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CHAPTER 6

# GOVERNMENT WATCHDOG AGENCIES AND ADMINISTRATIVE JUSTICE

ANITA STUHMCKE

## 1. Introduction

Government watchdog agencies are a global phenomenon. Their role is to render government accountable to the citizen. Defined as an ' . . . institution, person or group of people whose job is to check that [governments] are not doing anything illegal or ignoring people's rights' (Oxford Dictionary 2019), watchdog agencies exist across diverse legal systems and play an important role in raising standards of public administration. They act as administrative mechanisms to 'reconcile the requirements of efficiency and administration and justice to the citizen' (Commonwealth Administrative Review Committee 1971, para 389). To do so they operate across a wide range of government activities to correct poor administration ranging from rudeness to government error through to corruption and other forms of criminal behaviour.

Yet, in what is a global phenomenon, watchdog agencies and accountability systems more generally struggle to keep pace with the realities of modern government. Watchdog agencies such as ombudsman and auditor generals must operate inside existing constitutional conventions including concepts such as the rule of law, a written or unwritten constitution, and the separation of powers. Yet often lacking formal constitutional or legislative protections, these watchdog agencies are susceptible to being subverted and controlled and used for political purposes (Stuhmcke 2016). This tendency undermines public trust in watchdog institutions (Guerin et. al. 2018).

This article addresses the structural ambiguity of watchdog agencies. It suggests that a normative framing of the work of watchdog agencies should be adopted to facilitate their service to administrative justice, rather than to leave them vulnerable to the underlying administration of the state. This article identifies integrity as the normative

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framework. Integrity is a common value of watchdog agencies through which their work in the administrative justice system may be understood (Abraham 2008, 378). However, the article does not attempt to proffer integrity as the sole solution to framing the work of watchdog agencies. Amongst the many concepts and principles suggested in this volume, integrity is only one of a number of useful tools to apply to understand the strengths and limits of watchdog agencies.

In proffering integrity as a normative framing of the work of watchdog agencies, this article continues international debate as to how unelected watchdogs should be positioned within the constitution (Kirkham 2014). To do so, the article provides the example of Australia as a jurisdiction where integrity has been deployed more extensively than elsewhere and a theory of integrity has been developed to tackle this development. The Australian experience is one where academic and judicial commentary is developing integrity to evolve as a constitutional actor (Lazarus 2020). Indeed, in Australia integrity review has been explored as a possible form of review alongside judicial review and merits review (Stuhmcke 2008). Further, integrity has even been suggested as the fourth arm of Australian government, alongside the legislature and the executive and the judiciary.

This point is drawn out in this article through two key steps. One is to assess the existing debate. It explains how watchdog agencies should behave, what is expected of them, and their role in government. In so doing it adopts a Diceyan approach as to the role of administrative agencies in upholding the rule of law. Dicey (1915) saw administrative law as incompatible with the principle of the rule of law because it allows adjudication by government officials who are not independent from government in the same manner as the judicial arm of government. This article draws upon this point and argues that some spirit of judicial independence and fundamental fairness must permeate the administrative process itself (Rohr 2002). It thus avoids the Diceyan concern that administrative law sits outside the rule of law and positions watchdog agencies within it by asserting norms of public administration.

The second step analyses the normative framing of integrity and identifies what integrity means and how it may be undertaken. This step examines how this normative framework of integrity may usefully be applied to watchdog agencies. The case study used to illustrate the normative framework of integrity is the system of Australian administrative justice. Currently, in Australia, it is widely accepted that watchdog agencies created by statute, such as royal commissions, auditor generals, and ombudsman, are a disruption of the separation of powers doctrine (Bathurst 2018; McMillan 2010). Debate suggests that watchdog agencies may form a fourth branch of government—an integrity branch alongside the executive, the legislature, and the judiciary. 'Integrity' (McMillan 2010) or 'integrity review' (Stuhmcke 2008) or an 'integrity system' (Brown 2005) is suggested to be a coherent framework to guide the creation, development, and operation of the watchdog role. This debate has application for exploring the usefulness of integrity as a framework for the structuring of the work and role of watchdog agencies internationally.

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## 2. Background and Definitions

Watchdog agencies come in a multiplicity of forms and resolve a wide range (in both scope and depth) of administrative justice–related issues (Sampford, Smith, and Brown 2005). The phrase 'watchdog agencies' is used here as an umbrella term to capture the oversight functions of both government and non-government agencies, ranging from the courts to industry ombudsman to media including a range of mechanisms such as investigation, review, and inquiry for review of administrative decision-making. In this article the term 'government watchdog agencies' is used broadly to cover statutory agencies that act in the public interest. This article therefore interrogates watchdog agencies operating under statute given jurisdiction to investigate maladministration, impropriety, and corruption in governmental functions (Bathurst 2018).

