

Commonwealth oversight arrangements – re-thinking the Separation of Powers¹

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THE EMERGENCE OF STATUTORY OVERSIGHT BODIES

The Australian constitutional system of government is premised on a principle of accountability. Government should not be arbitrary and uncontrolled, but act in the public interest and according to the rule of law. Important accountability mechanisms established in the Constitution include elections, Parliamentary processes, and judicial oversight. A vital aspect of an accountability model is that an individual who feels aggrieved by an exercise of official power should have both a legal right and a practical opportunity to question whether a government official has kept within legal bounds and acted in good faith and impartially. This questioning must be done in an independent forum that is procedurally fair and that can effectively remedy any wrongful exercise of power. Until forty years ago we relied principally on the courts, buttressed by the doctrine of the separation of powers, to be the independent scrutiny forum that was accessible to individuals. Expectations changed, as it became apparent that courts were not accessible to most people, yet dispute resolution between the community and government was of growing importance. Far greater interaction was occurring between people and government, as the scale of government regulation, benefit distribution, sanctions and licensing grew. A flawed government decision could have significant and lasting consequences for an individual. As people relied more on government to provide assistance or approval, they developed higher expectations of government to be transparent, responsive and answerable. Parliament responded by creating a range of new and independent review agencies and mechanisms to review and scrutinise executive government processes. Two prominent examples at the national level were the creation of the Administrative Appeals Tribunal in 1975, to undertake independent merit review of administrative decision making, and the Commonwealth Ombudsman in 1976, to investigate complaints from members of the public about administrative action and to conduct own initiative investigations.

1 Presentation to the Australian Study of Parliament Group Annual Conference, Perth, October 2013. The ideas in this article are spelt out in greater detail in other published papers by the author – ‘Rethinking the Separation of Powers’ (2010) 38 *Federal Law Review* 423; ‘Administrative Law Evolution: Independent Complaint and Review Agencies’ (2010) 59 *Admin Review* 52 (with Ian Carnell); and ‘The Impact of Technology on the Administrative Justice System’ (2013) 75 *AIAL Forum* 11

Many similar oversight bodies have since been established to review the actions of Australian Government agencies. Examples include the Australian Human Rights Commission, first established in 1986 as the Human Rights and Equal Opportunity Commission, to promote human rights and combat discrimination, including by investigating and conciliating complaints; the Inspector-General of Intelligence and Security in 1987, to provide independent review (including through complaints) of the agencies that constitute the Australian intelligence community; the Privacy Commissioner in 1988, to monitor compliance by government agencies with privacy principles; the Inspector-General of Taxation in 2003, to review the systems established to administer Australian taxation laws; the Australian Commissioner for Law Enforcement Integrity in 2006, to investigate and detect corruption in law enforcement agencies; the Aged Care Commissioner in 2007, to review decisions concerning aged care services; and the Office of the Australian Information Commissioner (OAIC) in 2010, to review and monitor compliance with privacy and freedom of information laws (FOI). These oversight bodies were a new and radical method of receiving and resolving disputes between people and government. Importantly, the bodies mentioned are established by statute as independent bodies that are not subject to government direction, and they are headed by officers who have security of tenure on the conditions specified in the statute. They can investigate the administrative actions of government agencies, and have both the legal powers necessary to conduct an investigation and prepare a report, and the statutory protections and immunities required by investigation staff, witnesses and complainants. The range of investigation functions and methods that are utilised by the statutory oversight bodies has also expanded. In the 1970s the focus was upon individual dispute resolution – on reviewing the merits of an administrative decision contested by an applicant for review, or investigating the adverse impact of an administrative action upon a complainant. Complaint investigation and review of individual decisions is still a core function of most oversight bodies, but other functions are now used frequently to examine more broadly the integrity of administrative systems through which individual decision making occurs. Examples include record inspection programs, administrative audits, publication of decision making guidelines, public inquiries, and training and public education. Some of the statutory oversight bodies also have jurisdiction over private sector activity. The Ombudsman can investigate complaints against government contractors that provide services to the public; the Australian Privacy Principles administered by the OAIC extend to private entities that provide health services or have an annual turnover exceeding \$3 million; and the Human Rights Commission can investigate the actions of private businesses that provide goods and services to the public. This expanded public/private jurisdiction means that there is greater harmonisation in the conduct standards expected of all bodies that provide public services, and seamless dispute resolution options are available to the public.

COMPARING COURTS AND OTHER OVERSIGHT ARRANGEMENTS

Another way of understanding the scale and significance of these developments of the past forty years is to stand back and take stock of how they mesh with conventional theories of accountability and administrative dispute resolution. In particular, we need to ask whether the constitutional doctrine of the separation of powers continues to provide

an accurate and meaningful picture of how people question the exercise of official power. 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, however, this is equally problematic. The oversight bodies are different from executive departments, in terms of

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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. Four points bear this out.

