

**THE SEPARATION OF POWERS BETWEEN THE
EXECUTIVE AND THE JUDICIARY**

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Abstract

The Australian version of the Westminster system of government requires periodic revisiting and reassessment and this includes the Executive's role in relation to the other branches of government, that is, the legislature and the judiciary. In Australia the doctrine of the separation of powers is well-known at the federal government level but this doctrine has had little impact at the state government level, especially in Queensland. The main problem is that Australian democracy is based on responsible government and the Westminster parliamentary system and is not based on the separation of powers. The paper outlines of the main writers on the doctrine of the separation of powers. Next, the paper looks at the state of Queensland where the executive infringes on the functions of the legislature and the judiciary. Finally, the paper looks at a suggested contribution to the SOP doctrine with a legislative or constitutional recognition of the separation of powers. There is no formal or constitutional separation of powers at the state level, however is an implied separation of powers in practice at the state level in Australia. The Queensland Constitution does not specifically outline the separation of powers particularly the separation of the judicial power. This paper also looks at the historical record of the separation of powers in Queensland under various Queensland Governments. In Queensland the powers of the executive have encroached on the functions of the other two branches, that is, the legislature and the judiciary. The paper further cites various cases of abuse to demonstrate the lack of formal recognition of separation of powers in Queensland. These incidents have arisen partly because the separation of powers doctrine has not been entrenched in the Queensland Constitution or even recognised by various Queensland Governments or courts.

Introduction

The separation of powers is fundamental to a democracy. The doctrine of the separation of powers (SOP) affords freedom from 'tyranny' of absolute power in government. The SOP is important in protecting citizens from the abuse of government power. This is partly achieved by the rule of law, a separate and independent judiciary, judicial review, and legislative or constitutional protection of civil rights (Alvey and Ryan 2005; 2006). The 'rule of law' is supported by a proper separation of state power, which in turn is maintained to ensure the protection of liberty, of individuals' freedom.

The doctrine of the SOP (the separation of the executive, legislative and judicial powers) is well-known at the federal government level but this doctrine has had little impact at the state government level in Australia. This paper looks at: (1) the main writers of the doctrine of the separation of powers; (2) the separation of powers at the Commonwealth level; (3) the state of Queensland where historically the executive infringes on the functions of the legislature and the judiciary; (4) various cases of abuse to demonstrate the lack of formal recognition of SOP in Queensland; and finally (5) a suggested contribution to the SOP doctrine.

(1) The main writers of the doctrine of the separation of powers.

The theory of the separation of powers may be divided between two historical periods ancient and modern. The ancient theory can be traced back to ancient Greece and the philosophical writings of Plato [375 BC] (1974, 1975), Aristotle [323 BC] (1984) and Polybius [?] (1979) (who greatly influenced Montesquieu). Classical political thought recognised different functions of government. Aristotle, for example, distinguished between the deliberative, magisterial and judicial aspects of ruling. These ancient philosophers and their writings have had a great influence on modern writers.

The modern theory can be traced from the Glorious Revolution of 1688 in England and the writings of the most famous modern theorists of the SOP are Locke (1690) and Montesquieu [1748]. Locke the theoretical defender of liberal constitutionalism, distinguished between three powers – the legislative, the executive and the federative. Locke considered the executive and federative are almost always united. For Locke there is a separation between the legislative and the executive (Locke 1690; Patapan 2000: 151-2). Another advance on the SOP doctrine came from Blackstone. Blackstone (1765) elaborated on the common law view in the UK model. Blackstone saw the SOP protecting the common law, which is the ultimate security of life, liberty and property.

The separation of judicial power became prominent in Montesquieu's [1748] (1989) account of the SOP. In *Spirit of the Laws* Montesquieu distinguishes between the legislative power, the executive power and what he calls 'the power of judging'. According to Montesquieu SOP is necessary to ensure a balance of powers and therefore the liberty of the Constitution. However a more fundamental reason for the separation of the power of judging is the liberty of the citizen (Montesquieu 1748; Patapan 2000: 152).

