accountable to the private sector or an Ombudsman, for example. Nor would it appear to me to be likely that if, say, the strength of the Ombudsman was significantly reduced, or indeed there was no Ombudsman, or if the role of the private sector in relation to the maintenance of integrity diminished, that "the load will ultimately tilt and the whole edifice collapse into chaos".

Dr Brown and others have produced another diagrammatic depiction of the relationships between integrity agencies.[32]

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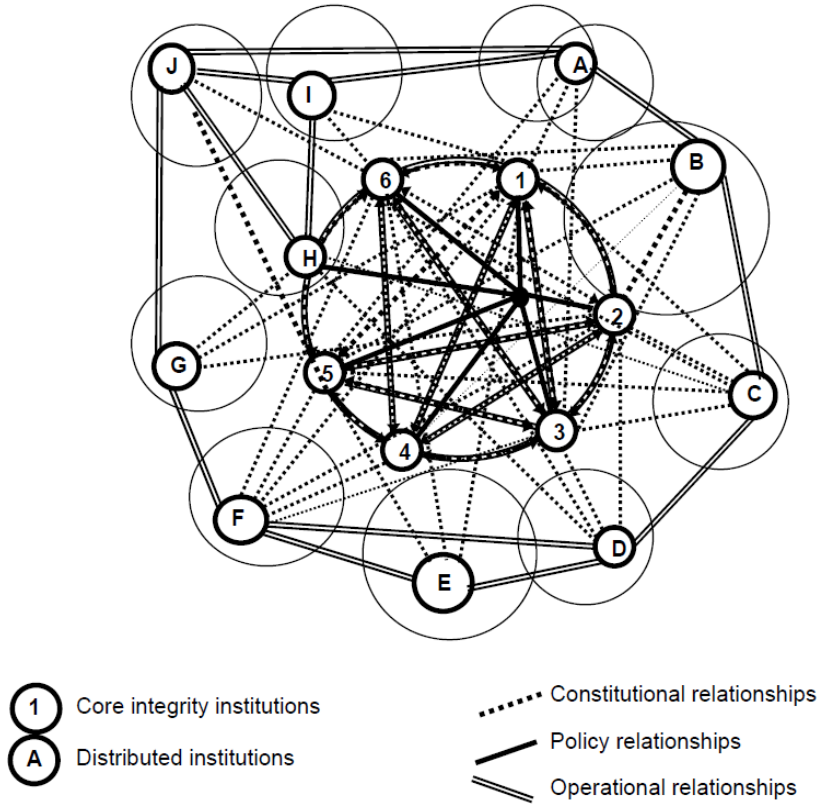
[31] J Pope (ed) (2000) *Confronting Corruption: The Elements of a National Integrity System* (2nd ed) 36.

[32] Dr A J Brown, 'Putting Administrative Law Back into Integrity and Putting the Integrity Back into Administrative Law' (2007) *AIAL Forum* No 53 32, 36, citing C Sandford, R Smith & AJ Brown, 'From Greek Temple to Bird's Nest: towards a theory of coherence and mutual accountability for the national integrity systems' (2005) 64(2) *Australian Journal of Public Administration* 96-108, 105. The authors



Perhaps it is my training as a lawyer and my current role as a judge that induces a further sense of alarm arising from this diagram which was said to be drawn from an Australian assessment. The propositions implicit in the diagram; that there are core integrity institutions and other "distributed institutions", all relating to and bearing upon each other, with none of the "core institutions" appearing to have any pre-eminence, appears to me to fly in the face of fundamental principles of the rule of law in Australia. According to those principles, 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.

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of the bird's nest model describe it as showing "a loose or 'open' system in which the number and nature of institutions is not prescribed, but will be determined in any context by the combination of what already exists and what might be desired".

What do we mean by "integrity"?

When the word "integrity" was first used by Ackerman in this context, he described it as meaning, in its simplest form, the absence of corruption, in the popular sense of that term, such as taking bribes.[33] Subsequent authors in this field have used the term much more broadly. In some respects, the term can be seen as the obverse of impropriety, but "impropriety" is itself a concept with contestable boundaries. The best description of "integrity" which I have encountered, and which provides some practical content to the meaning of the word is that provided by Burton and Williams:

> "[I]ntegrity can be seen to comprise at least four components: legality, fidelity to purpose, fidelity to public values and accountability." [34]

I will now examine each of these components of the term. As will be seen, in my view "accountability" in this context raises important issues with respect to independence and transparency.

Legality

Burton and Williams observe, correctly in my view:

> "Legality is arguably the most concrete and essential component of integrity … an integrity framework which relies entirely or predominantly on non-judicial integrity agencies will lack the ability to effectively police legality, the foundation of integrity."[35]

[33] Note 23, 691.
[34] L Burton and G Williams, 'The Integrity Function and ASIO's Extraordinary Questioning and Detention Powers' (2012) 38(3) *Monash University Law Review* 1, 24.
[35] Note 34, 24-25.

Similar observations have been made extracurially by the Hon William Gummow AC.[36] The vital importance of the judicial supervision of every agency of government, including the integrity agencies, to ensure that they remain within the jurisdiction conferred upon them by the legislature is, with respect, inconsistent with the notion that the judicial branch of government is just one of many pillars supporting a Greek temple, or just another straw making up a bird's nest.

However, there is a significant limitation upon the efficacy of judicial review as a mechanism for the supervision of administrative action. 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. But as the Hon James Wood has pointed out, and as many subjects of inquiry know to their cost, the actions and findings of an investigative agency acting within its jurisdiction can have just as adverse an impact as actions taken and findings made outside jurisdiction.[37] It is vital that this significant limitation on the efficacy of judicial review be borne steadfastly in mind whenever an agency is given powers which can be exercised independently of any other agency or branch of government.