Statutory watchdog agencies have a long tradition across legal systems (e.g., Arthurs 1980; Sackville 2005). They include bodies with generalist statutory jurisdiction, such as government ombudsman, through to bodies that have statutory oversight of particular areas of government activity, such as corruption commissions, freedom-of-information agencies, or environmental authorities. They present across legal systems as ombudsman, auditor generals, integrity commissioners, anti-corruption agencies, and commissions of inquiry such as royal commissions. With a mandate to ensure that ' . . . each governmental institution exercises the powers conferred on it in the manner in which it is expected and/or required to do so and the purposes for which those powers were conferred, and for no other purpose' (Spigelman 2004, 726), government watchdog agencies are created to improve government accountability. Universally their shared aim is firstly act to safeguard the rights and interests of individuals, and secondly to articulate society's desires as to how government decisions affecting individuals are and should be made.

Importantly, the definition of watchdog agencies adopted in this article excludes courts and tribunals. The court system is linked to but separate from watchdog agencies (Kirkham and Stuhmcke 2020), and the traditional model of administrative law is dominated by the courts as the legitimating mechanism for executive decision-making. However, it is also the case that the reach of courts as a review mechanism to facilitate accountability through judicial review of government decision-making has diminished as the involvement of the executive in lawmaking has increased (Howe et al. 2016). Today, in the new regulatory state (Braithwaite 1999), much of the lawmaking occurs within the administrative arm of government. The number of regulations dwarfs the amount of primary legislation, and yet the process of making it generally bypasses the elected legislature, except for cabinet signoff.

Further, the exclusion of courts is directly referable to the concept of administrative justice. As explained elsewhere in this volume, and evidenced by the global application of the term, administrative justice is a 'philosophy' that requires that the interests of

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individuals be safeguarded in administrative decision-making (Creyke et al. 2000). The narrowest approach to administrative justice is to align it with judicial review, meaning that the sole watchdog institution is the courts (Groves 2010). However, Mashaw's (1985) seminal work on administrative justice shifts the focus from the top-down oversight of courts to a bottom-up conception of administrative process (Thomas 2011; Groves 2010). This perspective emphasizes the centrality of administrative process. Here Mashaw's emphasis on process is emphasized by the growing importance of watchdog agencies that simulate the role of courts and take on a top-down approach to guarantee and ensure the quality of administrative decision-making.

The search for the place of watchdog agencies within this new order is more than a process of justification of their role within a legal system. It is a struggle to unearth a normative standard or standards by which to hold watchdog agencies themselves to account as well as standards by which they can hold government to account. In this sense the article adopts what O'Brien and Doyle (2020) have called a 'demosprudential' approach. On the one hand, the rise of the watchdog agency sees courts, the parliament, and government being increasingly supplemented by numerous statutory bodies that legitimate administrative decision-making without themselves having democratic sanction. On the other hand—and this is the approach adopted in this article—administrative justice is firmly rooted in making the response to citizen grievances more democratic and embedding legal change in the broader culture of administrative decision-making.

## 3. Poor Behaviour: The Need for a Normative Administrative Justice Framework for Watchdog Agencies

Framing this search for validity as demosprudential is useful to highlight that watchdog agencies sit outside, and yet function within, public administration (Kirkham and Stuhmcke 2020). Watchdog agencies are subject to the rule of law and serve the citizen. Yet they do so in a way that is not the same as either courts or tribunals. Reflecting upon the rule of law conceptualized by Dicey (1915), the value of establishing a normative framework to structure the work of watchdog agencies is in moving beyond the limited structures of administrative review that are otherwise offered by courts and administrative law more generally. The informality of applying a framework to structure and understand their work acknowledges their unusual position in the constitutional order.

This unusual constitutional position is reflected in their structural ambiguity. Government watchdog agencies span at least three conflicting sets of interest—the public, parliament, and the executive (Finn 1992, 255). The result is that the role of a watchdog agency is often simultaneously directed to serve three purposes. First, good government—acting as an affirmation or conduit of power for the executive through

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setting standards of good administration. This is due to the complicated role of, preventing corruption and so on. Second, good governance—assisting the governed to hold the governors accountable through functions that allow citizens to act, such as the role of an Ombudsman in individual complaint resolution. Third, to parliament—assisting to hold the executive to account through government audit and reporting to parliament. While these tripartite responsibilities of watchdog agencies are not always in conflict, they will compete with one another at times. This helps explain fissures such as the politicization of ad hoc inquiry agencies, such as royal commissions, or the battle between the executive and parliament over budget scrutiny through the auditor general (English and Guthrie 2000) or the watering down of the role of ombudsman and corruption institutions.

This structural ambiguity allows both exploitation of watchdog agencies and watchdog agencies to overstep their role in the administrative justice system. This occurs as the proliferation of watchdog agencies has evolved without either systematic planning or evaluation of their effectiveness. Here high-profile and controversial instances from Australia of watchdog agencies performing poorly in the public sphere, as well as clear instances of their operation being influenced by government, illustrate the need for a normative framework to guide their creation, development, and operation. The two examples below illustrate these problems.