Madison and Hamilton (1788) elaborated on the checks and balances in the US model. The modern checks and balances reinterpretation also enabled the separation of powers doctrine's detractors to deny that it was ever a part of the English Constitution. Two arguments for the SOP advanced in the *Federalist* are: first, the SOP is needed as a precaution against the encroaching nature of power and second, that ambition is to counter ambition (Hamilton, Madison and Jay [1788] 1982; Patapan 2000: 153).

There has been a divergence of opinion on the SOP from general writers on Australian politics (Patapan 1999: 391). Lucy denies the existence of the SOP in Australia, regarding the model 'incoherent' (1993: 321-4). Maddox following Bagehot appears to characterise the Australian arrangement as a 'fusion' rather than a separation of powers (1991: 176). For other writers, Australia represents a hybrid or 'mutation' of British and American models (Wynes 1976: 2, 125-7; Emy and Hughes 1991: 265; Singleton et al 1996: 16). Even when writers examined the SOP in detail, there is significant variation in the theoretical approaches that has been adopted (Sawer 1961; Vile 1967; Finnis 1967). From a legal perspective, Australia's asymmetrical model of the SOP along with the separation of judicial and non-judicial power and the exceptions to the rules of separation has been outlined by Ratnapala (2002).

(2) The Separation of Powers at the Commonwealth Level.

The Commonwealth Constitution outlines the separation of legislative, executive and judicial power. The original doctrine and constitutional intent by the founding fathers in the constitution has been modified by the decisions of the High Court and some of these cases are mentioned. Since federation the Commonwealth has taken priority over the States and continues to do so and the *Commonwealth of Australian Constitution Act* (1900) sets out a type of separation of powers between the legislative power (section 1), executive power (section 61) and judicial powers (section 71). This follows the *Constitution of the United States of America* (1788) that set out a separation of powers and institutions. The US Constitution sets out the separation of powers (Article I, section 1: the legislative power is vested in Congress (Parliament); Article II, section 1: the executive power is vested in the President; and Article III, section 1: the judicial power is vested in the Supreme Court).

Commonwealth Executive Infringes on the Judiciary

Commonwealth justices have security of permanent tenure (retirement age is 70 years of age) and independence from the executive (section 72, *Commonwealth of Australia Constitution Act* 1900). The executive however chooses, judicial replacements and makes the appointment official. The Executive can also remove justices from office. Justices are removed by the Governor-General in Council after an address from both houses of the Parliament and removal is on the ground of proved misbehaviour or incapacity (Lumb & Moens 1995: 375-6). An example of the executive interference in the judiciary at the Commonwealth level was the case of High Court Justice Lionel Murphy. In 1984 the Senate appointed committees to enquire into the behaviour of Murphy J (Justice of the High Court) in relation to allegations he attempted to 'pervert the course of justice'.

Justices are appointed formally, by the Governor-General, in practice, however justices are selected by Cabinet. The Attorney-General will usually seek advice about the suitability

of appointees from fellow ministers, from state Bar Associations, and (as required by law since 1979) from state Attorneys-General. Once appointed, members of the Court have tenure to the age of seventy. Section 72 gives Parliament the power to remove justices for proved misbehaviour or incompetence. There is no precedent for the removal of a High Court Judge, but in the mid-1980s anti-Labor Senators initiated two separate Senate committee inquiries and then a parliamentary commission of inquiry in their attempt to remove Justice Lionel K. Murphy (a former Labor Attorney-General) from the High Court, for alleged misbehaviour. This sorry episode, ending with Murphy's death; the power of Commonwealth Parliament to dismiss a High Court Judge remains untested. It demonstrated that in practice Parliament's power to dismiss a judge has not had a final determination on the issue.

(3) The Implication of the Separation of Powers Doctrine for State Governments.