The failure to give proper weight to this important consideration has resulted in many of the integrity agencies created over the last few decades being effectively beyond the scope of review with respect to actions taken by them within their jurisdiction. Returning like a homing pigeon to Western Australia, there is effectively no mechanism for the review of lawful actions taken by the Auditor General, the Ombudsman, the Public Sector Commissioner, the

[36] The Hon W M C Gummow AC, 'A Fourth Branch of Government?' (2012) 70 *AIAL Forum* 19.
[37] Note 27, 17.

Corruption and Crime Commissioner, the Parliamentary Inspector of the Corruption and Crime Commission or the Inspector of Custodial Services. A number of integrity agencies are subject to ministerial direction, but in almost all instances can decline to comply.[38] Thus they are only accountable politically through committees of the Parliament. However, those committees have no power of direction, and their practical capacity to oversee the actions of these agencies in individual cases is very limited. Those limitations are exacerbated by the fact that each of these agencies other than the Public Sector Commissioner and the Commissioner for Children and Young People is exempt from the operation of the FOI Act,[39] with the result that a person aggrieved by their actions will face significant practical difficulties in gathering sufficient evidentiary material to attract the interest of a parliamentary committee.

Even in those cases in which it might be credibly suggested that an integrity agency has exceeded its lawful jurisdiction, there are practical limitations upon the efficacy of judicial review as a mechanism of oversight and control. The opacity to which I have referred creates a practical obstacle to the establishment of an arguable case, and in many States, like Western Australia, there is no general entitlement to a statement of reasons in respect of decisions made by State administrative agencies. Cost, delay, complexity, uncertainty of outcomes

[38] The Inspector of Custodial Services can be directed to undertake inspections and reviews and be given directions as to the performance of his of her functions, but can decline if he or she is of the opinion that there are "exceptional circumstances" justifying non-compliance with the direction (*Inspector for Custodial Services Act*, s 17). The Commissioner for Children and Young People is only subject to direction under the Commissioner for Children and Young People Act (CCYP Act), in relation to the general policy to be followed in undertaking the Commissioner's functions but can decline to comply with the direction (CCYP Act, s 25). The Public Sector Commissioner is not subject to direction by Minister other than under PSM Act and the general power to direct under s 32 does not apply (PSM Act s 22). Directions can be given about holding special inquiries or reviews and the establishment or abolition of departments, but the Commissioner can decline to comply with directions to hold inquiries and reviews (PSM Act ss 24B, 24H, 35).

[39] FOI Act, Schedule 2.

and the risk of an adverse costs order combine to place a hurdle in the path of judicial review proceedings which is beyond the vault of many.

In the case of the Public Service Commissioner, the Parliament of Western Australia has gone even further, and effectively provided that officer with the power to override laws of the Parliament. Pursuant to s 21 of the PSM Act the Commissioner is given the functions of establishing public sector standards, and issuing codes of ethics setting out minimum standards of conduct and integrity to be complied with by public sector bodies and employees. By s 22A of the Act, the Commissioner is empowered to issue written instructions on a wide variety of matters including the management and administration of public sector bodies, official conduct, suspected breaches of discipline, and the taking of disciplinary action and "any other matter in respect of which Commissioner's instructions are required or permitted under" the Act. Section 22 of the Act excludes the Commissioner from the general power of Ministerial direction under s 32. It provides that the Commissioner is to act independently in the performance of his or her functions and is not subject to direction by the Minister or any other person except in the limited ways provided under the PSM Act.

Within this framework, s 32 of the Act provides that in the performance of his or her functions, a Chief Executive Officer of an agency is to comply with any lawful directions or instructions given to him or her by the responsible authority of his or her agency (generally speaking, the responsible Minister), but only subject to compliance with:

- acting independently in human resource matters (PSM Act, s 8(2));
- any instruction, public sector standard or code of ethics issued by the Commissioner; and
- any other written law relating to his or her agency.

Extraordinarily, the section goes on to effectively provide that to the extent that there is any conflict between any public sector standard or code of ethics published by the Commissioner, and any other written law relating to the agency, the public sector standard or code of ethics prevails over the written law. So, under the laws of Western Australia, the power of a Minister to direct the CEO of an agency for which he or she is responsible is, understandably, subject to any written law and independence in human resourcing matters, but both the written law and any directions of the Minister are trumped by any public sector standard or code of ethics published by the Commissioner, who is not subject to direction by anyone.

Put another way, in at least one Australian State, the principle of legality of administrative action has been modified to the extent that a public official not subject to ministerial direction can promulgate standards and codes which have the effect of overriding laws passed by the Parliament. On the face of it, it is difficult to see how this framework promotes the cause of "integrity" given the breadth of this extraordinary delegation of legislative power to an unaccountable official. It is to be remembered that this is the same official who is responsible for the conduct of reviews, inquiries and investigations on a wide variety of matters broadly related to the Public Sector. The same official is now also the employing authority of each agency CEO, who therefore depends upon the favour of the Commissioner for their continuation in office or

reappointment.[40] Moreover, in a Bill presented to the previous Parliament which lapsed,[41] the Commissioner was to have been given the Corruption and Crime Commission's power to investigate misconduct by public officers[42] (other than corruption or offences punishable by 2 or more years imprisonment). The Commissioner was also to be given the power to monitor the way in which other independent agencies took action in relation to allegations and matters referred to them by the Commissioner.[43]

My alarm bells are ringing even louder.