## 3.1 Example 1: Watchdogs Performing Poorly

Watchdog agencies are granted powers to investigate which can 'be coercive and intrusive in a way that is open to abuse' (Bathurst 2018). This observation is not new. Over ten years ago, in 2008, the Australian Administrative Review Council report, *The Coercive Information-Gathering Powers of Government Agencies*, highlighted the expansive nature of the statutory powers of watchdogs, noting that they 'typically permit agency officers to enter and search premises, to require the production of information or documents, and to require provision of information relevant to their statutory functions by way of oral examination or hearing without the issuing of a warrant or other external authorisation' (2008). Further, depending upon the agency, the statutory powers may include the jurisdiction to make recommendations regarding prosecution or disciplinary action and to prosecute for contempt.

However, even when a channel for independent review exists with oversight of watchdog agencies, there is no guarantee that power will not be misused. Most recently IBAC, Victoria's anti-corruption commission, operating under the *Independent Broad-based Anti-corruption Commission Act 2011* (IBAC Act), failed to adopt specific recommendations, made by the Victorian inspectorate—set up to oversee IBAC—to overhaul its policies regarding the welfare of witnesses (Tomazin 2019). IBAC wields enormous powers in Victoria. It was established to eliminate public sector corruption and police misconduct with significant powers to tap phones, search and seize

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documents, and compel witness to give evidence. Yet IBAC has failed to respond to its own oversight agency, rejecting the premise of the Victorian inspectorate's conclusions.

Further, watchdog agencies are powerful in their influence. Gilligan notes that some royal commissions can 'have destabilising or profoundly critical implications and may even become a . . . danger to a government' (Gilligan 2002) by 'creat[ing] a new political imperative' (Gilligan 2002, 299) and changing the public discourse around a particular issue. For example the 1995 royal commission into use of executive powers (Marks Royal Commission) was seen as an inquiry to bring Dr. Carmen Lawrence, the former Western Australian premier, into disrepute, as at the time of the commission she was the commonwealth minister for health. The then–prime minister Keating said that the Marks Royal Commission 'was: . . . conceived as an act of political malevolence by the Court Government . . . the basic principles of natural justice were ignored . . . the terms of reference were deliberately narrow . . . drawn up to put Dr Carmen Lawrence and the Labor Party on trial . . . the establishment of the Royal Commission was unique and uniquely disreputable . . . ' (Prasser 2005, 34).

## 3.2 Example 2: Incursions and Misuse by the State

Watchdog agencies may be used by the state for its own purposes. This is evident in the changing role of the Australian commonwealth ombudsman. As Field observes, 'some functions suggested for Ombudsmen officers are simply not a good fit and, as independent officers, should be refused accordingly' (2010, 8). A good example is the grant of power to the commonwealth ombudsman to conduct a national assurance and audit (NAA), in what is a dramatic departure from its traditional role.

These powers give the commonwealth ombudsman oversight to ensure that the law-enforcement agencies that are given considerable covert information-gathering powers under legislation use those powers lawfully and appropriately.[1] Over 350 laws in Australia hold serious potential to encroach upon rights and freedoms essential to the maintenance of a healthy democracy (Williams 2016). The ombudsman oversees this system of around twenty law-enforcement agencies including the Australian Crime Commission (ACC) and the Australian Federal Police (AFP). The function is rapidly expanding—both because use of the powers is increasing and because new powers are being introduced. In 2009–2010 only three agencies were subject to ombudsman oversight, whereas in 2014–2015, the ombudsman performed more than fifty inspections on the use of these powers and produced more than forty reports to inspected agencies as well as statutory reports to ministers and the parliament.

On the one hand, this power conforms to the role of the ombudsman as an integrity agency. It is a public sector integrity role where the commonwealth ombudsman provides external oversight of 'policing by consent' (Glenn 2016). A recent example of this was the self-reporting of the Australian federal police to the commonwealth ombudsman in relation to the 'Access to journalist's telecommunications data without a journalist information warrant' (Commonwealth Ombudsman 2017) where metadata were used by an

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AFP officer without a warrant. The commonwealth ombudsman observes on its website that 'These inspections serve as an important community safeguard and assist agencies in applying sound administrative practices' (Commonwealth Ombudsman 2019).

On the other hand, these powers transform the original role and functions of the ombudsman. Instead of acting on complaints, it becomes the 'citizen' as the ombudsman stands in the shoes of the nominal complainant (Glenn 2016). There is no complainant, and the ombudsman is the complainant, the investigator, and the remedy. Using the ombudsman as an accountability mechanism for state surveillance has unintended consequences. One important issue for the office is a loss of independence or impartiality—or more importantly a perceived loss in the eyes of the public. For example, secrecy is required of the ombudsman in its reporting. The ombudsman's NAA report is not made public. While the attorney general is required to provide a summary of the ombudsman's telecommunications interception inspection findings, this requirement is discretionary and does not include the ombudsman-stored communications inspection findings. The office has criticized this (Commonwealth Ombudsman 2012):

> The purpose of an independent oversight mechanism, such as the Ombudsman and other inspecting authorities under the TIA Act, is to increase accountability and transparency and to maintain public confidence in agencies' use of covert and intrusive powers. Publicly reporting on whether agencies have used these powers lawfully is a key element in providing this accountability and transparency. However, the current provisions in the TIA Act do not permit the Ombudsman to publicly report on our inspection activities and compliance assessments of agencies.