Although there is no formal separation, there is an implied separation of powers at the State level in Australia. Historically, there has been a lack of a constitutional separation of powers at the State Government level in Australia, including Queensland. Queensland Government's have dominated and controlled the Parliament; their accountability to parliament has been very limited. This has been compounded by two factors. First, the abolition of the Legislative Council in 1922 (Fitzgerald 1984: 22-28). A fuller implementation of the SOP would see the re-introduction of an upper house in Qld (Montesquieu approved of two houses) (Carney 1993). Queensland has adopted a unicameral system, in which the legislature is generally recognised as more tightly controlled by the Executive than in a bicameral parliament (Alvey 2006). Second, it never developed an effective parliamentary committee system to review the Government of the day (Hughes 1980: 147-51). The primary role of parliamentary committees is to safeguard the public interest. The demise of Bjelke-Petersen in 1987 brought an end to opposition to parliamentary committees in Queensland (Alvey 2007; 2008). The Queensland

parliamentary system of government is a locally modified version of the Westminster system that does not completely separate the legislature and the executive powers.

The New South Wales, Queensland or Victorian Constitutions do not separate judicial and legislative power (see also *Clyne v East* 1967; *BLF Case* 1986; *Mabo Case* 1988; *Collingwood City Case* 1993). As Lumb (1991: 132) argues “there is no constitutional impediment to a state parliament legislating in a manner which would intrude upon the exercise of judicial power.” This would, of course, then be open to an appeal to the High Court (at the Commonwealth level) to possibly overrule the State Parliament and its legislation. The Queensland Supreme Court or the Court of Appeal has not as yet ruled specifically on the issue of the separation of powers doctrine in a case in Queensland but would likely follow precedent set by other States (Carney 1993: 5). A Qld Court of Appeal case in 2012 has mentions the SOP and the *Kable* case (1996) (*The Australian Workers’ Union of Employees, Queensland v State of Queensland; State of Queensland v Together Queensland Industrial Union of Employees & Anor* [2012] QCA 353)

The Separation of Powers in Queensland

Under the Australian version of the Westminster system, the separation of powers is not complete as the executive is part of and responsible to the legislature. Queensland’s Constitution Acts, unlike the Australian Constitution, do not provide expressly that Ministers of the Crown have to be elected parliamentarians. Also Queensland is part of a federation and the Australian High Court has overruled the state’s authority in certain areas through reference to the federal government’s constitutional powers. Further, legislative authority of Qld within the Australian federation have been limited by rulings of the High Court of Australia [see *Koowarta case* (1982); *Mabo case* (No 1) (1988) and (1992) (No 2)].

At least ‘the independence of the judiciary’ and its role in judicial review of Government legislation and other actions needs to be constitutionally entrenched (Carney 1993). The role of the Supreme Court and Court of Appeal is the final determinate institution on State constitutional matters and Queenslanders’ civil rights unless this conflicts with Commonwealth powers in which case the High Court decisions prevail (*Commonwealth of Australia Constitution Act 1900*, s. 109). The Queensland Constitution, as a result of the work of a number of bodies, has recently been consolidated and for the first time contained in one document. The consolidated Constitution, the *Queensland Constitution Act 2001*, came into effect on Queensland Day (6 June) 2002.

(4) Various cases of abuse to demonstrate the lack of formal recognition of SOP in Queensland.

At times, the executive has infringed on the judiciary in Queensland; this was exposed in the Fitzgerald Inquiry (1987-9) and in the subsequent Fitzgerald Report (1989) (Whitton 1989). The lack of knowledge of the doctrine of the separation of powers by political leaders in Queensland such as Premier Bjelke-Petersen (1968-87) was also exposed during the Fitzgerald Inquiry (Bjelke-Petersen presented evidence at the Fitzgerald Inquiry on 1 & 9 December 1988; *Fitzgerald Report 1989*: A161, A170, A232; see also Spindler 2000: 1-4; *Palmer’s Oz Politics 1996-2003*: 1-4; Whitton 1989: 184-5; Lovell et al 1995: 64). The Fitzgerald Inquiry also presented evidence of political interference in judicial appointments such as the Chief Justice position (see appointment of Justice Dorman Andrews as CJ; Coaldrake 1989). Bjelke-Petersen also used the defamation laws to stifle opposition and to gag discussion of the level of corruption in the Government (*Fitzgerald Report 1989*; Whitton 1989: 110; Wear 2002: 219).

