She will not be alright — the need for greater protection of integrity institutions

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> '[T]he ongoing health and effectiveness of the integrity branch should not be taken for granted.'[1]

On Christmas Eve in 2019 the former Deputy Prime Minister expressed, in an infamous Twitter video, that he was 'sick of the government being in [his] life'.[2] Getting the government out of one's life is not particularly viable in our modern administrative state where laws, regulations and administrative processes govern much of our lives. Re-ascending to second in command of the Australian Government is not a viable option for most Australians aggrieved of government action. Australians most vulnerable to suffering from government actions (due to their reliance on them for their livelihoods) are often those without financial, political, and social power. Thus, it is vital that Australians have accessible means of recourse which provide them with effective remedies, limit the occurrence of grievances and provide government accountability — broadly, 'administrative justice'.

Providing remedies and government accountability are no longer solely (or even primarily) administered by the judicial branch. This article first considers this context, exploring the profound change that has occurred from the original separation of powers before then defining the 'integrity branch'. The next two parts explain the insufficiency of the judiciary in providing adequate remedies and government accountability in modern Australia and how integrity institutions are fulfilling this role, and express concerns arising from the current position of integrity institutions. The article builds on the previous parts by arguing that justifications for judicial independence are analogously applicable (to an extent) to integrity institutions. The final part considers how this protection could be ensured, exploring first the constitutional enshrinement of a fourth branch of government and then ensured funding for integrity institutions, and also addresses concerns about granting greater protections.

The article concludes that the current separation of powers does not accurately reflect how an accountable government is (at least somewhat) achieved and remedies are granted to those aggrieved in Australia's modern administrative state. Instead, integrity institutions have a vital role in affording accessible remedies and creating accountability, and so require greater protection, analogous to judicial independence.

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1 Alexander Jonathan Brown, 'The integrity branch: a "system", an "industry", or a sensible emerging fourth arm of government?' in Matthew Groves (ed), *Modern Administrative Law in Australia* (Cambridge University Press, 2014) 325 ('The integrity branch').

2 Barnaby Joyce, *Twitter* (24 December 2019) <https://twitter.com/Barnaby_Joyce/status/1209372444726743046>.

Context

Changes to the separation of powers and government accountability

The separation of powers doctrine underpinning Australia's system of government holds that the legislature creates the laws, the executive implements them, and the judiciary interprets and applies them, ensuring that the other two branches exercise their power within the law. According to Sir Gerard Brennan, judicial independence 'exists to serve and protect not the governors but the governed', and it is 'of such public importance' because 'a free society exists only so long as it is governed by the rule of law … administered impartially and treating equally all those who seek its remedies or against whom its remedies are sought'.[3] Thus, it appears that the judiciary is the body which holds the government to account by ensuring its actions are within the law and providing those it wrongs with effective recourse. And until the 1970s it seems this was largely correct: 'we relied principally on the courts, buttressed by the doctrine of the separation of powers, to be the independent scrutiny forum that was accessible to individuals'.[4]

However, this no longer accurately reflects reality. As McMillan has stated: 'The task of resolving people's disputes with government, and in the process holding the executive government to account, is now extensively discharged by independent bodies other than courts.'[5] McMillan and Carnell have described this as a '*profound*' change to the nature of government, despite what has become our familiarity with 'this model of independent review'.[6] Justice Brennan, writing about Dicey's system of representative and responsible government, stated that 'the courts were to be independent of the other branches of government … [and] there is no doubt but that responsible government was the form of government intended by the framers of the Constitution'.[7] However, he acknowledged that responsible government had been 'turned on its head by the political dependence of the majority of members of the Parliament on the Executive Government'.[8]

Thus there have been changes in how the government is held to account: the judiciary is no longer the primary institution and the executive now has great power over the Parliament (likely resulting in reduced parliamentary scrutiny of the government). These changes affect the non-judicial independent (to varying degrees) bodies that now primarily perform the function of holding governments accountable and assisting those aggrieved, called here the 'integrity institutions'.