First, few people now turn to courts to resolve their disputes against national government action, except in relation to migration disputes. For example, in 2012–13 the Federal Circuit Court received only 22 administrative law applications against Australian Government agencies (.3% of its general caseload), as against 1,981 migration applications (28% of its general caseload). The Federal Court no longer maintains separate statistics on administrative law cases, apart from migration cases. In the same period, by contrast, the Commonwealth Ombudsman received over 18,000 complaints and inquiries, touching all areas of government. The remedies provided included a decision being changed or reconsidered (624 cases), a financial remedy (807), apology (559), action expedited (467), a better explanation (807), disciplinary action taken against an official (288) and a change to a law or policy (87). Similarly high numbers of people approach other statutory oversight bodies. For example, the OAIC caseload for 2012–13 comprised 18,205 phone and 3,142 written enquiries about privacy and FOI, 1,644 complaints, and 507 applications for merit review of FOI decisions. The Administrative Appeals Tribunal, which can hear appeals under more than 450 legislative instruments, received 6,176 applications for review in 2012–13.

Secondly, access to courts may become even more difficult for most people as a result of increases in court filing fees. It presently costs an individual \$515 to commence an administrative law action in the Federal Circuit Court, plus \$615 per hearing day and additional fees for interlocutory stages and the issue of subpoenas (the costs are roughly three times higher for corporations). Higher filing fees apply in the Federal Court – \$1080 for an individual to commence an action and \$4720 for a publicly listed company. The costs will be considerably higher for a person who obtains professional legal assistance or has to take time off work to attend court or other meetings. The high filing fees for

court proceedings reflect a clear government policy to discourage people from using conventional and formal legal processes to resolve disputes. Government has strongly promoted alternative dispute resolution, the legislation regulating court proceedings requires the parties to certify that they have taken genuine steps to resolve the matter before commencing litigation, and government agencies are also expected to negotiate and explore mediation and settlement options to avoid the need for a court resolution.

Thirdly, technology is changing the face of government, including dispute resolution. People prefer to conduct many of their transactions with government online – lodging tax returns, applying for benefits, obtaining information, applying for passports, accessing health advice and complaining about or disputing administrative decisions. This trend is being actively encouraged by government, through email protocols, web access portals and downloadable apps. This new model of communication and the expectations that underlay it may not fit easily with traditional practices of dispute resolution. Nowadays people generally prefer mechanisms that are online, responsive and cost free. When dealing with government they generally want a quick response that is short and clear, and with an open line of communication that allows ongoing dialogue and interaction. People may increasingly turn away from more formal and structured processes that require forms to be prepared, lodged and exchanged, fees to be paid, evidence to be assembled, and the case to be presented orally at a scheduled day in an adversarial setting that may also be a public hearing. In short, technology is changing everything and at an astonishing pace. It is hard to see that the conventional role and processes of courts will not be fundamentally altered by these changes.

Fourthly, the community now has broad and complex expectations of oversight and accountability mechanisms. At an operational level they expect an oversight body – whether a court, tribunal or ombudsman – to be able to resolve their individual claim or complaint in a prompt and inexpensive (and hopefully favourable) manner. At an institutional level many people expect oversight bodies to provide advice and guidance on legal issues and administrative processes. They also welcome their forthright contribution to public debate about executive accountability. Courts and adversarial tribunals have traditional expertise in undertaking individual dispute resolution. They prepare reasoned decisions that may distil important principles that can be a precedent in future cases. Judges and tribunal members also contribute occasionally to public forums, though usually professional gatherings. Individual case resolution is no less important for ombudsmen, commissioners and inspectors-general. Their higher caseloads mean that most matters are despatched quickly and routinely and are not highlighted or made individually accessible in the work of the oversight body. On the other hand, it is not uncommon that some cases are selected for greater elaboration or prominence, whether as a case study, a published decision or in a special report. More importantly, however, the newer oversight bodies are relying more heavily on other publication measures to convey their work and to promote good administration and executive integrity. The OAIC, for example, publishes extensive guidelines on the FOI Act and the Privacy Acts, together with a range of other manuals, policy statements, fact sheets and business resources. These are supplemented by reports, submissions, speeches and media statements.

It is clear that this is the material that the public is most interested in accessing. Website visits to the OAIC will exceed 1.6 million this year, and are increasing by up to 20% per year. Generally, too, this material is written in a language and style that makes it more easily

understandable by the community (unlike, for example, the current approach in many administrative law cases of crafting decision-making principles under the opaque heading of 'jurisdictional error'). In short, the community welcomes the advent of oversight bodies that can resolve individual disputes, but can also provide comprehensible guidance and can influence government in broader ways.