After the excesses of the Bjelke-Petersen years, all aspects of government required review. The judicial culture in Queensland required examination and the behaviour of judges

came under the terms of reference of the Fitzgerald Inquiry. The behaviour of Judges Pratt and Vasta, in particular, exposed deep problems in the appointment and removal of the judiciary (*Fitzgerald Report* 1989; Fitzgerald 1990). The unusual circumstances of the removal of Judge Vasta from the Supreme Court required a process to be developed; the process included a Parliamentary Judges Commission of Inquiry to recommend dismissal before a Parliamentary vote on the matter (*Fitzgerald Report* 1989; Dickie 1989; Whitton 1989: 14).

Three case studies will now be considered: (1) Vasta, (2) Fingleton and (3) Carmody, that demonstrate problems in Queensland for the doctrine of the separation of powers in general and the separation of the judicial power in particular.

Case Study No.1:

Justice Angelo Vasta, QC (Qld Supreme Court Judge: 1984-88)

Angelo Vasta was appointed (unannounced appointment) Judge of the Supreme Court on 23 September 1983; this unannounced appointment by the minority National Party Government was rescinded four days later. Mr Vasta was officially appointed Supreme Court Judge on 13 February 1984. Justice Vasta took legal action against the satirical magazine *Matilda* in 1986, in part, over allegations of his closeness to Police Commissioner Sir Terrence Lewis. Diaries of Sir Terrence were found to contain 60 references to Mr Justice Vasta in a list of special friends in a statement to the Fitzgerald Inquiry, July 1988; he gave evidence on this friendship, October 1988. Mr Justice Vasta was stood down from judicial duties on 24 October 1988; he alleged a conspiracy by the Attorney-General Paul Clauson, Chief Justice Dormer Andrews and Commissioner Tony Fitzgerald, 27 October 1988; he asked that this allegation (denied and later withdrawn) and any specific allegations against him be referred to a panel of three retired judges.

A Parliamentary Judges Commission of Inquiry was appointed on 17 November 1988; the Commission reported on Mr Justice Vasta on 12 May 1989. On 30 May 1989 the First Report of the Parliamentary Judges Commission of Inquiry (the report), appointed under the expired *Parliamentary (Judges) Commission of Inquiry Act 1988* was tabled. The report found various matters warranted the removal of Hon Angelo Vasta from office as a Supreme Court Justice because he gave false evidence, he arranged sham transactions for taxation advantages, and he made and maintained allegations of conspiracy. Strangely, however it also said that he was not guilty of any judicial misconduct. Angelo Vasta disputed the findings of the allegedly “scandalous” Gibbs et al Inquiry before the bar of Parliament on 7 June 1989. Parliament voted for his removal from office as a Supreme Court judge the next day on 8 June 1989 (Dickie 1989: 328). In March 1995, an international human rights group condemned the sacking of former Queensland Supreme Court Judge Angelo Vasta as unfair and a breach of judicial independence (*The Courier Mail*, 21 March 1995: 1). In 1996 the Queensland Government paid Vasta \$600,000 compensation, but without an apology or acknowledgement that removing him was not the right decision (Caldwell 2017).

Another case of executive interference in the judiciary was the case of the former Chief Magistrate Dianne Fingleton.

Case Study No. 2:

Chief Magistrate Diane Fingleton (Qld/Chief Magistrate: 1999-2003)

Another controversy concerning the judiciary and the separation of powers arose in the career of Diane Fingleton and events which ended her term in office as Chief Magistrate (see *R v Fingleton* [2003] QCA 266 (26 June 2003)). In 1999, the Chief Magistrate Diane Fingleton was a controversial appointee of the former Labor Attorney General Matthew Foley (Ramsey 2005). Fingleton was Queensland’s first female Chief Magistrate and was seen at the time as a

political appointment and part of reforming the Magistrates Court. The following year Fingleton was criticised by Chief Justice de Jersey and others for holding reconciliation ceremonies in six Magistrates Courts in Queensland and issuing a formal apology to indigenous peoples (Aiken 2000). The executive infringement on the judiciary was at issue again (as it was with Justice Vasta).