3 Gerard Brennan, 'Judicial independence' (Speech, Australian Judicial Conference, Australian National University, 2 November 1996).
4 John McMillan, 'Commonwealth oversight arrangements — re-thinking the separation of powers' (2014) 29(1) *Australasian Parliamentary Review* 32, 32 ('Commonwealth oversight arrangements').
5 Ibid 34.
6 John McMillan and Ian Carnell, 'Administrative law evolution: independent complaint and review agencies' (2010) 59 *Admin Review* 42, 43.
7 Gerard Brennan, 'Courts, democracy and the law' (1991) 65(2) *Australian Law Journal* 32, 33–4.
8 Ibid 34–5.

What are 'integrity institutions'?

The Western Australian Integrity Coordinating Group[9] defines integrity as 'earning and sustaining public trust by serving the public interest; using powers responsibly; acting with honesty and transparency; and preventing and addressing improper conduct'.[10] The scope within these institutions is even broader than this. As Field[11] has noted, 'honest but simply inadequate administrative practice … are not matters that necessarily lack integrity' yet he acknowledged they 'may require investigation and remedy'.[12] Institutions such as ombudsmen and Auditors-General deal with these issues and can be properly conceptualised as part of an integrity branch even if they 'sometimes deal with matters not properly cast as lacking in integrity'.[13] This article views integrity institutions' role broadly, namely to ensure effective recourse for individuals who are aggrieved by government action (whether due to corruption, irresponsible administration or a simple misunderstanding) and to be involved in institutional development to improve decision-making — stopping such issues arising, as the best and most accessible remedy is to not require one at all. Such institutions include:

> Auditors-General, ombudsmen, administrative tribunals, independent crime commissions, privacy commissioners, information commissioners, human rights and anti-discrimination commissions, public service standards commissioners, and inspectors-general of taxation, security intelligence and military discipline.[14]

Further, as Brown highlighted, these institutions ensure government powers are exercised

> for the purposes of which they were conferred, and in the manner expected of them, consistent with both legal and wider precepts of integrity and accountability which are increasingly recognised as fundamental to good governance in modern liberal democracies.[15]

This expectancy of wider considerations of integrity forming good governance emphasises the importance of integrity institutions' role in ensuring our modern democracy. More is expected than strict legality.

9 The Western Australian Integrity Coordinating Group is an informal collaboration of the state's Corruption and Crime Commission, Public Sector Commissioner, Auditor General, Ombudsman and Information Commissioner.

10 Chris Field, 'The fourth branch of government: the evolution of integrity agencies and enhanced government accountability' (2013) 72 *AIAL Forum* 24, 25.

11 Chris Field is currently the Western Australian Ombudsman and President of the International Ombudsman Institute.

12 See, eg, Field (n 10) 25.

13 Ibid.

14 Greg Weeks, 'Attacks on integrity offices: a separation of powers riddle' in Greg Weeks and Matthew Groves (eds), *Administrative Redress In and Out of the Courts: Essays in Honour of Robin Creyke and John McMillan* (Federation Press, 2019) 25 ('Attacks on integrity offices').

15 Brown, 'The integrity branch' (n 1) 302.

Insufficiency of judicial review and fulfilling by integrity institutions

Judicial processes do not provide adequate assistance for those aggrieved

Most processes of holding the government to account occur outside of the judiciary.[16] It is an entirely uncontroversial statement that judicial review of government action does not provide effective recourse for most people. The remedies issued rarely 'fix' the problem, instead ordering a decision to be remade forcing someone back through government processes. The extensive time and costs involved also place judicial review outside the realistic reach of most people aggrieved by government action. There are 'continuing increases in the cost of legal services and continuing comparative lack of legal aid support for administrative matters'.[17] The failure of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to simplify judicial review has caused it to become largely irrelevant, rather than providing a more accessible route for judicial review. Additionally, with the proliferation of outsourcing of government services and the seemingly restrictive definition of 'officer of the Commonwealth' under s 75(v) of the *Constitution*, it is likely judicial review will become more inadequate in providing remedies and accountability.