And:

> In our view, this diminishes the effectiveness of the oversight mechanism. We have previously suggested to the Attorney-General's Department (AGO) that these provisions should be amended and a public reporting mechanism for the Ombudsman be introduced.

The NAA report is a result of the state granting the ombudsman nominal complainant status because the state needs public trust. Yet in so doing an unintended consequence is that public trust in the commonwealth ombudsman may be undermined.

## 3.3 Summary

Both of the above examples confirm that although the balance between administrative justice and the promotion of administrative efficiency may be traversed and transformed through the deployment of watchdog agencies, the danger is that the framework that structures their work fails to guard the guardians. In the first example, it is clear that watchdogs themselves may overstate their democratic function and thus undermine the rule of law. In the second, they themselves may be undermined, leaving

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them to operate with no independence and at the behest of government, to become an extension of the state.

If the justice system is to be understood as comprised of two interlocking components, a judicial justice system and an administrative justice system, a more robust appreciation as to the normative framework of the watchdog agencies that comprise administrative justice is required. This is necessary because while watchdog agencies operate within the rule of law, they are generally not constitutionally protected. The next part suggests integrity as a possible framework to structure the work of watchdog agencies.

## 4. Using Integrity as the Framework to Structure the Working of Watchdog Agencies: The Australian Experience

The conundrum facing an effective regulatory framework for watchdog agencies is twofold. Firstly, as explained above, these agencies are subject to the rule of law. They are part of an administrative justice system or perhaps an 'administrative continuum',[2] yet their role is ill defined. Secondly, as previously discussed, this article adopts a 'demosprudential' approach despite the fact that watchdog agencies are not direct representatives of the people. In theory the role of representing the people is filled by the elected members of parliament. Yet in practice executive control of the legislature means that watchdogs exist to 'fill the lacunae of accountability left by the emasculation of Parliament's role' (Kinley 1995; Rock 2020). The conundrum for watchdog agencies is therefore that public accountability entails oversight by watchdog agencies, who are not hierarchical superiors to government or parliament, but who have the power to criticize and even to overrule. Provided that the ultimate decision-making authority rests in the executive, legislative, or judicial branch of the constitution, watchdog agencies can legitimately aid accountability of government and assist democratic scrutiny (Kirkham 2014).

One advantage of utilising a normative framework to structure the work of watchdog agencies is to embrace this structural conundrum. It recognizes that the accountability they achieve is not of the same nature as that provided by elected parliamentary representatives. They provide government accountability not against party platforms or political agendas but with reference to the standards reflected in the concerns of the public. As observed by Sir Gerard Brennan, a former chief justice of the High Court, this role is ' . . . intended to celebrate a democracy under a rule of law which advances the public interest' (Brennan 2013). This notion of the public interest is key to watchdog agencies. The form of accountability they undertake is a common endeavour aimed at increasing citizen trust and promoting administrative justice internationally. The watchdog agency thus represents the public in a more direct sense, through their accountability role.

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A further advantage then of a normative framework is to recognize that under a Diceyan formulation of the rule of law, the authority of watchdog agencies stems from the democratic state. Here it may be suggested that the current legitimacy of watchdog agencies is sourced in statutes passed by parliament. Their development is thus founded upon the core assumption of a democratic system that government exists 'for the benefit of the community it serves and not for its own practitioners, officials and allies' (Finn 1992). For example, in *Botany Council* v. *The Ombudsman* (1995) 37 NSWLR 357, the New South Wales court of appeal considered the powers of the New South Wales ombudsman to investigate and report on administrative action to be 'beneficial provisions, designed in the public interest for the important object of improving public administration and increasing its accountability, including to ordinary citizens . . .'. It is now to Australia we turn as a case study of how integrity may be framed as the normative structure for the work of watchdog agencies.

## 4.1 The Australian Case Study

In Australia the debate as to the normative framework for watchdog agencies is focused upon integrity. While framing the work of watchdog agencies has been addressed in various ways in the literature including 'reasonableness' (Field 2010) or a form of public consciousness (Abraham 2008), in recent Australian debate, watchdog agencies are described as acting with integrity, performing integrity review, and belonging to a wider integrity system. Yet the extent and application of 'integrity' and 'integrity system' and 'integrity review' to watchdog agencies is uncertain. Despite the emergence of integrity as a central element of administrative justice that is useful to contextualize the role and function of watchdog agencies, it remains an aspiration rather than a formal legal characteristic. It is described as an 'amorphous, complex and value-laden concept' (Brown 2006, 5). While it may be best understood as part of a continuum of behaviour, ranging from integrity to corruption, its meaning in the context of the administrative justice system is novel and imprecise.

