Queensland's integrity network

by Dr David Solomon AM
Queensland Integrity Commissioner

The position of Integrity Commissioner was created in Queensland by a 1998 amendment to the *Public Sector Ethics Act 1994*. It resulted from concern on all sides of politics about the perceived low public standing of people holding political office. A public opinion poll at that time showed that, of the people surveyed, only 7 per cent considered that State and federal politicians in Australia had standards of honesty and ethics that rated as high or very high. The Queensland Government proposed that an independent Integrity Commissioner should be available to Members of Parliament to provide them with advice, if they wanted it, on conflicts of interest. Those who took part in the parliamentary debate thought that if there was some confidential sounding board available to give advice before a possible blunder was made, this would contribute to enhancing the image of politicians.

In fact, the legislation provided that a quite large number of people – not just MPs – would be able to seek advice from the Integrity Commissioner. The list of what it calls "designated persons" begins with Ministers, Assistant Ministers and government MPs (a later amendment included all MPs), but extends also to the staff of Ministers, the Chief Executives of Government Departments and statutory officers, and senior executives and senior officers in the public service – more than 5,000 people. However the public servants can only get advice with the permission of their Chief Executive. As it turns out the number of requests for advice that were made was quite small – averaging just 28 in the first 10 years. Anticipating this, the Integrity Commissioner was appointed only on a part-time basis, the equivalent of two days a week.

There were two essential elements of the scheme. The first was that the whole process of seeking and providing advice would be confidential and exempt from Freedom of Information legislation – although the person receiving the advice could, if they wished, make the advice public. But that happened rarely. The second was that the Integrity Commissioner had no investigative powers. He - all three appointees have been men – could ask the person seeking advice for more information but he had no authority or power to conduct any other inquiries.

Some changes were made at the end of 2009. Once again, the driver was concern about public opinion. In the middle of that year a former Minister in the Labor Government was found guilty of corruption charges and sent to gaol for seven years. Also Mr Tony Fitzgerald QC, who had conducted an inquiry into police and government corruption a generation earlier, made a speech marking the 20th anniversary of the publication of his report with a highly critical warning about Queensland's commitment to reform. He complained that while things were better than they had been, it was a mistake to take this for granted.

The Government responded by publishing a green paper on Integrity and Accountability in Queensland and commencing a four-month long review of the integrity system. Virtually the first result of the review was the passage through Parliament of a new *Integrity Act*. This moved the provisions affecting the Integrity Commissioner from the *Public Sector Ethics Act* into the new Act and it expanded some of the Commissioner's functions. It also provided a legislative framework for the regulation of the lobbying industry in Queensland and made the Integrity

Commissioner responsible for the Register of Lobbyists. I won't deal any further with various other provisions intended to ensure that lobbying was above board. I am concerned here with what I call the Commissioner's "integrity functions" and the way the Act expanded them.

First, the range of advice that could be sought from the Integrity Commissioner was increased. The former limitation to conflicts of interest was broadened to include any ethics or integrity matter concerning the person. Partly as a result, the number of requests for advice that I now receive is about double what it used to be.

Second, Members of Parliament were permitted to discuss with the Integrity Commissioner any ethics or integrity issue arising from their declarations of interest. I should explain that Members are required to make quite extensive declarations of their interests, and those of related persons, to the Parliament. The register of Members' interests is published on the Parliament's website. The Integrity Commissioner could provide advice to MPs either orally or in writing. The Labor Premier, at the time the Act came into force, instructed all the Government MPs, including Ministers, to arrange appointments to see me to discuss their declarations. After the elections this year the new Liberal National Party Premier issued a similar instruction to his MPs.

On the subject of declarations of interest, chief executive officers and most statutory officers are required to provide the Integrity Commissioner with copies of the declarations they have to make to Ministers or other officials. And the Integrity Commissioner is required to tell Parliament the names of any officials who do not comply with these requirements.

I should mention one other aspect of the Integrity Commissioner's role that theoretically has not changed significantly under the Integrity Act, but has in practice. The Premier may ask the Integrity Commissioner for advice about ethics or integrity issues concerning any government MP and may also ask for advice on "standard setting for ethics or integrity issues". The secrecy provisions of the Act prevent me from commenting on the first of these but the former Premier publicly sought my advice as a member of the group that considered her government's green paper on Integrity and Accountability while the current Premier has disclosed publicly that he sought my advice on a new Ministerial Code of Conduct. When I say the Commissioner's role has changed in practice, I am referring only to the fact that Premiers in recent years have shown they sometimes want to access the advice that the Integrity Commissioner can provide to them. And in undertaking those tasks the Integrity Commissioner does have to become involved not in an investigation, but in what can be described as research.

One last comment about the Integrity Commissioner's role. During this year's election campaign the new Premier promised that checks would be made each year of the declarations of interest made by his ministers. The new Code of Conduct assigns the responsibility for making those checks to the Integrity Commissioner. As I have stressed, the Commissioner cannot investigate anything. So the Code of Conduct requires Ministers to provide the Integrity Commissioner with any information that he seeks from them. Not quite an investigation. It also allows the Integrity Commissioner to choose, at his own convenience, the time when he will interview and question each Minister about their declarations of interest.