Fidelity to purpose

In the context of discourse with respect to integrity agencies, the notion of fidelity to purpose is rather broader than the notion of purpose in the context of the familiar ground of judicial review. In the context of judicial review, the purposes for which a power may be lawfully exercised are derived by the usual processes of statutory construction and define jurisdiction. In the discourse of integrity agencies, "purpose" is not so constrained. As Burton and Williams observe, according to both Spigelman CJ and Dr Brown, in this context purpose extends to the general purposes for which the institution or agency was

[40] The Public Sector Commissioner makes recommendations to the Governor about the appointment, reappointment and removal of CEOs (PSM Act, ss 45, 46, 49). Section 52(2) states that "No proceedings for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction or for any other relief lie in respect" of these matters.

[41] Corruption and Crime Commission Amendment Bill 2012 (WA) and see Alex Hickman, 'Parliamentary Privilege and Statutory Officeholders - some recent developments in Western Australia' (Paper delivered at Australia and New Zealand Association of Clerks at the Table Conference, Canberra, 23 January 2013).

[42] Other than police, parliamentarians or local government members (as per the definition of "serious misconduct" in the *Corruption and Crime Commission Act*, s 3). Judicial officers are also excluded by the terms of s 27(3).

[43] Alex Hickman, 'Parliamentary Privilege and Statutory Officeholders - some recent developments in Western Australia' (Paper delivered at Australia and New Zealand Association of Clerks at the Table Conference, Canberra, 23 January 2013)14.

created.[44] But if the process goes beyond the conventional processes of statutory construction, who is to define the purpose or range of purposes for which any integrity agency was created, and by reference to what standards? The answer seems to be that the agency itself derives these purposes by references to its own objectives and priorities. The potential for idiosyncrasy in this area makes the components of legality and accountability all the more important.

Fidelity to public values

If there is scope for idiosyncrasy in the identification of the purposes for which an agency was created, how much broader is the scope for idiosyncrasy in the identification of the "public values" which are to be promoted by the agency? Burton and Williams suggest that this is the area in which the Chinese censorate's Hsieh-Chih operates.[45] I have already expressed my concerns arising from the use of this metaphor. The notion that integrity agencies can intuit immorality from a distance and thence rip the perceived malevolent to shreds serves again to reinforce the importance of the components of legality and accountability.

It is timely to recall what Gleeson CJ described as "a big difference" between applying facts found to statutory provisions embodying objective standards of conduct (which is one characteristic of the judicial function) "and an exercise of passing moral or political judgment".[46] In his view, judgments of the latter kind were for Parliament and the electorate. Developments since those observations were made (in 1992) suggest that judgments of the latter kind are now to be made by the many and varied "integrity" agencies which have been created

[44] Note 34, 25.
[45] Note 34, 25.
[46] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 145.

since then. The extent to which those agencies are accountable to either Parliament or the electorate, or indeed, in practical terms to anybody, is the subject to which I will now turn.

Accountability

Burton and Williams draw a useful distinction between what they describe as "soft" and "hard" accountability.[47] An example of soft accountability is a report with respect to conduct. In their lexicon, hard accountability produces binding consequences - such as a court order declaring an action to be illegal and prohibiting its continuation.

Attached to this paper is a spreadsheet which endeavours to depict the extent to which the agencies to which I have referred are accountable to each other, or to the Parliament or to some other form of oversight, and which includes the extent to which they are subject to direction by a minister and any limitations upon the extent to which they are subject to judicial review.

The statutory provisions identified in the column relating to judicial review must be read subject to the decision of the High Court in *Kirk v Industrial Court of New South Wales*,[48] which must cast doubt upon the validity of some of those provisions. Therefore, while it can be safely concluded that each of the agencies to which I have referred is subject to the "hard" accountability of judicial review, the limited scope of that form of accountability must be remembered - namely, that judicial review is limited to the legality of the agency's actions, and in particular, whether the agency has exceeded its jurisdiction, together with the practical obstacles in the path of judicial review referred to previously, including the lack of transparency in relation to the

[47] Note 34, 26.
[48] [2010] HCA 1; (2010) 239 CLR 531.

actions of many of these agencies which will inhibit the practical capacity to effectively challenge the legality of their actions.

The other form of "hard" accountability identified on the spreadsheet, namely, direction by a minister, does not apply to any of the integrity agencies. The Inspector of Custodial Services, the Commissioner for Children and Young People and the Public Sector Commissioner can be given directions only in accordance with the specific provisions of the enabling legislation and in nearly all instances they can decline to comply with such directions.[49]

Turning to the various forms of "soft" accountability, it will be seen that all of the agencies other than the Public Sector Commissioner and the Commissioner of Children and Young People are exempt from the operation of the FOI Act.[50] Further, most of the agencies are specifically prohibited from disclosing information obtained in the course of their activities.[51] I will refer later to the operation of some of those provisions. All agencies are exempt from investigation by the Ombudsman,[52] and all are exempt to a greater or lesser degree from aspects of the PSM Act.[53] All are subject to investigation by the CCC[54] (except the CCC and the Parliamentary Inspector of the CCC[55]) and all

[49] See note 38.
[50] FOI Act, Schedule 2.
[51] See appended 'Overview of Western Australian Integrity Agencies and Statutory Accountability Provisions', "Confidentiality" column.
[52] Except for their internal administration in some instances. See *Parliamentary Commissioner Act,* Schedule 1.
[53] See appended 'Overview of Overview of Western Australian Integrity Agencies and Statutory Accountability Provisions', "Public Sector Commission" column.
[54] "Misconduct" under the *Corruption and Crime Commission Act* is defined with reference to the conduct of "public officers" (s 4); "public officer" is defined to include "a person exercising authority under a written law" (see s 3 and *Criminal Code*, s 1).
[55] *Corruption and Crime Commission Act,* s 27.

are subject to audit by the Auditor General.[56] Four of the agencies (the Auditor General, the CCC, the Parliamentary Inspector of the CCC and the Commissioner for Children and Young People) are expressly required to report to specified parliamentary committees,[57] and it would be reasonable to assume that the conduct of other agencies could be investigated by an appropriate parliamentary committee provided that the conduct fell within its terms of reference. The CCC is itself subject to review by the Parliamentary Inspector, although the Parliamentary Inspector lacks any power to give binding directions to the CCC with respect to its conduct or activities.[58] Each of the statutory office holders can be suspended by the Governor and removed by the Parliament, other than the Inspector of Custodial Services, who may be removed by the Governor only.[59]

Differing views might reasonably be held as to the characterisation of these "soft" accountabilities. My own view is significantly influenced by the view which I have formed with respect to the limited forms of hard accountability applicable to these agencies. In that context, the exemption of these agencies from various forms of soft accountability, particularly those which relate to transparency of action, appears to me to give rise to serious concerns.