The courts undoubtedly sit as an important and constitutionally enshrined backstop to enforce the rule of law. The entrenchment of review of government officials under s 75(v) has been heralded as guaranteeing the rule of law in Australia as it ensures the right to a hearing is not stymied by arbitrary decisions.[18] But practically the rule of law, effective remedies and government accountability are generated through other means — the integrity institutions. Judicial review is a 'remedial process of last resort'.[19]

The courts have themselves admitted that it is not their role to ensure administrative justice or 'good governance'. Justice Brennan's seminal statement in *Attorney-General (NSW) v Quin* declared:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law … If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error.[20]

Thus, as administrative justice has become expected as part of good governance, there is clearly a gap left by the judiciary.[21] Further, as Brennan also stated, the 'adversary system [is not] ideally suited to the doing of administrative justice'.[22] Due to the prevalence of government involvement in people's lives, it is vital that some institution has this purpose of securing administrative justice. It is clearly not the courts.

16 McMillan, 'Commonwealth oversight arrangements' (n 4) 34.
17 Alexander Jonathan Brown, 'Putting administrative law back into integrity and putting the integrity back into administrative law' (2007) 53 *AIAL Forum* 32, 47 ('Integrity and administrative law').
18 See, eg, former High Court Justice Mary Gaudron quoted in Pamela Burton, *From Moree to Mabo: The Mary Gaudron Story* (UWA Publishing, 2010) 387.
19 Janina Boughey, Ellen Rock and Greg Weeks, *Government Liability: Principles and Remedies* (LexisNexis Australia, 2019) 7.
20 (1990) 170 CLR 1, 35–6 ('*Quin*').
21 See, eg, Brown, 'The integrity branch' (n 1) 302.
22 *Quin* (n 20) 37.

This is particularly so considering that Australian courts have refused to venture into considerations of 'fairness' or merits, unlike courts in other countries. For example, the courts in the United Kingdom consider abuse of power,[23] which was rejected by the High Court of Australia.[24] And Canada has held it unreasonable for a Minister to change their decision in some circumstances as their power has already been spent.[25] Australia remains reluctant to hold government to account in this way. This narrow approach may be appropriate due to the existence of tribunals and other integrity institutions; however, it emphasises that there is a large area of administrative justice which Australian courts refuse to touch but which greatly impacts people's lives.

Integrity institutions — the providers of administrative justice

Beyond the reluctance of the courts to extend their scope, integrity institutions are also providing something new. There are now not just the three governmental powers to make, execute and adjudicate disputes but also a fourth — the 'power to ensure integrity in the manner that laws are made, executed and adjudicated upon'.[26] Considering the expansiveness of the modern administrative state, 'citizens have come to expect more of government, and perhaps place greater reliance on government and in turn, integrity agencies'.[27] The courts are not meeting this expectation. There is a gap and the filling of it is desirable to ensure governments act with integrity and not just within the law.

What is clear is that '[a]dministrative justice is the work of many hands' and emphasising the role of the judiciary fails to acknowledge that 'modern administration which is characterised by openness and fair process is substantially the work of the other branches of government'.[28] For example, the ombudsmen alone play a very significant role, handling just under 38,000 complaints during the 2019/20 reporting year.[29] And they have a great level of influence 'simply because ombudsmen are well respected and have significant moral authority'.[30] A case study into the Commonwealth Ombudsman's involvement in immigration cases highlighted the 'need for bodies to watch over administrative decision-makers' and 'reinforce[d] the importance of such oversight bodies in improving the systemic defects and recommending change to minimise recurrence of such events'.[31]

The Chief Justice of Victoria claimed that

> when you are arrested and placed in custody, when your insurer unfairly refuses to pay for your damaged home or vehicle, when a sales person tells lies and misleads … when a State or local government fails to do what it is bound to do by law at your loss and cost, it is the independent Judiciary to whom you may turn.[32]

23 See, eg, *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213.
24 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.
25 *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 (CanLII).
26 Brown, 'The integrity branch' (n 1) 320.
27 Field (n 10) 26.
28 Sian Elias, 'National lecture on administrative law: 2013 National Administrative Law Conference' (2013) 74 *AIAL Forum* 1, 5.
29 Commonwealth Ombudsman, *Annual Report 2019–20* (Report, October 2020) pt 7 (Appendices).
30 Weeks, 'Attacks on integrity offices' (n 14) 33.
31 Anita Stuhmcke and Anne Tran, 'The Commonwealth Ombudsman: an integrity branch of government?' (2007) 32(4) *Alternative Law Journal* 233, 236.
32 McMillan, 'Commonwealth oversight arrangements' (n 4) 36.