The clearest application of a normative framing of integrity to the Australian justice system is in its application to courts. This too is a recent development. In 2006 the high court considered the term 'institutional integrity' with respect to the supreme court of New South Wales in *Forge v Australian Securities and Investments Commission*. Gummow, Hayne, and Crennan JJ observed:

> when reference is made to the institutional 'integrity' of a court, the allusion is to what *The Oxford English Dictionary* describes as '[t]he condition of not being marred or violated; unimpaired or uncorrupted condition; original perfect state; soundness'.[3]

The above observation from *Forge* is a normative framing of the institutional integrity of courts and is also a formal legal requirement. In 2013 in *Pompano* (2013) 285 ALR 638, 659–60 [67], Chief Justice French of the Australian high court elaborated upon *Forge* and the characteristics of a court's institutional integrity:

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> The 'institutional integrity' of a court is said to be distorted if it no longer exhibits in some relevant aspect the defining characteristics which mark a court apart from other decision-making bodies. The defining characteristics of courts include:
>
> - the reality and appearance of decisional independence and impartiality;
> - the application of procedural fairness;
> - adherence as a general rule to the open court principle;
> - the provision of reasons for the courts' decisions.
>
> Those characteristics are not exhaustive.

The integrity of courts is thus both an aspiration and a formality. The normative aspiration is contextualized in *Forge* as the court being in a perfect state, not marred or violated. The formal requirements are those characteristics of behaviour or judicial function ascribed to it by Chief Justice French in *Pompano* such as procedural fairness and the open court principle.

While the high court has recognized both the aspiration and the characteristics of the institutional integrity of courts, integrity is ill defined in administrative justice scholarship (Groves 2010). The judicial decisions that have examined the legality of watchdog agency actions have not, with the exception of private-industry ombudsmen, dealt with constitutional issues concerning integrity or the place of an integrity system within the wider justice system. Rather the focus has been upon ensuring that watchdog agencies are not, in contravention of the separation-of-powers doctrine, wielding judicial power. For example, in the case of *Brandy* v *Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, decisions of the commission were registrable in the federal court, and thereby enforceable as if an order of that court. This meant the commission was impermissibly exercising judicial power, and the legislation found constitutionally invalid. The courts rely on the legislative design of the watchdog institution to determine its legality of operations rather than any normative or formal framing of integrity.

Any guidance given as to the meaning of a normative framing of integrity in administrative justice is therefore drawn from secondary sources. In the administrative justice literature, integrity is used synonymously with terms such as decency, goodness, honesty, morality, probity, rectitude, righteousness, rightness, uprightness, and virtue. Virtuousness is the traditionally used framing for anti-corruption and anti-fraud agencies. For example, virtue is used particularly in relation to police integrity units with police integrity being the normative inclination among police to resist temptations to abuse the rights and privileges of their occupation (Klockars et al. 2006, 1). The formal framing of integrity, in Australia, is most often located in various legislative instruments established to prevent corruption in government agencies such as the *Australian Capital Territory Integrity Commission Act 2018; Independent Commission Against Corruption Act 1988 (NSW)*; *Crime and Corruption Act 2001 (Qld)*; *Corruption, Crime and Misconduct Act 2003 (WA)*; *Integrity Commission Act 2009 (Tas)*; *Independent Broad-based Anti-corruption Commission Act 2011 (Vic)*; *Independent Commissioner Against Corruption Act 2017 (NT), Integrity Commission Act 2018 (ACT)*; and *Independent Commissioner Against Corruption Act 2012 (SA).*

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However, the shared concern in administrative justice literature is the need for a definition or framing of integrity that extends beyond corruption in terms of an individual or institution's honesty or conduct. The desire is to articulate integrity as a normative concept to apply to 'how well the system as a whole is functioning' (Creyke 2012, 34). This concept of integrity is repeated in Australian scholarship, for example, D'Ascenzo states that 'integrity means being whole or healthy. . . And the health of the system is more than compliance with law including administrative law (D'Ascenzo 2008, 65).

Thus the search for a definition of integrity in administrative justice is more than compliance with the existing branch of administrative law. The consensus is that integrity is more than formal legal standards:

> The label 'integrity' is applied to convey that our expectations of government and business go beyond legal compliance and incorporate other expectations such as good decision-making, respect for values that underpin institutional integrity and public virtue, fidelity to the public interest, and lack of corruption.
>
> (McMillan 2010, 438)

> 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: 'Integrity can be seen to compromise at least four components: legality, fidelity to purpose, fidelity to public values and accountability.
>
> (Martin 2014, 116)

> Integrity itself goes beyond matters of legality, but is not so wide as to encompass any misuse of power. It requires that each public institution observe "fidelity to the public purposes for the pursuit of which the institution was created', and obey 'the public values, including procedural values, which the institution is expected to obey'.
>
> (Hoole and Appleby 2017, 407, citing Spigelman 2004, 725)

Yet, despite the above observations from numerous scholars that integrity goes beyond legal compliance with administrative law, all of the characteristics repeated in the above quotes—legality, fidelity to purpose, fidelity to public values, and accountability—arguably mirror administrative law principles of acting in the public interest, acting in good faith, avoiding bias, and providing procedural fairness (Wheeler 2012).