Some writers have suggested that these concerns can be alleviated by the degree of trust which we should repose in the personnel who comprise these agencies, and the procedures which they adopt. For example, the Hon James Wood has

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[56] See appended 'Overview of Overview of Western Australian Integrity Agencies and Statutory Accountability Provisions', "Auditor General" column. The Auditor General's Office is subject to a statutory requirement that it be independently audited (*Auditor General Act*, Part 5).

[57] See appended 'Overview of Overview of Western Australian Integrity Agencies and Statutory Accountability Provisions', "Other Oversight" column.

[58] *Corruption and Crime Commission Act*, Part 13.

[59] See appended 'Overview of Overview of Western Australian Integrity Agencies and Statutory Accountability Provisions', "Removal" column.

suggested that the adoption of codes of conduct, specific guidelines and practice manuals, the implementation of IT systems with suitable firewalls, controls as to permitted access and capacity for an audit trace, accompanied by an expectation of high levels of ethical behaviour should provide sufficient confidence to the effect that the powers of these agencies will not be abused.[60] With respect, I am not convinced.

After reflecting upon the dangers of reposing power in a single individual, the WA Ombudsman, Mr Chris Field, has suggested that the repositories of power in agencies of the kind to which I have referred in this paper, could be expected to have reflected upon "the almost sage-like level of expertise required, combined with sustained humility" so as to ensure that powers are not abused.[61] With respect to Mr Field, the assertion "trust me, I am a sage and humble integrity agency" is about as convincing as the assertion "trust me, I am a sage and humble lawyer".

My concerns can be illustrated by two recent examples of dealings between statutory officeholders and parliamentary committees, again drawn from Western Australia.[62] The first instance concerns a request by the Standing Committee on Public Administration of the Legislative Council of Western Australia[63] to the Auditor General for the provision of information with respect

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[60] Note 27, 14.

[61] Chris Field, 'The fourth branch of government: the evolution of integrity agencies and enhanced government accountability' (Paper presented at the 2012 AIAL National Administrative Law Forum, Adelaide, 19-20 July 2012) 6-7.

[62] Drawn from Hickman, note 43.

[63] An extract from Schedule 1 of the Legislative Council (WA) Standing Orders (reproduced by Hickman, note 43, 5) outlines the terms of reference for the Committee:

> "3. Public Administration Committee
> 3.1 A Public Administration Committee is established.
> 3.2 The Committee consists of 5 members.
> 3.3 The functions of the Committee are to –
> (a) inquire and report on –
> (i) the structure, efficiency and effectiveness of the system of public administration;

to his allegation that a Committee report that was critical of his conduct contained "inaccuracies and misunderstandings".[64] When asked for documentation which would support his claim, the Auditor General refused to provide the information on the basis of legal advice to the effect that he was only able to provide information to the three parliamentary committees specified in the *Auditor General Act* – namely, the Public Accounts Committee, the Estimates and Financial Operations Committee, and the Joint Standing Committee on Audit (the latter not being in existence at that time). However, the legal advice, which has been made publicly available,[65] makes no reference to s 23(2) of the *Auditor General Act* which provides:

> 23(2) The Auditor General may provide advice or information to a person or body relating to the Auditor General's responsibilities if, in the Auditor General's opinion, the provision of the information or advice:
>
> (a) would be in the State's interests; and
>
> (b) would not comprise the Auditor General's independence.

(ii) the extent to which the principles of procedural fairness are embodied in any practice or procedure applied in decision making;
(iii) the existence, adequacy, or availability, of merit and judicial review of administrative acts or decisions;
(iv) any Bill or other matter relating to the foregoing functions referred by the Council; and
(b) consult regularly with the Parliamentary Commissioner for Administrative Investigations, the Public Sector Standards Commissioner, the Information Commissioner, the Inspector of Custodial Services, and any similar officer.

3.4 The Committee is not to make inquiry with respect to –
(a) the constitution, functions or operations of the Executive Council;
(b) the Governor's Establishment;
(c) the constitution and administration of Parliament;
(d) the judiciary;
(e) a decision made by a person acting judicially;
(f) a decision made by a person to exercise, or not exercise, a power of arrest or detention; or
(g) the merits of a particular case or grievance that is not received as a petition."

[64] Standing Committee on Public Administration, *Special Report* (June 2012) 1.

[65] Note 64, Appendix 1.

The second instance to which I would refer in this context involves an occasion upon which the same Committee of the Parliament requested documentation from the Ombudsman in relation to its inquiry into the management of water use in an area of the Kimberley. Acting on legal advice, the Ombudsman considered that s 23 of his Act prevented him from disclosing information to the Committee unless the Committee issued a summons to produce documents. That position was adopted notwithstanding a provision in the relevant Act, similar to the provision in the *Auditor General Act*, conferring upon the Ombudsman a discretion to provide information "to any person or to the public or a section of the public" if the Ombudsman considers it in the public interest to do so.[66]

These examples of a disinclination by integrity agencies to exercise a discretion to provide information to a parliamentary committee do nothing to alleviate my concerns with respect to the limitations upon the accountability of these bodies.

