

## **Australasian Study of Parliament Group Annual Conference**

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### **A Fourth Branch of Government? The Evolution and Role of Parliamentary Statutory Officers<sup>1</sup>**

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#### **Introduction**

It is a pleasure to be here for the Australasian Study of Parliament Group Annual Conference. It is a particular pleasure this year as the conference includes a focus on oversight agencies, such as the Ombudsman.

In this paper, I will consider four issues. First, the evolution and role of Parliamentary Statutory Officers, second, the concept of a fourth branch of government, third, the relationship of these officers to the rule of law and, finally, the accountability of these officers.

#### **1. The evolution and role of Parliamentary Statutory Officers**

First, I want to consider the evolution and role of Parliamentary Statutory Officers. The relationship of these officers can be defined through legislation or convention or both. For example, in Western Australia, the Auditor General and the Parliamentary Inspector of the Corruption and Crime Commission are defined in their legislation as officers of the Parliament. The Ombudsman, or by their legislated title, the Parliamentary Commissioner for Administrative Investigations, is considered to be a Parliamentary Statutory Officer. Oonagh Gay of the Parliament and Constitution Centre in the House of Commons Library has observed:

The concept of Officers of the House was developed in the twentieth century, well beyond its earlier usage, to apply to new types of constitutional watchdogs. The term has come to denote a special relationship of accountability to Parliament and such designation implies independence of the executive. Formal mechanisms, such as restrictions on dismissal of Officers and direct appointment of staff as non civil servants assist in upholding this independence. A similar development has occurred in a number of other Westminster style Parliaments, which have adopted the term from Westminster.

These officers are agents of Parliament that work to ensure that Parliament's laws, including appropriations of money for public expenditure, are administered in a way that is lawful, efficient, effective and fair. This is not to say that Parliament does not do this directly, of course it does, and through a variety of mechanisms – but these officers have a standing, dedicated series of functions that Parliament has created to be a critical adjunct to Parliament's own work in scrutinising the Executive. More broadly, these officers also promote integrity in government. The importance of integrity in government should never be underestimated. For example, Australia placed 4th (of 142 countries) in the 2012 Legatum Institute Prosperity Index and 10<sup>th</sup> (of 152 countries) in the Fraser Institute's Economic Freedom of the World 2013 Annual Report. At the same time we finished equal 7<sup>th</sup> in Transparency International's 2012 Corruption Perceptions Index. The strong correlation

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<sup>1</sup> Footnotes have been omitted from this speaking version of the paper.

between, on one hand, integrity in government, and economic and personal freedom and prosperity on the other, is well accepted.

Further, through their functions, these officers deliver services of value to the public. For example, the office of the Ombudsman is an accessible pathway for administrative justice for citizens – a timely, cost effective mechanism for redressing grievances with the Executive, a matter reflected in a range of access to justice inquiries held in this country.

Over the past few decades and for a variety of reasons, legislatures around the world have increased the number and scope of oversight agencies. As an example, since the creation of the office of the Western Australian Ombudsman over forty years ago, successive Western Australian governments have created a range of offices including the Office of the Public Sector Standards Commissioner, now the Public Sector Commission, the Corruption and Crime Commission, an office of Inspector of Custodial Services and an office of the Information Commissioner.

## **2. Should we recognise a fourth branch of government?**

I now turn to consider whether we should recognise a fourth branch of government. Most conference delegates will be very familiar with the development of a debate regarding a possible fourth or integrity branch of government. The idea is largely attributed to American constitutional scholar Professor Bruce Ackerman. In this country, the idea was first promulgated by His Honour, Justice Spigelman in a lecture for the Australian Institute of Administrative Law.

There are, in fact, many variations of how to separate the accretion and exercise of the power of the state. For example, the traditional Chinese system of government had five branches, including an integrity or control branch. The Control Yuan of Taiwan is a modern embodiment of this branch.

The idea of the fourth branch is, in fact, a recognition that, first, within and across our three branches of government there are a range of integrity functions that are undertaken and, second, the growth of so called accountability or integrity agencies (which includes Parliamentary Statutory Officers). The question becomes, when these two matters are taken together, ought we consider the formal recognition of a fourth branch of government, the integrity branch.

The recognition of a new branch of government is a matter of considerable contest. The question becomes not that integrity functions and integrity institutions, including Parliamentary Statutory Officers, exist, as they plainly do, but whether these functions and institutions should be, in Professor Ackerman's words, 'endowed with constitutional dignity'.