The characteristics expected from watchdog agencies also mirror administrative law. Wheeler, amongst others (Griffith 2005), provides a useful checklist for identifying common features of integrity agencies, observing that integrity agencies should have:

- A significant integrity related function, with a significant jurisdiction over at least one branch of government
- A need to be independent of Executive government

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- A need to independent of the Parliament and Judiciary if their role includes investigating MP's or judicial officers
- Interdependence with at least one other branch of government—the body or official does not have determinative or enforcement powers, and possibly not prosecutorial powers. (Wheeler 2012, 55–56)

In the above list independence features heavily. It is also the driver for the below discussion as to the separation-of-powers fourth-arm-of-government debate and the platform for the debate concerning the integrity system. Yet independence and procedural fairness, while critical, are not characteristics that set integrity agencies apart from the other branches of government.

## 5. The Place of Watchdog Agencies in the Administrative Justice System: How to Guard the Guardians?

This ongoing debate as to the meaning of integrity hints at a deeper shift in the place of watchdog agencies under the rule of law. This is the struggle between the need for administrative efficiency and administrative justice. Without more attention in administrative justice literature being given to the standards applied by and to the operation of watchdog agencies, one risk is that the mere existence of watchdog agencies will legitimize public decision-making without providing either accountability of the agencies themselves (Kirkham 2014) or administrative justice for the individual (Del Villar 2002, 44). In summary, without putting in place structures that guard the guardians, the rule of law will be undermined.

For this reason even though there is no general agreement as to the meaning of integrity, most Australian commentators assume it to be a positive development. Indeed, currently debate is centred upon the statutory creation of a federal integrity body (Senate Select Committee on a National Integrity Commission 2017). Yet exactly how integrity should be embedded across and within the legal system is uncertain. Broadly there are two positions. The first is to formally recognize watchdog agencies within the constitutional framework, and the second is to informally recognize it as a normative standard of administrative justice.

Before assessing these two positions, it must be acknowledged that there is a view that the current constitutional status of watchdogs should not change. The most prominent promoter of this view is by the now-retired Western Australian supreme court judge, His Honour Wayne Martin, observed (2014):

> 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,

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> 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.

The Hon. Wayne Martin notes the danger that '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' (2014, 122). His honour, along with a handful of other commentators such as Justice Gummow, a former chief justice of the high court (Gummow 2012), is very much in the minority. Most Australian scholarship promotes either constitutional change or more formal recognition of the watchdog agency role. A smaller cohort of the undecided argue that there is merit in having the debate (Field 2013; Stuhmcke and Tran 2007). Amongst those who disagree with Justice Martin, two streams of thought are broadly evident: first those who argue the agencies form a fourth arm of government and second, those who argue that they form an integrity system that fits within the existing constitutional framework.

## 5.1 A Fourth Arm of Government

The initial assertion that watchdog agencies might be a fourth integrity arm of government alongside courts, the legislature, and the executive appears in Australia in 1999 (Topperwein 1999). However, it is former high court justice, Justice Spigelman, who is widely attributed as articulating the fourth-arm-of-government debate. His honour, in a 2004 speech (Spigelman 2004), referred to a United States commentator, Bruce Ackerman, who suggested that there should be an 'integrity branch' of government existing somewhere among the traditional three arms (Ackerman 2000). The role of the agencies within that branch would be dedicated to supervizing the use of public power on the part of the organizations within the other branches of government. Justice Spigelman argued that some of the institutions in Australia that perform integrity functions include the auditor general, independent commission against corruption (NSW) and other commissions, the ombudsman, inquiries, and some of the statutory rights, such as whistleblower and FOI legislation.

His honour's observations have been enthusiastically taken up by political and legal scholars. For example, Wenta (2012, 61) confirms the notion of a fourth branch as a reasonable way to explain the expanding accountability functions in contemporary government, and that it is 'not inimical to core principles informing Australia's constitutional structure'. Brown also points to an identifiable integrity branch, found not in the broader web of integrity functions within various branches of government, but only in the core agencies for whom maintaining public integrity is their primary mandate. Most recently Cochrane (2018) discusses the fourth branch in the context of commissions—questioning where commissions fit in the separation of powers. The

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fourth arm of government has also been argued to apply at both the state and commonwealth level. Solomon outlines and surveys the multiplicity of integrity agencies and powers in Queensland, arguing that in this state they had 'recognised the development of an integrity or fourth branch even before Chief Justice Spigelman drew it to general attention' (Solomon 2012, 29). Similarly in exploring collaboration between watchdog agencies in Western Australia, Wilkins et al. (2017, 307) note: 'In relation to both the integrity system and fourth branch concepts, the examples of collaboration looked at here reinforce a view that the watchdogs operate as parts of an integrity system that is independent of the other arms of government'.