I turn now to the other major constituents of the integrity network. Queensland, as is the case in most other jurisdictions, has many other people or bodies with an integrity function, including (in its case) the Ombudsman, the Auditor-General, the Crime and Misconduct Commission and the Information Commissioner. In Queensland, all these are statutory, independent bodies, supervised or overseen to a greater or lesser extent by various parliamentary committees.

In Australia the Auditor-General is an office of very long standing. The NSW Governor appointed the first Auditor-General in 1824, Tasmania had its first Auditor-General two years later and Western Australia three years later in 1829. As the other colonies subsequently came into being as self-governing entities, they quickly – within a year or so – appointed Auditors-General to monitor spending by government officials.

We have to move forward about a century and a half for the next institutional development in the integrity branch – the creation of the office of Ombudsman. The Ombudsman is an independent officer who can investigate complaints by people about decisions or actions of government departments or agencies. If an investigation finds that the complaint is justified, the Ombudsman normally can only recommend that the agency change the decision and does not have any power to override or change it. Ombudsmen, like Auditors-General, have expanded their roles in recent years, in particular in carrying out systemic investigations. They also may offer to help agencies improve their decision-making and administrative practice by providing training.

The next major integrity changes in Queensland occurred in the early 1990s, following the Commission of Inquiry that I mentioned earlier, that was conducted by former justice Tony Fitzgerald. Partly as a result of the scandals that were revealed during the inquiry, there was a change of government in 1989. The Police Commissioner and a number of former Ministers were tried and gaoled. I should point out that Commissions of Inquiry were often also a part of the integrity network, but each was only created by the executive government to investigate a particular problem and for a limited time.

One of the first integrity outcomes of the Fitzgerald report was the creation of the Criminal Justice Commission (CJC), modelled to a considerable extent on the NSW Independent Commission Against Corruption, which itself was based on the Hong Kong ICAC. Just over a decade later, the CJC became the Crime and Misconduct Commission, after being merged with a Crime Commission created by a later government. It has all the powers of a Commission of Inquiry – and more – and is a continuing body. The CMC's functions still include investigation of complaints against public sector misconduct by police, politicians, public sector officer and public officials, and working with public sector agencies, including the Queensland Police Service (QPS), to fight misconduct, including corruption.

A second result of the Fitzgerald report was the creation of the Electoral and Administrative Review Commission (EARC). This body was mainly concerned with making recommendations to government about reforms, but it was also empowered to carry out a redistribution of electoral boundaries. Many of the reforms recommended by EARC and adopted by the Government were concerned with integrity issues and resulted in additions being made to the integrity branch in Queensland, or changes to existing institutions to increase their independence, their scope or their effectiveness. For example, one of the early EARC reports was on Public Sector Auditing, and resulted in changes that increased the independence of the Auditor-General and expanded his oversight of the public sector to include, for example, Government Business Enterprises, as they were then called.

The first EARC report recommended guidelines for the declaration of registrable interests of elected representatives of the Parliament of Queensland. Parliament's register of Members' interests actually dates from the previous year.

Later EARC produced a report on Codes of Conduct for public officials. This resulted two years later in the passage of the *Public Sector Ethics Act 1994* which provided for the introduction of formal codes of conduct by public service agencies. A sector-wide code was introduced following amendments to the Act in 2010.

An important EARC report on judicial review of administrative decisions and actions resulted in the Supreme Court being given a specific judicial review jurisdiction.

That report was followed by one which recommended that Queensland adopt a Freedom of Information law. That legislation was duly passed and was similar to laws already in force in the Commonwealth and some other States. However it became less and less effective as changes were made by subsequent governments. The Act was replaced by the *Right to Information Act* in 2009. I won't discuss the changes in any detail, but as with similar developments that followed in Tasmania and New South Wales, and to a lesser extent the Commonwealth, it ceased to be correct to characterise the laws as constituting freedom **from** information.

The legislation created the positions of Information Commissioner, the Right to Information Commissioner and the Privacy Commissioner. These are independent officers who hold statutory appointments to oversee the working of the *Right to Information Act* and the *Information Privacy Act*, to hear and investigate complaints and to determine various appeals. The Information Commissioner is responsible for advancing the RTI's pro-disclosure of information agenda.

In 1991 EARC produced a report on the protection of whistleblowers. This also resulted in new legislation – the *Whistleblowers Protection Act 1994*. Once again that legislation has recently been reviewed in Queensland and it has been replaced by a *Public Interest Disclosure Act* (PID Act), which should be more effective, increasing the likelihood that complaints will be properly investigated and acted upon. As an aside I note that responsibility for oversight of the PID Act was initially given to the Public Service Commission but in the past few months the Act has been amended to give that responsibility to the Ombudsman – in my view a very good development.