This exaggerates the role of the judiciary in people's lives. Although the judiciary can play this independent role, it seems that in most of these situations — apart from being in custody — many people would likely not even go to a lawyer.[33] 'The more likely scenario is that an aggrieved person will seek assistance from a website or a complaint handling unit or Ombudsman.'[34] 'There is a tendency in some quarters to go further and assume either that the judiciary alone plays that role or that no other agency can be as effective in doing so'.[35] For example, 'If the courts do not control these excesses, nobody will.'[36] Yet integrity institutions in fact play a major if not predominant role in ensuring remedies for those aggrieved. These judicial statements also highlight how judges tend to emphasise the importance of the judiciary. While they have great experience, they also have a vested interest in the continued elevation of the judicial branch and do not interact with the majority of people aggrieved. Similarly, those who have dedicated their professional lives to integrity agencies also have 'skin in the game'. The views in this area almost exclusively come from these two groups, which both appear skewed according to profession. Being conscious of this I argue that an independent judiciary acts as a vital backstop to ensure remedies and the rule of law, whilst integrity institutions provide most practical assistance to those aggrieved of government decisions through accessible remedies and ensuring administrative accountability.

Concerns regarding the integrity branch's position

Prima facie there is something odd about integrity institutions being nested within the executive, the body it is primarily trying to hold accountable. There are a wide range of bodies which fall under the executive branch, from which integrity institutions maintain degrees of independence. Thus it may just be a 'technical, constitutional truth' to say they are part of the executive.[37] However, there is still a precariousness to the current placement of the integrity branch: integrity institutions are created and funded by the Parliament (which as noted is largely controlled by the executive), thus the executive branch's attitude to an integrity body impacts its security.

It is important to note the success of many integrity institutions. Government bodies take the work of agencies seriously and accept many of their recommendations.[38] As such, it is likely that older institutions which have become entrenched in government processes and even taken a place in the public consciousness (such as the Commonwealth Ombudsman, the Australian National Audit Office and the Administrative Appeals Tribunal ('AAT')) could not be quietly defunded or disbanded. Weeks asserts that '[t]he significance of the Ombudsman, in terms of the rule of law, is that after more than 40 years, to abolish it would cause an outcry'.[39] However, there is still concern that these bodies may be restrained from reaching their full accountability capacity. Moreover, newer bodies that are not viewed as vital are more at risk. Yet, new institutions or at least new powers for existing institutions are likely necessary in the evolving modern world where government continues to play a large role in people's lives and uses new technologies such as automated decision-making.

33 Ibid.
34 Ibid.
35 John McMillan, 'Re-thinking the separation of powers' (2010) 38(3) *Federal Law Review* 423.
36 *Paradise Projects Pty Ltd v Gold Coast City Council* [1994] 1 Qd R 314, 322 (Thomas J).
37 Weeks, 'Attacks on integrity offices' (n 14) 25.
38 See, eg, Field (n 10) 29.
39 Weeks, 'Attacks on integrity offices' (n 14) 43.

The downfall of the Administrative Review Council ('ARC') and the temporary defunding of the Office of the Australian Information Commissioner ('OAIC') provide reasons to feel uneasy about the security of other integrity institutions. The then government considered that 'their functions could easily be replicated elsewhere'.[40] The role of the ARC was moved to the Attorney General's Department ('AGD'), which led to the 'curious' (and concerning) result that 'public servants (in the AGD) would have the role of overseeing the AAT, whose purpose and role is to review the decisions of public servants'.[41] This outcome raises concerns that the executive may further bring integrity institutions within its remit rather than ensuring their independence so they can effectively perform their functions.