FITTING CONVENTIONAL THEORY TO NEW OVERSIGHT ARRANGEMENTS

The public has shown its understanding of and support for new oversight and accountability arrangements. Are other actors in the system responding in like fashion? The short answer is no. In law schools and legal scholarship the focus is still very heavily on judicial review, infused at times with value-laden distinctions between 'courts and non-courts', 'hard law and soft law' and 'hard-edged remedies and soft remedies'. There is scarcely any acknowledgement that the administrative law jurisprudence of federal courts mostly deals with migration visa and asylum claims and may not sit comfortably in other areas of Commonwealth decision making dealing with areas such as benefit distribution, commercial regulation, professional accreditation and native title. This is not to question either the respect that courts hold in Australian society or the importance of the judicial role in holding government to account. The tradition of an independent judiciary that can make a conclusive ruling about the legality of government action is an integral and vital feature of Australian democracy and the rule of law. There is nevertheless a tendency to exaggerate the practical significance of the judicial role. This is illustrated by a recent observation of the Hon Marilyn Warren, Chief Justice of Victoria:

[W]hen the knock comes on the door late at night, when you are arrested and placed in custody, when your insurer unfairly refuses to pay for your damaged home or vehicle, when a sales person tells lies and misleads you on the quality of the product being bought, when a State or local government fails to do what it is bound to do by law at your loss and cost, it is the independent Judiciary to whom you may turn.²

Doubtless the judiciary could provide an impartial review and effective remedy in each of those examples, but courts are unlikely to be the first port of call for most people. It is questionable even whether many people would go directly to a lawyer in many of those instances (except perhaps for release from custody). The more likely scenario is that an aggrieved person will seek assistance from a website or a complaint handling unit or Ombudsman. Indeed, in a digital age the possibilities for resolving a dispute are extensive, and embrace newer social media options such as tweeting a complaint, crowd sourcing a grievance or creating a new website to draw attention to an issue.

A second example of a deep-rooted judicial reluctance to adjust traditional theory to incorporate new developments in oversight and accountability was a paper by the Hon. Wayne Martin, Chief Justice of Western Australia.³ The paper trenchantly criticised the

2 The Hon Marilyn Warren AC, 'Does Judicial Independence Matter?', Victoria Law Foundation Law Week Oration, 27 May 2010

3 The Hon Wayne Martin AC, 'Forewarned and Four-Armed – Administrative Law Values and the Fourth Arm of Government', Whitmore Lecture 2013, 1 August 2013.

notion that statutory oversight agencies could be collectively regarded as a fourth branch of government, labelled an integrity branch. Much of the paper is an analysis of the role, work and legislative arrangements of WA statutory agencies, with some criticism of how they have portrayed their 'integrity' function. In comparing courts and statutory agencies, the Chief Justice convincingly explains that it is wrong to elevate the latter to the same constitutional plane as courts. The newer agencies do not fit easily in the constitutional matrix of checks and balances that applies to the legislature, the executive and the courts; and it is misleading to suggest that there is mutual accountability between, say, the judiciary and the Ombudsman.

The paper goes further:

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.

With respect, this criticism misconstrues the thinking that has propelled 'fourth branch theories' of government. The objective has not been to accord a special constitutional stature or immunity to the statutory oversight agencies, nor to suggest that they are transposable with courts. The objective is rather to emphasise that fundamental changes have occurred in government and society that require us to update our constitutional thinking. The notion of a fourth or integrity branch is designed to register that courts no longer stand alone in checking and curbing government power. Statutory oversight agencies nowadays perform a major role in reviewing and scrutinising government decision-making, cementing public law values in government processes, and meeting public expectations by providing an accessible forum to which grievances can be taken and resolved. Labelling the statutory agencies as a 'fourth branch' has been a convenient way of stimulating debate on the evolving accountability landscape. Admittedly there are difficulties with this theory, because of the diversity of bodies that may qualify for inclusion, the differences between them, and unresolved questions about their relationship to each other and the Parliament. For those reasons other theories have also been propounded – for example, that we should regard all of them (including courts) as forming part of a 'national integrity system' that controls executive action and promotes integrity; or that we should broaden our concept of the 'justice system' to include all bodies or mechanisms that play a shared role of resolving disputes arising between people and with government.

The unifying theme in these labels is that we need a new constitutional theory to explain the more complex dispute resolution and accountability framework that has evolved over the past forty years. It is highly probable, if we were adopting a constitution afresh, that bodies such as the Auditor-General and the Ombudsman, and principles such as privacy protection, freedom of information and integrity in government, would be included within the constitution. While it is not so easy to change the text of the constitution, constitutional theory and doctrine should not be as resistant to change. The doctrine of the separation of the powers, unless questioned or 're-thought', will become a barrier rather than a key to understanding constitutional accountability.