The limitations upon these mechanisms of "soft" accountability was brought graphically home to me some years ago when, a few days before Christmas, I heard an ex parte application brought by the Commissioner of the Corruption and Crime Commission who sought an interlocutory injunction restraining the Parliamentary Inspector of that Commission from delivering a report to the Committee of Parliament responsible for the oversight of the activities of both the Parliamentary Inspector and the Commission. The application was the culmination of a long and unfortunate period of public hostility between the then Parliamentary Inspector and the then Commissioner. As the Parliamentary Inspector was declared by the legislation to be an officer of the Parliament, it seemed to me that any relief of the kind sought would very likely constitute a

[66] *Parliamentary Commissioner Act*, s 23(1b).

contempt of the Parliament. I expressed that view to counsel appearing on behalf of the Commission, and suggested to him that while he might be happy to spend Christmas incarcerated at the behest of the Black Rod, I had other plans. More seriously, the fact that one of these agencies thought it necessary to obtain injunctive relief to restrain another from performing its statutory function suggests that the matrix of soft accountabilities set out in the attachment to this paper may have deficiencies.

Independence

It is reasonable to infer that the specific limitations upon the accountabilities of the agencies to which I have referred have been provided in order to ensure their independence. It can be readily acknowledged that there is an obvious and direct tension between rendering an integrity agency subject to ministerial direction, and the ability of that agency to effectively review the actions of executive government. The resolution of that obvious tension is not easy. However, there is something to be said for the view that the current balance, at least in some jurisdictions, is tilted a little too far in favour of independence, at the expense of accountability.

Transparency

The traditional mechanism for the reconciliation of independence and accountability is transparency. The two most obvious examples of that mechanism are perhaps the oldest – namely, the courts and the parliament. Each is independent but each has long entrenched traditions of transparency which have enhanced public awareness of their operations and, perhaps, over the longer term at least, public input into their operations. Nothing limits effective public engagement like secrecy. But, as I have pointed out, many of

the agencies to which I have referred lack transparency as a result of their exemption from freedom of information legislation, specific statutory provisions preventing disclosure of information in some cases, and in at least two instances, a disinclination to exercise a discretion, exercisable in the public interest, to enable disclosure of information to a parliamentary committee. Although my researches have not extended to a comprehensive survey of legislation in other Australian jurisdictions, there is at least some reason to suppose that examples will be found in other jurisdictions which are similar to those which I have drawn from Western Australia. For example, in New South Wales, s 34(4) of the *Ombudsman Act 1974* provides that if the Ombudsman is to give evidence before the Joint Committee which oversees his or her activities, the Ombudsman must make a request for the evidence to be taken in private, or for a direction that any documents which are produced are to be treated as confidential. In Queensland, s 92 of the *Ombudsman Act 2001* makes no express provision for the disclosure of confidential information to a Parliamentary Committee.[67]

The Integrity Coordinating Group (WA)

In Western Australia, a number of the agencies to which I have referred have formed what has been described as "an informal collaboration"[68] of the Corruption and Crime Commission, the Public Sector Commissioner, the Auditor General, the Ombudsman and the Information Commissioner known as the Integrity Coordinating Group (the ICG). Its terms of reference are:

[67] A recent development has been the establishment of the Victorian Inspectorate described as "the key oversight body in Victoria's new integrity system" (Victorian Inspectorate, 'Welcome to the Victorian Inspectorate' at http://www.vicinspectorate.vic.gov.au/ (accessed 30 July 2013). My resources have not extended to analysing the Inspectorate's role in relation to other integrity agencies in that State and, given it only commenced operations in February 2013, it is too early to assess its impact.

[68] Note 61, 2.

1. Fostering collaboration between public sector integrity bodies.

2. Encouraging and supporting research, evaluation and policy discussion to monitor the implementation of integrity and accountability mechanisms in Western Australia, and other jurisdictions nationally and internationally.

3. Inspiring operational cooperation and consistency in communication, education and support in public sector organisations (including State Government bodies, local government organisations and public universities).[69]

A former senior officer of one of these agencies has described the ICG′s original purpose as being "to facilitate communication between sector-wide integrity agencies - particularly at appropriately senior levels, to ensure ongoing information flows and shared experiences".[70] The Auditor General is quoted as referring to the group's capacity to "ensure appropriate levels of operational information are shared as necessary", in the context of coordination of operations.[71]

As I have noted, the Hon James Wood has drawn attention to the capacity of coordinated operations to substantially enhance the impact and effect of powers given to any one agency. The combination of powers conferred upon separate and distinct agencies by the Parliament might well take the collaborative exercise of those powers well beyond anything contemplated by Parliament at the times the separate pieces of legislation were enacted. It is interesting to note that the members of the ICG appear quite enthusiastic about sharing information

[69] Integrity Coordinating Group, 'Integrity in the public sector' at http://www.icg.wa.gov.au/integrity-public-sector (accessed 24 July 2013). In fact public universities and local government are not public sector organisations under the PSM Act (Schedule 1), but universities are audited by the Auditor General as statutory authorities under the *Financial Management Act 2006* (Schedule 1) and local government does fall within the jurisdiction of the Ombudsman (*Parliamentary Commissioner Act*, ss 4A, 14).

[70] Professor David Gilchrist, 'Closing the Circle - integrity coordination in the West' (2012) 29 *Public Administration Today* 62.

[71] Note 70.

with each other, but on the occasions to which I have referred, at least some members of that group have been unwilling to provide information to the Parliament with respect to their activities.