In 2007 (before the defunding of the ARC and the OAIC), following the National Integrity System Assessment, it was concluded that we were 'travelling a road of gradual curtailment of the effective legal capacity of citizens to challenge government actions that affect them personally or conflict with valid conceptions of the public interest'.[42] The government was attacking integrity institutions as a 'grievance industry' rather than seeing them as a vital aspect of ensuring remedies and improving administration.[43] Another indicator of government disregard for integrity institutions is its response to former High Court Justice Ian Callinan's 2018 review of the amalgamation of the AAT[44] which was not tabled in Parliament until eight months after it was completed. As of late 2022, the Australian Government was *still* yet to formally respond to the report.[45] Further, in a politically sensitive area like migration, the Government has denied any statutory judicial review and the AAT cannot review migration decisions made personally by a Minister.[46] Although these positions have policy justifications, it is apparent that in politically controversial areas governments are willing to remove review mechanisms and thus the ability for those aggrieved to access remedies. The promise of a federal anti-corruption commission was not acted upon for more than a full term of government.[47] All of these instances illustrate a lack of desire for creating and maintaining integrity institutions, and a lack of appreciation of the vital role they play in ensuring administrative justice in Australia's modern administrative state.

Thus, despite much of integrity institutions' work being taken seriously, there is well-founded concern that they are not protected from a government that is ambivalent about or hostile to their role. Considering integrity institutions' expansive role in ensuring effective remedies and accountability, this is concerning and results in a need for greater protection.

40 Ibid 42.
41 Ian Callinan, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015* (Statutory Review, 23 July 2019) 20.
42 Brown, 'Integrity and administrative law' (n 17) 48.
43 Ibid.
44 Callinan (n 41).
45 Department of Parliamentary Services (Cth), 'Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Bill 2021', *Bills Digest* (Digest No 12 of 2021–22, 19 August 2021) 5–6.
46 'Migration and refugee: can we help?', *Administrative Appeals Tribunal* (Web Page) <https://www.aat.gov.au/apply-for-a-review/migration-and-refugee/migration/can-we-help>.
47 Christopher Knaus, ' "Massive policy failure": retired judges blast Morrison's broken promise on federal ICAC', *The Guardian* (online, 15 April 2022) <https://www.theguardian.com/australia-news/2022/apr/15/massive-policy-failure-retired-judges-blast-morrisons-broken-promise-on-federal-icac>.

Greater protection justifiable as analogous to judicial independence

This greater protection can be justified analogously to judicial independence, due to the role integrity institutions now play. Former High Court Justice Mary Gaudron described 'the Court as being the chief dispute mechanism of society — the glue that keep society together and enables society to work harmoniously'.[48] However, while the courts are still the chief dispute mechanisms, this article argues that the 'glue' holding society together is now better attributed to our integrity institutions due to their ease of access, prevalence of decisions and ability to run their own investigations. They 'perform a major role in reviewing and scrutinising government decision-making, cementing public law values in government processes, and meeting public expectations by providing an accessible forum to which grievances can be taken and resolved'.[49] Thus, integrity institutions are now performing a function — broadly, of providing 'administrative justice' — which means their protection can be justified via analogy to the judiciary (although not to the same extent).

Additionally to the discussion above regarding the inaccessibility of judicial remedies, courts are becoming even more costly as a result of increasing fees for court filing, reflecting 'a clear government policy to discourage people from using conventional and formal legal processes to resolve disputes'.[50] Indeed, '[g]overnment has strongly promoted alternative dispute resolution', requiring parties to 'have taken genuine steps to resolve the matter before commencing litigation'.[51] This points towards both the courts being less accessible to people and the government relying on other processes, making it appropriate for the justification of integrity institutions' protection to be made via analogy with the judiciary. If integrity institutions are not better protected there is the distinct possibility that Australians will be left without readily accessible courts and that integrity institutions can be removed by the government of the day (which is in substance the executive considering that responsible government has been 'turned on its head' due to the executive's control of Parliament, as mentioned above).[52] This is deeply concerning.

Three is not plenty — protection is justifiable

Some advocates for protection of integrity institutions have proposed creating a fourth branch of government to place and protect these institutions.[53] Justice Gageler wrote a paper entitled 'Three is plenty' which argued that a fourth branch is not needed. However, his arguments can be examined to illustrate that the administrative justice supplied by integrity institutions justifies their protection analogously to the judiciary.

Gageler makes clear that 'the separateness of the judicial power of the Commonwealth' has become justified by the need for it 'to determine controversies between the Commonwealth and an individual about the legality of Commonwealth administrative action'.[54] Referring to

48 Burton (n 18) 254.
49 McMillan, 'Commonwealth oversight arrangements' (n 4) 37.
50 Ibid.
51 Ibid 34–5.
52 Brennan, 'Courts, democracy and the law' (n 7) 34–5.
53 See, eg, McMillan, 'Re-thinking the separation of powers' (n 35).
54 Stephen Gageler, 'Three is plenty' in Weeks and Groves (eds) (n 14) 12, 21.