The facts and significant dates leading up to Magistrate Basil Gribbin's complaint to the Crime and Misconduct Commission (CMC) about the Chief Magistrate Diane Fingleton are as follows: On June 4, 2002 Queensland's Chief Magistrate Diane Fingleton summoned the Southport magistrate Sheryl Cornack to discuss complaints about her performance. On September 6, 2002 Cornack filed a Supreme Court affidavit calling for a judicial review of Fingleton's performance. On September 18, 2002 Chief Magistrate Fingleton e-mailed Beenleigh co-ordinating magistrate Basil Gribbin asking why he gave evidence against her for a fellow magistrate, Anne Thacker (who was fighting a transfer). The same e-mail also demanded Gribbin show cause why he should remain in his position (Ramsey 2005). On September 20, 2002 Gribbin filed a complaint with the Crime and Misconduct Commission (CMC) claiming that Fingleton's dealings with him represented criminal misconduct in attempting to pervert the course of justice. As Fingleton herself summarizes the events, "an intense workplace dispute escalated into litigation because of an email" (Fingleton 2010).

On June 26, 2003 Fingleton's Appeal was rejected, her sentence was upheld but her jail term was reduced from 12 months to 6 months (Ramsey 2005). The Queensland Government waited for her resignation. Fingleton was the first Australian Chief Magistrate ever to receive a jail sentence then to be jailed. Executive interference may have occurred in the judicial process on June 27, 2003 when the Queensland Attorney-General Rod Welford put a deadline of 5.00pm Friday 27 June 2003 for Di Fingleton to resign as Chief Magistrate, if he did not hear from her by then he would apply to the Queensland Supreme Court to order her removal

from office. On June 30, 2003 Fingleton decided to resign (effective the next day June 31 2003). Fingleton bowed to Government pressure, she also rules out exercising her rights in the judicial process, that is a High Court Appeal to challenge the Court decision. On July 2, 2003 Fingleton officially resigned from the position of Chief Magistrate. On December 3, 2003 Fingleton left prison after serving six months jail time (the sentence was reduced on appeal to six months).

On October 8, 2004, Fingleton was granted by Justices McHugh and Gummow leave to appeal to the High Court (Ramsey 2005), 10 months after being released from jail. In the High Court lawyers were forced to admit they had overlooked laws which may have saved Fingleton from prosecution on a charge of retaliating against a witness. In a case reminiscent of Pauline Hanson's court ordeal, the High Court has found that Fingleton may have been protected by her position as a magistrate. High Court Justice Michael McHugh told the hearing (on October 8, 2004) that the judiciary may be protected from prosecution under Queensland's *Criminal Code* (1899) and *Magistrates Act* (1991). Justice McHugh argued that Fingleton may have had the same protection under the laws in exercising her administrative duties as she did in performing her criminal function. In a joint decision with Justice William Gummow, Justice McHugh argued that Fingleton may have gone to jail for simply doing her job, that is, she was doing what she was authorised to do. Justice McHugh told the hearing that it was hard to imagine a stronger case of miscarriage of justice.

On 23 June 2005 the High Court quashed Fingleton's conviction for unlawful retaliation against a witness, holding that the conduct that led to the charge was protected by the immunity against criminal prosecution conferred by the *Magistrates Act* (*Fingleton v R* 2005 HCA 34). After the High Court decision Chief Justice de Jersey said he was aware of an immunity law (in the *Magistrates Act*) that could have spared former Chief Magistrate Di Fingleton from serving six months in jail. Chief Justice de Jersey said he didn't realise the

immunity law could be used in that way. Di Fingleton's defence team and the culture within the state's legal system, has been criticised by legal experts, for allowing such a mistake to happen (Kruger 2005). Later that year Fingleton was appointed as Magistrate of the Caloundra Magistrates Court. She retired in May 2010. After retiring from the Magistrates Court, Fingleton said in her book that she "had to get out of Queensland to get justice" (Fingleton 2010).