One of the members of the ICG, the Ombudsman, has posed the question of whether "the proliferation of multiple niche integrity agencies should be consolidated into overarching integrity bodies".[72] Such a move would institutionalise the concerns expressed by the Hon James Wood, and which I share.

The ICG has formulated a definition of integrity as follows:

> "Integrity means earning and sustaining public trust by:
>
> - serving the public interest
> - using powers responsibly, for the purpose and in the manner for which they were intended
> - acting with honesty and transparency, 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."[73]

The same group had proposed that integrity is demonstrated by:

> "… public sector employees who serve the public interest with integrity by avoiding actual or perceived conflicts of interest and not allowing decisions or actions to be

[72] Note 61, 9.
[73] Integrity Coordinating Group, 'Integrity in the public sector' at http://www.icg.wa.gov.au/integrity-public-sector (accessed 24 July 2013).

> influenced by personal or private interests; use these powers for the purpose, and in the manner, for which they were intended; act without bias, make decisions by following fair and objective decision-making processes and give reasons for decisions where required, and behave honestly and transparently, disclosing facts, and not hiding or distorting them. This includes preventing, addressing and reporting corruption, fraud and other forms of misconduct."[74]

I do not mean to suggest that there is any particular component of the proposed definition of integrity, or the enunciated qualities of public administration to which objection should be taken. It is, however, of some concern to me that these statutory 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.

This concern is illustrated by the distinction which the WA Ombudsman has drawn between matters which he describes as poor administration, and matters which go to issues of integrity. In the former category he places:

> "The failure to give reasons, honest mistakes, otherwise honest, but simply inadequate administrative practice or even well intentioned, but ultimately misconceived practices of the executive that all might be characterised as undesirable, but not matters that necessarily lack integrity."[75]

To the extent that it is possible to glean from this language a distinction between conduct which merely constitutes maladministration, and conduct which demonstrates a lack of integrity, it is not a distinction which draws any support from the language of the statute creating the office of Ombudsman.[76]

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[74] Note 61, 5.
[75] Note 61, 3.
[76] *Parliamentary Commissioner Act.*

I refer to the ICG not for the purpose of exposing its statements and activities to detailed scrutiny. My purpose is broader. This paper is a response to various suggestions made over the last 10 years or so to the effect that various statutory agencies with different functions and responsibilities should be collectively regarded as a fourth arm of government, united in the discharge of a shared responsibility. It appears to me that there may be significant dangers in this proposition, including the risk of distraction from the specific language used by the Parliament in conferring functions upon each agency, and in defining the standards to be applied and observed by each agency. The collection of these agencies in one grouping creates the risk that they will cease to be the islands of power to which Gummow J referred,[77] but will instead come to be regarded, at least by themselves, as an overarching part of the fabric of government, perhaps as the pediment in the metaphorical Greek temple shown earlier in this paper. This in turn carries the risk that the efficacy of the checks and balances that have characterised relations between the three recognised branches of government, and which have stood the test of time, may be undermined.

In this paper I have endeavoured to demonstrate that we should resist the hasty assurance that we are wiser than our fathers and forefathers, who fashioned government into three branches. The integrity agencies have an important role to play in contemporary Australia. However they are and must remain firmly within the executive branch of government, subject to the scrutiny of Parliament, and to laws passed by the Parliament and enforced by the courts. They must apply standards of conduct stipulated in the statutes which create them, rather than possibly idiosyncratic notions of public purposes and values. In many cases, the nature of the functions performed by integrity agencies requires that they be independent of other agencies of the executive, with the

[77] Note 36, 24.

consequence that their accountability for their actions is significantly diminished. In that context, any departure from transparency should be carefully scrutinised and is justified only when, in the particular circumstances in question, transparency of action would be incompatible with the effective performance of the agency's statutory functions.

Overview of Western Australian Integrity Agencies and Statutory Accountability Provisions