My views on the fourth branch of government can be encapsulated in a comment attributed to the great French scientist, Pierre La Place. Napoleon, upon receiving La Place's work, *Celestial Mechanics*, remarked "La Place they tell me you have written a book on the system of the Universe and have never mentioned its Creator" to which La Place responded "I had no need of that hypothesis".

I think we can explain the evolution and role of Parliamentary Statutory Officers without the need of a fourth branch of government hypothesis. Oversight and other similar agencies have developed due to a desire for proper regulation and safeguards as the modern state, and markets, have developed. This has been done without the intent of a design of a new arm of government, and even after reflecting on what is undoubtedly a large growth in the number and scope of these agencies, we can still safely, if not without complete comfort, place these agencies within the Executive.

Furthermore, I do hold the view that a level of constitutional conservatism is a virtue - our three branches of government have served us, and our forebears, exceptionally well. We are, after all, one of the most stable, peaceful and prosperous countries in the world - our system of government, including our existing separation of powers, is fundamental to this success.

It is for this reason that I think we should show great care and contemplation before departing from a system that has served us so well. Moreover, it should, in my view, never be the case that a fourth branch of government could be self-proclaimed through its prospective members, although I am not aware, at least from a Western Australian perspective, that there has been such a proclamation. This does not mean, however, that the fourth branch concept is not a useful tool to consider how oversight agencies contribute to our system of government and, in doing so, we can carefully consider the arguments of the range of eminent scholars, judicial figures and practitioners who suggest the concept.

### **3. The relationship of Parliamentary Statutory Officers and the rule of law**

Next, I want to turn to the relationship of Parliamentary Statutory Officers and the rule of law. The Austrian economist, Friedrich Hayek considered that the rule of law:

means that government ... is bound by fixed rules and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.

A central component of the rule of law is to 'reduce the complexity, arbitrariness and uncertainty of the administrative application of law.' In my view, this very clearly describes the role played by officers such as the Ombudsman.

This is, however, different from saying that these officers are essential to the rule of law. We would readily accept, for example, that America strongly respects the rule of law, but the institution of the Ombudsman is not a significant feature of the American governance landscape.

Nonetheless, where Parliamentary Statutory Officers do exist, they have become, in my view, a strong protector and promoter of the rule of law (as they have, I would contend, of human rights and personal responsibility).

The rule of law is also critical to the development and continuation of economic and personal freedom, or in the words of Australian economist Henry Ergas, 'without the rule of law to buttress it, [economic] liberalisation has been inherently unstable'.

While these officers are not essential to the rule of law, given the centrality of the rule of law to the growth of free, successful societies, its further support and promotion by Parliament through its statutory officers is, I think, something to celebrate.

Furthermore, I have observed, from my tenure as the President of the Australasian and Pacific Ombudsman Region and as a Director of the International Ombudsman Institute, that the work of Parliamentary Statutory Officers can be, and is, important to states that are transitioning to democracy. These officers can, and do, facilitate this transition by building recognition and respect for the importance of the rule of law, the elimination of institutionalised corruption and the furtherance of good governance generally.

#### 4. The accountability of Parliamentary Statutory Officers

Finally, I want to discuss the accountability of Parliamentary Statutory Officers. These officers are granted by Parliament the capacity to operate with high levels of independence, power and confidentiality. The office of the Ombudsman, for example, has the powers of a standing royal commission, reports directly to Parliament, not to the government of the day, and is required by the Ombudsman's legislation to maintain confidentiality in relation to the investigation of complaints. The capacity to operate free of Ministerial directive, to provide the public assurance regarding the privacy of the, often deeply personal and sensitive matters about which they are aggrieved and to have the necessary powers to undertake our work effectively are all critical to our success in fulfilling the role that Parliament has asked us to undertake.

It is vital, however, that agencies of the Parliament that exist to keep others to account are themselves kept to account. This is required for Parliamentary and public confidence in the system of integrity oversight and the confidence of those that are subject to oversight.