Yet those who agree that there should be a fourth branch of government cannot agree which institutions will be in it. Whereas Brown (2014) and Creyke (2012) argue that only key integrity bodies fall within this branch, many others suggest that the branch should include the judiciary. Spigelman is of this latter group, arguing that judicial review is part of the fourth branch as it ensures that government actions remain within the 'powers given to it by law' (Spigelman 2008, 42). This approach defines the judiciary as one element only of a broader justice system. Wenta (2012) also argues that judges play a number of roles in the integrity system that are outside of the judicial branch: including serving on administrative tribunals, commissions, and investigations, and approving warrants. Elias (2010) agrees that a fourth branch is recognizable and suggests that courts—especially judicial review—should be included in that branch. Other commentators such as Hoole and Appleby go as far to state that 'the integrity branch comprises both institutions formally mandated to hold others to account—such as anti-corruption commissions – and more diffuse instruments of integrity, including policies, individual officials and accountability systems' (2017, 407).

While interesting, this debate is academic, at least at the federal level. Given the federal history of constitutional change, a fourth branch of government is highly unlikely. This is the case as the federal constitution is a written constitution. It can only be amended by a referendum, which requires a majority of voters in a majority of states to agree to the change. Since 1901, when the federal government was established, there have been forty-four referendums held, and only eight of these have been successful. These changes have been minor and have required bipartisan support. Moreover, the fact that the current political parties cannot agree on even the creation of a statutory national integrity body indicates that constitutional change will be neigh impossible. Further, at the federal level, the separation of powers is one of the most significant constitutional limitations on the design of watchdog agencies. Under the commonwealth constitution, only courts referred to in s 71 of the constitution may exercise judicial power. Thus without formal constitutional change, integrity agencies at both federal and state level will exercise executive power.

## 5.2 A National Integrity System

Although academic for 'formal' purposes, the concept of integrity remains of value in pointing the way forward as to how these institutions should be designed. While the

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fourth-arm-of-government debate garners much attention, the dominant view amongst commentators of administrative justice is that watchdog agencies form a 'national integrity system'. This view holds that the integrity system is not a separate branch of government. Rather, it is the sum total of institutions, laws, procedures, practices, and attitudes that encourage and support integrity in the exercise of power in modern Australian society (Brown 2005, 1). This model of a national integrity system has been conceptualized in a series of studies prepared jointly by the Key Centre for Ethics Law Justice and Governance at Griffith University and Transparency International Australia (Brown 2005; Brown et al. 2018).

An attraction of the national integrity system is that it does not necessarily entail formal constitutional change. Instead one practical attraction of the integrity system is that it already exists as a loose and informal collection of watchdog agencies. This concept has had traction at a state level. Since 2010 Australian states have introduced variations upon public-sector integrity commissions (Brown et al. 2018, 2). In some states such as Queensland, Tasmania, Victoria, and Western Australia, this concept has evolved into both formal and informal integrity systems. For example, Western Australia has the WA Integrity Coordinating Group (the ICG), an informal network of watchdog agencies. In Victoria, as briefly discussed above, there is a formal and constitutionally recognized integrity system comprised of three agencies, the Victorian auditor general's office, the Victorian ombudsman, and the independent broad-based anti-corruption commission. Each agency has a distinct role with an overarching shared responsibility for protecting integrity in the Victorian public sector and Victoria police.

At the federal level, exactly what the integrity system is and how it is to be conceptualized varies widely between commentators. Wenta (2012, 43) characterizes the 'systems' view of integrity as an 'extension' of the concept of a branch of government. McMillan describes the concept of a national integrity system as an expanded concept of the administrative justice system tha 'refers to a collection of institutions, laws, procedures, practices and attitudes that promote and encourage integrity in the exercise of power in Australian society' (McMillan 2010, 438). Wheeler acknowledges that there has been an attempt to distance these types of integrity bodies from the executive by deeming them 'officers of parliament' (Wheeler 2012, 53). But Wheeler is quick to identify problems in this as some integrity bodies have jurisdiction over MPs such as the anti-corruption commission and auditor generals, 'for the same reason there are problems in seeing integrity type bodies (in that capacity) as 'officers of the court' if they have jurisdiction over the courts and/or judicial officers (for example, ICAC, Auditor General and Judicial Commission)' (Wheeler 2012, 53). This observation confirms the view of McMillan and Carnell, that the place of watchdog agencies requires an integrity system as they do not fit under any other branch of government. Conventionally these integrity agencies have been located within the executive branch, mainly due to the fact that they do not belong anywhere else and clearly do not belong within the legislative and judicial branches (McMillan and Carnell 2010, 40). The consensus amongst this loose amalgamation of views is that watchdog agencies are a unique group within

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the government, so unique that the term 'integrity' should apply to identify and describe their function.