Statutory Accountability Provisions[78]	***Appointment***	***Direction by Minister***	***Confidentiality***	***Auditor General***[79]	***Ombudsman***	***FOI***
Auditor General *(Auditor General Act 2006 –* AG Act*)*	Appointed by, and sworn before, the Governor on recommendation of the Minister after consulting relevant Parliamentary Committees and party leaders. Term of 10 years (Schedule 1, cl 1)	Is deemed CEO under PSM Act (s 4) but Auditor General cannot be directed by responsible authority under PSM Act s 32 (s 9 AG Act). Minister can require that information about an agency not disclosed to Parliament not be disclosed by Auditor General (s 37)	Information confidential except for purposes of, or proceedings under, Act, other written law or Criminal Code, if in relation to three named committees (s 46) or if in the State's interests and would not compromise Auditor General's independence (s 23)	Independently audited (Part 5) and see also Financial Management Act, Schedule 3	Exempt other than as CEO of Office of the Auditor General: PC Act, Schedule 1	Exempt (including the Office of the Auditor General): FOI Act, Schedule 2
Ombudsman *(Parliamentary Commissioner Act 1971 -* PC Act*)*	Appointed by Governor, term of 5 years (s 5); oath administered by the Speaker (s 8)	Not deemed to be CEO under PSM Act or regulations so cannot be directed by Minister	Investigations to be conducted in private (s 19). Can direct that correspondence not be disclosed (s 23) May disclose information to Inspector Custodial Services, DPP, CCYP, CCC and Parliamentary Inspector but otherwise not disclosed except for the purposes of an investigation or report under the Act, for proceedings for perjury or offences under the Act (ss 22B, 23) or if in the public interest to disclose to "any person or to the public or a section of the public" (s 23).	Not exempt - Financial Management Act, s 5	Does not apply: PC Act, Schedule 1	Exempt: FOI Act, Schedule 2
Information Commissioner *(Freedom of Information Act 1982 -* FOI Act*)*	Appointed by Governor up to 7 years (s 56); oath administered by Speaker of the Legislative Assembly (s 60)	Not deemed to be CEO under PSM Act or regulations so cannot be directed by Minister	No disclosure of confidential information other than for the purposes of or proceedings under this or another written law (s 82)	Not exempt - Financial Management Act, s 5	Does not apply: PC Act, Schedule 1	Exempt: FOI Act, Schedule 2
Public Sector Commissioner *(Public Sector Management Act 1994 -* PSM Act*)*	Appointed by Governor for 5 year term, on recommendation of Minister after consulting the parliamentary leader of each party (s 17); declaration before Governor prior to commencement (s 17)	Is deemed to be a CEO under s 4 of PSM Act but is to act independently, is not subject to lawful direction by Minister other than under PSM Act although s 32 does not apply (s 22) Can be directed to hold special inquiries and reviews and on establishment/ abolition of departments but Commissioner can decline direction on inquiries and reviews (ss 24B, 24H, 35)	No special provisions; general confidentiality applies	Not exempt - a department	Exempt other than as CEO of the department of the Public Service: PC Act, Schedule 1	Not exempt
Inspector of Custodial Services *(Inspector of Custodial Services Act 2003 –* ICS Act*)*	Inspector is appointed by the Governor for not more than 7 years (s 6); oath administered by Governor (s 8)	Is deemed CEO under PSM regulations (r 4A) so would be subject to direction by Minister, but ICS Act states only subject to direction as under s 17 ICS Act (s 17) – Minister can direct inspections, reviews and generally but Inspector can decline (s 17)	May direct non-disclosure of OICS documents (s 48) Non-disclosure of information obtained except in performance of the Inspector's functions; for consultations with CCC, DPP and Ombudsman; if in the Inspector's opinion it is in the public interest or in proceedings for perjury or offence under Act (ss 44-47)	Not exempt – a department and see s 63	Does not apply: PC Act, Schedule 1	Exempt: FOI Act, Schedule 2
Corruption & Crime Commission (CCC) *(Corruption and Crime Commission Act 2003 –* CCC Act*)*	Commissioner appointed on recommendation of Premier by Governor, after referral of three eligible persons by nominating committee (Chief Justice, Chief Judge and community representative) and supported by Standing Committee (s 9); oath to be taken before a Judge (s 15); appointment for a 5 year term (Schedule 2)	Not deemed CEO under PSM Act or regulations so is not subject to direction by Minister	Examinations only to be in public if in the public interest and not an organised crime examination (s 140) No disclosure of restricted matter unless directed by Commission or as part of hearing (s 151), or of official information except for purposes under the Act, prosecutions or disciplinary action in relation to misconduct, Commission certifies it is necessary in the public interest, to either House of Parliament or the Standing Committee, or disclosure to a prescribed authority (s 152) Can consult, cooperate and exchange information with Ombudsman, DPP, Auditor General, Inspector Custodial Services, Public Sector Commissioner, (ss 3, 18(g))	Not exempt - Financial Management Act, Schedule 1 and see s 187	Does not apply: PC Act, Schedule 1	Exempt: FOI Act, Schedule 2
Parliamentary Inspector Corruption & Crime Commission *(Corruption and Crime Commission Act 2003 –* CCC Act*)*	Except for the first Parliamentary Inspector, the Inspector is appointed by the Governor on recommendation of Premier from a list of three selected by nominating committee (Chief Justice, Chief Judge and community representative) and supported by Standing Committee (s 189) Oath to be taken before a Judge (s 194); appointment for 5 year term (Schedule 3)	Not deemed CEO under PSM Act or regulations so is not subject to direction by Minister	Inquiries not to be held in public (s 197) Non-disclosure obligation under s 151 applies to Parliamentary Inspector (s 207). No official information to be disclosed except for purposes of Act, for prosecution or disciplinary action relating to misconduct, to either House of parliament or Standing Committee or to prescribed authorities (ss 208, 209)	Not exempt - Financial Management Act, Schedule 1 and see s 216	Does not apply: PC Act, Schedule 1	Exempt: FOI Act, Schedule 2
Commissioner for Children and Young People *(Commissioner for Children and Young People Act 2006 –* CCYP Act*)*	Appointed by Governor on recommendation of Premier after consultation with leaders political parties (s 7) for a term up to 5 years (s 9) on oath administered by Governor (s15)	Not deemed CEO under PSM Act or regulations so not subject to direction by Minister generally but is subject to direction under CCYP Act (ss 25, 26). Minister can direct general policy in performing functions but Commissioner can decline (s 26)	No disclosure except for purposes of Act, offence under the Act, the Public Interest Disclosure Act or another written law, with written consent of Minister or person to whom information relates, or statistics (s 60)	Not exempt - taken to be a department for the purposes of the Financial Management Act (Financial Management Regulations, r 3A)	Exempt other than as chief employee under PSM Act: PC Act, Schedule 1	Not exempt

[78] This table is not a conclusive or an exhaustive account of relevant statutory provisions and other provisions or legislation may affect the accountability of integrity agencies. For example, the *Auditor General Act* states that the powers of Parliament to act in relation to the Auditor General "are as specified in or applying under this Act and other written laws" (s 7(5)).

[79] See also Western Australia, *Government Gazette*, No 112 (28 June 2013) and Public Sector Commission, *Chart of the Western Australian Government* (1 July 2013).