Another senior judicial appointment, Tim Carmody as Chief Justice, presented an example of the executive interference in the judiciary, specifically a senior judicial appointment based at least in part on political bias rather than judicial experience.

Case Study No. 3:

Chief Justice Tim Carmody (Qld Chief Justice: 2014-2015).

Tim Carmody was sworn in as Chief Justice behind closed doors on July 8, 2014, following the elevation of his predecessor in the role, Paul de Jersey, to Governor of Queensland (Bochenski 2014). Carmody's public ceremony was boycotted by the Supreme Court judges. Carmody had never served on the Supreme Court and was promoted to the top judicial post just nine months after being made Chief Magistrate. After extensive public criticism Tim Carmody resigned from the position of Chief Justice on July 1, 2015. It has been said that the appointment of Tim Carmody as Chief Justice of Queensland was the most controversial judicial appointment in the nation's history (Lynch 2014; Ananian-Welsh, Appleby and Lynch 2016). In an attempt to respond to his critics, Carmody hit the airwaves in an unprecedented attempt to promote and defend himself as independent and competent – but to no avail.

Tim Carmody's subsequent appointment to Chief Justice after nine months as Chief Magistrate was criticised by legal opinion, with criticism from several current and former judges and senior lawyers focusing on his perceived closeness to Campbell Newman's LNP

Government, relative inexperience and lack of support from the legal profession and other judges for his promotion. The appointment was welcomed by the Queensland Police Union (Wilson 2014) and initially by the Queensland Law Society (Hurst 2014; *NineMSN*, 13 June 2014); Queensland Law Society, 12 June 2014). However, in the aftermath of the resignation and concerns expressed by President of the Bar Association of Queensland, Peter Davis QC, the Society express its own concerns about the appointment process (Hurst 2014). Carmody's appointment was criticised by the former head of the Fitzgerald Inquiry, Tony Fitzgerald; Queensland's former solicitor general, Walter Sofronoff QC; and retired Supreme Court judges Richard Chesterman QC and George Fryberg (Hurst 2014). Carmody's response was that he denied any bias in favour of the Newman LNP Government, stating he was "fiercely independent" (Wilson 2014).

In January 2014 at a swearing in of new magistrates, Carmody criticised judges who sought to "deliberately frustrate or defeat the policy goals of what they might personally regard as unfair but nonetheless regular laws under cover of office as a form of redress or amelioration", noting that the separation of powers was a "two way street" and that Parliament was supreme (Vogler 2014; Wilson 2014). An analysis of Carmody's first six months in office showed that he had delivered three published judgments, compared to the twenty delivered in the final six months of his predecessor Paul de Jersey (Robertson 2015). Two of Carmody's unpublished decisions were overturned by the Court of Appeal, including a case where he refused bail to a mother of eight children who faced drugs charges (Robertson 2015). One of the most serious allegations against Carmody was that he attempted to intervene improperly in the composition of the Court of Disputed Returns following the 31 January 2015 election in Queensland (Ananian-Welsh, Appleby and Lynch 2016: 209).

At his retirement ceremony on 26 March 2015, Justice Wilson stated that Carmody's public calls for civility and courtesy in the legal profession were hypocritical given that he had

privately referred to his judicial colleagues as “snakes” and “scum” (<http://www.theguardian.com/Australia-news/2015/mar/26/>). Wilson alleged that Carmody had sought to remove Justice John Byrne from his role as Senior Judge Administrator, a move that he reversed after “universal condemnation” from other Supreme Court judges (<http://www.theguardian.com/Australia-news/2015/mar/26/>). Wilson also stated that Carmody had failed to hear any cases in recent weeks, preferring instead to undertake a public relations role which resulted in the Supreme Court judges having to hear a heavier workload (<http://www.theguardian.com/Australia-news/2015/mar/26/>). Queensland Premier Annastacia Palaszczuk called for the disagreements within the judiciary to end (<http://www.abc.net.au/news/2015-05-08/>).