## 6. Conclusion

This article urges that further administrative justice research be undertaken to investigate how the work of watchdog agencies may be facilitated and supported while also being scrutinized and restricted. This challenge requires a global research response. The need for this research is pressing. Watchdog agencies perform an increasingly important role in a changing global political environment. Disenchantment with government and population crises such as COVID-19 and global warming expose weaknesses across democratic institutions within nation-states on an international scale. The shared challenge facing many constitutional democracies is how to ensure that administrative justice allows watchdog agencies to hold truth to power rather than becoming either instruments of the state or victims of their own success through self-abuse of an ever growing and expansive jurisdiction.

This article suggests that the normative framework of integrity offers a point of both exploration and comparison for future international research. The case study provided in this article demonstrates the expansive constitutional and administrative law debate in Australia. This debate, which has taken place over two decades, extends beyond the existing legislation in many jurisdictions that aims to prevent government corruption to interrogate the use of integrity as a normative framework for understanding the function of watchdog agencies. While this debate has not translated into general constitutional change, this article suggests that the steps taken in Australia towards a normative integrity framework act to diffuse executive power and provide commentators with a standard, albeit inexact, to measure behaviour at an individual, institutional, and systemic level. In this respect this Australian case study provides a national context for future research, discussion, and debate across other jurisdictions.

It is suggested that such future research address three questions embedded in the discussion in this article. Firstly, whether, as this article suggests, a normative framework is useful in positioning watchdogs on a non-legalistic and non-constitutional determinative footing or whether such a normative framework merely serves to place agencies upon a slippery slope of supplying a convenient managerial tool for executive government rather than accommodating the needs of citizens. In essence the research must address whether a normative framing works to support administrative justice institutions or a legislative protection is ultimately necessary. Subsequent questions to be asked include: (a) What is the extent to which a normative framework of integrity (which include fairness, rationality, lawfulness, transparency, and efficiency) influences practical factors such as agency policy, codes of conduct, and professional requirements, including investigating alleged violations by public officials of rules, policies, ethics, morality, or even good manners? (b) Does a normative framework, regardless of what it is,

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provide both the weapon for watchdog agencies to implement change while they themselves are subject to its standard? (c) Is there even any need for a normative framework given preexisting norms in the legal system such as the rule of law?

Secondly, future research should ask whether the answer to this initial question changes according to the normative framing used. In the Australian case study, the notion of integrity clearly resonates, yet an ongoing challenge is that 'integrity', 'integrity review', and 'integrity system' are ill defined and uncertain terms. The term captures any or all aspects of the operation of watchdog agencies, including that they exist to humanize the state bureaucracy, to rectify the administrative state, and are as much about values and attitudes as systems and process. In this sense integrity moves beyond the constraints of judicial review and administrative review in constitutional and administrative law. Yet, a fundamental question for future research is whether integrity remains apposite given the current challenges that confront the modern democracy. For example, can integrity usefully be applied to digitalisation of services and the AI augmented government of predictive governing? Is integrity a concept that has a place in competing interests such as when governments use watchdog agencies to reduce citizens' movement in the face of a worldwide pandemic?

Finally, empirical work must evidence the experience of the end user. The assertion of this article is that integrity as a normative framework will benefit Australian watchdog agencies—and thereby by implication the Australian people. Further research is required to evidence this assertion. It must interrogate whether a normative framework actually rectifies the tension between watchdog agencies serving administrative justice rather than the administrative state. While empirical work may involve qualitative research, such as interviews with citizens or with employees of watchdog agencies, or quantitative research as to numbers and cost of agency activities, it may also be useful to reference the case study in this article for additional avenues of research. For example, research could comprise a comparative study of instances where watchdog agencies have failed, or construct and measure a rubric as to the use of integrity-framed characteristics of legality, fidelity to purpose, fidelity to public values, and accountability, against the service of watchdogs for special interests as opposed to watchdogs serving society as a whole.

Globally public confidence and trust in institutions of government is low. Watchdog agencies are critical in improving confidence and trust, yet they themselves remain vulnerable to government influence. Watchdog agencies may promote administrative efficiency over administrative justice and fail to bring government to account. In this way the rule of law may be undermined. The case study of Australia put forward in this article illustrates that a normative framework of integrity may be useful to both govern the behaviour of watchdog agencies and promote a shared standard of good behaviour across the agencies they watch over. While further research must take place as to standards by which watchdog agencies will be both held to account and protected from stakeholder interference in the carrying out of their executive oversight functions, it is suggested that Australia, and the case study of a normative framing of integrity, demonstrates one possible solution to this shared global structural weakness of watchdog agencies.

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1. *Surveillance Devices Act 2004* (Cth) s55(1); *Crimes Act 1914* (Cth) Part IAB.
2. *Frugtniet v Australian Securities and Investments Commission* [2019] HCA 16, [53].
3. *Forge* [2006] HCA 44 [66]. The joint judgment of Gummow, Hayne, and Crennan JJ was approved by the remaining members of the court.

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