The following year EARC conducted a review of archives legislation. The legislation that resulted from this review gave the Queensland State Archivist relative autonomy, though not complete independence from the government. Importantly, the new Act made it a legal requirement that "A public authority must — (a) make and keep full and accurate records of its activities"[1]. That provision greatly assists other agencies and people concerned with and/or involved in the integrity process.

Another integrity agency was the agency that is now called the Public Service Commission (PSC). It is essentially a management tool for the executive government, but it does have an integrity function, for example, in overseeing the probity of appointments and discipline. Currently the PSC also provides ethics advice to public servants at their request. It also provides coordination across the public sector on ethics matters through the Queensland Public Sector Ethics Network, which holds regular (mostly monthly) meeting of relevant officers from agencies.

In 2001 the then Queensland Integrity Commissioner convened a meeting of some other officials who were concerned with integrity issues: the Chief Executive of the Public Service Commission, the Ombudsman, the Auditor-General and the Chair of the Crime and Misconduct Commission. They decided it would be useful if they met three or four times a year to exchange information and discuss matters of common interest to them. Four years later the Information Commissioner was added to the group. It is now known as the Integrity Committee, and it still meets three or four times a year. Contact between its members is not limited to those meetings. Discussions often result in one member saying to another that they will contact them about a particular matter, or they decide that particular staff members should get together to work on a problem. One specific outcome has been the development of a page on the Ombudsman's website, "It's OK to complain" listing, and linking to, the various agencies that handle complaints from the public, with referrals to federal as well as state agencies.

I have not included the Queensland Police on my list of integrity institutions – I consider its functions are quite different. But I should tell you that just one person in the service is listed as a "designated person" who can seek the Integrity Commissioner's advice on ethics or integrity matters, and that is the Police Commissioner. It has been the practice of my predecessors and me to meet with the Commissioner three or four times a year to discuss informally ethical/integrity issues involving the police service.

Returning to the Integrity Committee, I should tell you that its functioning has attracted attention in some other Australian States, where recent experience is that some of their integrity bodies seem to indulge more in conflict than co-operation. This is not the place to go into detail, but in the past year or so, the media in our two largest States, New South Wales and Victoria, have had many stories about disputes which have become a matter of public record between police, police complaints and/or crime investigative bodies of various kinds (they differ somewhat between the States). Our Queensland Integrity Committee had a meeting with people providing advice to one of those governments who expressed some surprise about how well we seemed to handle possible inter-jurisdictional disputes.

One can only speculate about why the Queensland model has been successful. Is it, for example, because the responsibilities of the various bodies are very carefully defined so that there is little overlap between them? That is not to say there is no overlap. At the margin, there can be and are matters that at the same time attract the attention of as many as three of these bodies – say, the Auditor-General and the Ombudsman and the Crime and Misconduct Commission. Or any two of those bodies. But each of those bodies would be aware of the possibility of overlap in any particular case, and the Integrity Committee allows them to discuss their respective involvement. That might happen at a meeting of the committee but it is just as likely to happen through a phone call between the relevant members of the committee.

Would it work better if it was given a statutory basis or is its informal nature a reason for its success? My own view is that creating a formal mechanism would be a mistake, not least because it is not clear that it would actually achieve anything. The committee does not need any powers that legislation might provide, or any authority.

A further question is whether the functioning of the committee would be improved if the secrecy provisions that are part of the remit of most of these bodies was able to be relaxed to improve inter-agency cooperation? There have certainly been occasions when I would have liked to provide members of the committee with information that I am required to keep secret, but I cannot really say that the workings of the committee have been adversely affected through my silence. I suspect the same applies to other members of the committee. However this is not a subject that we have discussed.

And a further question relating to my own responsibilities: would the Integrity Commissioner be better able to perform his functions if the Commissioner was able to utilise the investigative powers (or access the files) of the other agencies, particularly those of the Crime and Misconduct Commission or the Ombudsman? There have certainly been occasions when I have thought that a person seeking my advice was not telling me the whole story and I would have liked to be better informed. The Integrity Act anticipates this and provides for it in two ways. First, the Integrity Commissioner may ask for more information for the purpose of providing the advice.[ii] Second, the Integrity Commissioner does not have to provide any advice if he reasonably believes that he does not have enough information, or if the advice is being sought in circumstances where the giving of the advice would not be in keeping with the purpose of the Act.[iii] There is another device my predecessors and I have adopted: when we give our written advice we repeat all the

factual material the person seeking the advice has provided to us, so that there can be no doubt about the basis for the advice.

In my view the fact that the Integrity Commissioner cannot conduct investigations does not impact negatively on the utility of the scheme that has been put in place. It is actually a factor that may encourage people to seek advice, and that is desirable. I don't believe that using the resources of others to go behind a particular request for advice would add any value.

However I should add that the Integrity Act has been under review by the Department of the Premier and Cabinet for more than a year and some of the current provisions of the Act could be changed.

(28 August 2012)

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[i] s.7.
[ii] s. 15(5)
[iii] s. 21(4)