Overview of Western Australian Integrity Agencies and Statutory Accountability Provisions

Statutory Accountability Provisions	*Public Sector Commission*	*Corruption & Crime Commission*	*Other oversight*	*Judicial Review*	*Removal*
Auditor General *(Auditor General Act 2006 –* AG Act*)*	An independent officer of Parliament required to act independently (s 7). Auditor General is not an office in the Public Service and cannot be monitored or investigated by the Public Sector Commissioner or disciplined under the PSM Act (AG Act s 9, PSM Act s 4). Public service officers (or others) can be appointed to the Office of the Auditor General to conduct audits (s 29). The Public Sector Commissioner can undertake reviews or special inquiries under the PSM Act	Not exempt	Required to provide information to the Public Accounts Committee and Estimates and Financial Operations Committee [not dedicated committees for the oversight of Office of the Auditor General]; and the Joint Standing Committee on Audit [dedicated oversight Committee but not established until late 2012] (s 46)	No action or claim for damages lies against the Auditor General for act done or omitted unless malicious and without reasonable and probable cause (s 45)	Suspension by Governor, removal by Parliament (Schedule 1, cl 7)
Ombudsman *(Parliamentary Commissioner act 1971 -* PC Act*)*	Ombudsman and staff are not subject to Part 3 of PSM Act (s 10) so are not part of the Public Service. Can be monitored, reviewed, inquired into or investigated by the Public Sector Commissioner but not disciplined under the PSM Act	Not exempt		Documents to or from the Ombudsman which are specifically prepared in the course of an investigation under the Act are not admissible in proceedings (s 23A); Supreme Court may determine jurisdiction (s 29); no liability or proceedings unless there is evidence of bad faith and with leave of the Supreme Court (s 30); no prerogative writ shall be issued nor proceedings brought seeking one (s 30(3)); except in proceedings for perjury or offence under the Royal Commissions or this Act, Ombudsman and staff not to be called to give evidence or produce document in any judicial proceedings (s 30(4))	Suspension by Governor, removal by Parliament (s 6)
Information Commissioner *(Freedom of Information Act 1982 -* FOI Act*)*	Commissioner not Public Service office (s 55) and staff are not employed under Part 3 of the PSM Act (s 61). Can be monitored, reviewed, inquired into or investigated by the Public Sector Commissioner but not disciplined under the PSM Act	Not exempt		No review of decisions except under the FOI Act (s 103); Protection from personal liability if done in good faith (s 80); referrals to Supreme Court on questions of law relating to complaints, and appeals on exemption certificates or change in personal information (s 78, 85)	Suspension by Governor, removal by Parliament (s 58)
Public Sector Commissioner *(Public Sector Management Act 1994 -* PSM Act*)*	Commissioner not Public Service office (s 16), but can be monitored, reviewed, inquired into or investigated, but not disciplined, under the PSM Act. Commission staff are public service officers	Not exempt		When conducting special inquiries or investigations has the same protection and immunity as a Judge (ss 24I, 24, Schedule 3, cl 6)	Suspension by Governor, removal by Parliament (s 18)
Inspector of Custodial Services *(Inspector of Custodial Services Act 2003 -* ICS Act*)*	PSM Act does not apply to the Inspector (s 6) so cannot be monitored, reviewed, inquired into or investigated by the Public Sector Commissioner or disciplined under the PSM Act. However staff are public service officers (s 16)	Not exempt		No action in tort if done in good faith (s 52); no document prepared by or for the Inspector specifically for the purposes of the Inspector is admissible in proceedings (other than offence under ICS Act or perjury) (s 53)	Governor may remove for misbehaviour or incapacity (s 9)
Corruption & Crime Commission *(Corruption and Crime Commission Act 2003 –* CCC Act*)*	Not a Public Service office (s 9) and staff are not employed under part 3 of the PSM Act (s 179). Can be monitored, reviewed, inquired into or investigated by the Public Sector Commissioner but not disciplined under the PSM Act.	No allegation against Commissioner to be received. (s 27)	Supreme Court to issue search warrants (s 101) and may order registration of assumed identities (s 106); Supreme Court to review detention of an arrested person (s 150). Supreme Court issues listening device warrants (Surveillance Devices act 1998). Ombudsman inspects telecommunications warrants and authorisations issued to CCC (Telecommunications (Interception and Access) Western Australia Act 1966 and regulations). Parliamentary Inspector (Part 13) audits Act and CCC operations. Standing Committee (Part 13A) functions determined by Parliament and are not justiciable (s 216A)	Commission has same protection and immunity as judge of Supreme Court (s 147); no action in tort if done in good faith (s 219); no civil or criminal liability for purported compliance in good faith with Act (s 221); no prerogative writ in relation to organised crime, exceptional powers, fortifications except with consent of Inspector and after completion of investigation (s 83) Information acquired under the Act cannot be used in Court except for misconduct proceedings (s 152) [NB The CCC has powers to investigate judicial officers if crime sufficient to remove from office (s 27)]	Suspension by Governor, removal by Parliament (s 12)
Parliamentary Inspector CCC *(Corruption and Crime Commission Act 2003 –* CCC Act*)*	Not a Public Service office (s 188) and staff are not employed under part 3 of the PSM Act (s 210). Can be monitored, reviewed, inquired into or investigated by the Public Sector Commissioner but not disciplined under the PSM Act.	No allegation against the Parliamentary Inspector to be received (s 27)		Information acquired under the Act cannot be used in Court except for misconduct proceedings (s 208) no action in tort if done in good faith (s 219); no civil or criminal liability for purported compliance in good faith with Act (s 221)	Suspension by Governor, removal by Parliament (s 192)
Commissioner for Children and Young People *(Commissioner for Children and Young People Act 2006 –* CCYP Act*)*	Commissioner is not a Public Service position (s 6) so cannot be disciplined but can be monitored, reviewed, inquired into or investigated under PSM Act. Staff are appointed under Part 3 PSM Act (s 16) so are public service officers.	Not exempt	Standing Committee (Part 7) – functions determined by Parliament and are not justiciable (s 51)	No action in tort if done in good faith (s 59)	Suspension by Governor, removal by Parliament (s 8)