While on leave Carmody offered to resign on 25 May 2015 on “just terms” and on the condition that the State Government agree to a reform agenda for the courts, such as implementing a judicial commission (ABC News, 25 May 2015). His offer was welcomed by Labor Attorney-General Yvette D’Ath as putting the judiciary before himself (ABC News, 25 May 2015). Carmody resigned as Chief Justice on 1 July 2015 and was replaced as Chief Justice by Catherine Holmes (Forster 2015). Justice Holmes experience was clear she had served as a judge of the Queensland Supreme Court (2000-06) and judge of the Queensland Court of Appeal (2006-15).

Tim Carmody’s brief tenure as Chief Justice of Queensland was filled with an unprecedented level of controversy and acrimony. This episode provides a startlingly public and comprehensive demonstration of the failings in the regulation of the judicial branch of government – from appointments, to misconduct and bias, to resignation. It also demonstrated the lack of SOP and the lack of the separation of the judicial power in Queensland. There are important lessons to be learnt from the Tim Carmody Affair, lessons that must be learnt quickly if this sorry history isn’t to be repeated (Ananian-Welsh, Appleby and Lynch 2016). Five

lessons have been suggested as a result of the Carmody Affair: (1) reform judicial appointments; (2) address judicial misconduct; (3) speak up for the judges; (4) change the judicial disqualification procedure; and (5) reform courts of disputed returns (Ananian-Welsh, Appleby and Lynch 2016: 193-211).

(5) A suggested contribution to the SOP doctrine.

Suggestion 1: To establish fully and to maintain the separation of powers doctrine at the State level, the Australian States need to entrench the SOP in their State Constitutions to overcome the flexible nature of their State Constitutions (Ratnapala 2002: 299-300).

Suggestion 2: The independent position of State Supreme Courts to review the constitutional status of State executive decisions and legislation need to be doubly entrenched into State Constitutions.

Suggestion 3: To re-establish parliamentary scrutiny of executive decisions by Parliament to review and approve senior judicial appointments through its parliamentary committee system. After a formal process of nominations by bodies of solicitors and barristers then a panel of judges to review (screen and short list) senior judicial appointments, then for Parliamentary committees to approve senior judicial appointments.

Requirement:

However, a system such as Queensland with a unicameral parliament, with a feeble committee system, which meets infrequently, and where the executive controls the sittings and resourcing of parliament (and the courts), should be given powers to appoint judges and sack them) only after extensive parliamentary reform has taken place.

Necessary reforms of the parliamentary system:

- More independence for parliament itself;
- Re-introduction of the upper house (Legislative Council) in Queensland (Montesquieu approved of two houses);
- A panel of judges to screen potential senior judicial appointments and make recommendations;
- A formal process of nominations from bodies of solicitors and barristers;
- Parliamentary committee hearings for chosen nominees;
- Every phase being completely open and accountable.

Conclusion

The doctrine of separation of powers is part of a simultaneously robust and delicate constant interplay between the arms of government (legislative, executive and judicial). A tension within the separation of powers will always exist, and the greatest danger of abuse and excess will always lie with the executive arm - not judges or legislatures (Hamilton 1788 in *The Federalist* (1788) describes the judiciary as the least dangerous branch; Patapan 2003). It is in the executive that lies the greatest potential in theory and in practice for the misuse of power and for its corruption (Madison 1788 in *The Federalist*, No. 51). Preventing this in our system

relies as much upon conventions as constitutions and the alarm bells should ring loudly when government leaders dismiss or profess ignorance of the concept (Spindler 2000: 4).

Under the Australian version of the Westminster system of government, the government (executive) is associated with and dependent on the Parliament (legislature) (Lane 1994: 130). State Constitutions, including the Queensland Constitution (1867, updated 2001), provide very few restraints upon a government seeking to radically transform a State. From the three Queensland case studies: Vasta; Fingleton and Carmody it is clear that more checks and balances are needed.

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