The most obvious accountability measure is that the conduct of these officers is governed, regulated and circumscribed by Parliament through each officer's legislation. These officers are agents of Parliament – both accountable and subordinate to the legislature. This includes oversight by select and standing committees of Parliament. Additionally, the process for the appointment of these officers, fixed terms of appointment and mechanisms for their removal or suspension by Parliament, are all matters that promote accountability as does a wide range of public sector codes, standards and instructions that these officers observe in the administration of their offices. These officers will also publically report a comprehensive range of information about their work. Finally, these officers will generally have a level of accountability to other Parliamentary Statutory Officers. For example, in Western Australia, the Ombudsman is subject to the oversight of the Auditor General, the Public Sector Commission and the Corruption and Crime Commission.

Nonetheless, it is the case that there can be tension between the necessary levels of independence on one hand, and appropriate levels of accountability on the other. Ultimately, this is about striking a careful balance – between the independence, evidence gathering power and confidentiality that is integral to the work of these agencies and the need for accountability and transparency.

Before I leave the question of accountability, I want to touch on three further matters that are, in my view, critical for accountable and responsible oversight. First, as Professor Ackerman has observed of a proposed fourth branch, 'the broader its jurisdiction, the more it can disrupt the operations of the politically responsible authorities'. As an example, the Ombudsman is an officer of the Parliament and subordinate to the Parliament. The Ombudsman must never question the laws of the Parliament outside that which Parliament has empowered the Ombudsman to do in its enabling legislation. As an unelected official, the Ombudsman neither has the democratic mandate, nor can he/she be held to account in the same way as elected members of Parliament.

Second, just as American economist Milton Friedman famously reminded us that there is no such thing as a free lunch, similarly, there is no such thing as a free Parliamentary Statutory Officer. These officers are paid for by taxpayers. It follows, of course, that the cost of these officers is one that increases the taxation burden on taxpayers, or alternatively, is an opportunity cost to other things that the community values and which require the expenditure of public monies. It is for this reason that it is a matter of ongoing importance that these officers deliver their services at least cost, and be prepared, in an ongoing way, to perform more efficiently.

Third, Parliamentary Statutory Officers must in their work always consider the potential for them to create costly regulatory burden – a burden that is, once again, ultimately borne by the taxpayer. In his recent speech, ‘Law – Complexity and Moral Clarity’, His Honour Chief Justice French described a ‘galloping growth in regulation’ including a ‘growth of less visible soft law’ in the form of administrative guidelines.

It cannot be overstated that, insofar as any oversight agency was to believe that public administration could necessarily be improved in every instance, without regard to cost, opportunity cost or unintended consequence, would be to introduce a fatal level of hubris to the otherwise vital task of administrative oversight and improvement.

Simply put, designing public administration with perfectly good intentions is easier than implementing those intentions perfectly, as a range of public policies from American prohibition of the past through to the pink batts scheme of today bear as a reminder.

Oversight agencies must not just have good intentions when seeking to improve the work of public administrators. They must have a clear series of principles and mechanisms in place that seek to ensure that the investigations they choose, how the investigations are undertaken and the recommendations for improvements that the investigations make, are needed, evidence-based and ensure that the cost of implementing and undertaking the improvement is outweighed by its benefit. These principles should equally apply to the sort of “soft-law” that can be created by oversight agencies.

As a matter of some comfort, it has been my experience that oversight agencies are generally very mindful of these issues and have a range of principled and practical mechanisms in place to ensure that their work is needed, procedurally fair, evidence-based, proportionate and cost beneficial and does not suffer from overreach.

## **Conclusion**

In conclusion, whether or not you accept that the case is made out for a fourth branch of government - I personally do not - there is no need for any constitutional contortions to identify, and critically analyse, the oversight institutions and functions of modern government.

Within this oversight framework, Parliamentary Statutory Officers undertake, for and on behalf of Parliament, work that gives Parliament confidence that its laws are being administered as it intended. More broadly, these officers are now woven into the governance fabric of hundreds of countries around the world, and help to promote rights, responsibilities and the rule of law. In doing so, they operate with significant power and independence and must undertake their work with humility and care, and at the same time, guard against regulatory burden, unnecessary cost or overreach. They must also be subject to appropriate accountability.

Ultimately, this is a question of striking the correct balance. It is my view that, generally speaking in this country, we have got the balance about right – our place at the top of every major prosperity index, on one hand, and every transparency and good governance index, on the other, gives a level of empirical confidence for this view. This is not to say we ought ever be complacent – we must not. But it is to say that we should recognise the significant success of our modern state and the role that parliamentary officers can, and do, play in fortifying and furthering this success.