Montesquieu and Blackstone, he states that 'the separation of the judicial function came to be identified as serving liberty, and liberty itself came to be recognised as a constitutional objective'.[55] This I entirely agree with. However, the idea should be extended in the light of the modern administrative state and how disputes between government and individuals are actually resolved. The vast majority of people do not have ready access to the courts and alternative institutions such as ombudsmen are much more likely to be able to assist an individual in resolving their dispute and ensuring the government is acting legally not only in that matter but through broader checks of government policies, ensuring liberty. Further, as mentioned, people now expect more than just legality: the integrity institutions ensure good governance.[56] Thus the protection of integrity institutions can now be justified as serving liberty by ensuring access to remedies and good governance, ensuring the constitutional objective of which Gageler speaks.

Gageler also notes that '[f]our members of the High Court in 2000 adopted' the description of the Australian constitutional setting, that 'there is in our society a profound, tradition-taught reliance on the courts as the ultimate guardian and assurance of the limits set upon [administrative] power by the constitutions and legislatures'.[57] Considering the volume of complaints and comparative accessibility of the integrity institutions, there is now a *profound reliance* on them. The courts remain the ultimate guardian, but integrity institutions provide remedies for individuals and seek to fix maladministration, meaning government powers are kept within their restraints more readily, without requiring extensive litigation. Gageler does not question the ability for the Parliament to 'create agencies with oversight of the exercise of executive functions which are answerable directly to the Parliament'.[58] However, what he is missing is that the creation of these bodies does not ensure their ability to provide oversight effectively. What Parliament creates it can dissolve or defund. Given the prevalence of the practical assistance that integrity institutions provide, and their importance in ensuring good governance, they now are correctly characterised as serving liberty and as guardians limiting government power. This makes them analogous to the judiciary and by Gageler's own argument, justifiable of protection.

Integrity institutions are not the judiciary

As noted above, the analogy to the judiciary only extends so far, and it is important to note that the integrity institutions do not replace the courts. The judiciary acts as the vital backstop ensuring the rule of law, but greater protection for institutions that provide remedies and stymie maladministration before the court stage are essential. Profound change in government accountability has occurred. [59] Thus integrity institutions' protection is now justifiable on a similar basis as the judiciary, namely that those adjudicating the law and providing remedies should be independent from those who make and execute the laws. However, as courts continue to exist, integrity institutions' independence may not need to be as complete as the judiciary's. Yet, as these institutions provide remedies for those aggrieved by government action, axiomatically their work may often go against the political interests of the government

55 Ibid.
56 See, eg, Brown, 'The integrity branch' (n 1) 302.
57 Gageler (n 54) 22.
58 Ibid 18.
59 McMillan and Carnell (n 6) 43.

of the day. They therefore do require independence, since it is 'clearly the independence of integrity agencies from those institutions whose integrity they are charged with maintaining which represents their most important feature'.[60]

Is greater protection necessary?

The judiciary's constitutionally ensured existence is vital. However, it does not mean there is not a need for greater protection for integrity institutions as their defunding would restrict people's access to remedies and stymie government accountability. Integrity institutions ensure assistance is accessible, without the protracted time and costs of litigation; this is vital for ensuring administrative justice. As discussed, some institutions like the ombudsmen have become part of what is expected of the government; however, this does not mean that integrity institutions do not require greater protection. Public or political pressure seems insufficient as a protection — owing to both the institutions' importance in securing administrative justice and the public's lack of understanding of administrative law and how these institutions function. Although a similarly small amount of people can perform lifesaving heart surgery as understand administrative law, the removal of such services from Medicare would gain much greater political outcry than the disestablishment of an integrity institution, despite the reliance people unknowingly place on it for ensuring administrative justice. Thus, integrity institutions, while performing a key role beyond the courts, remain at the whim of the government of the day and are afforded little political protection. Their current statutory existence is not a good enough guarantee considering the vital role they play in ensuring administrative justice.

The role integrity agencies play in providing remedies and administrative justice means that integrity agencies should be owed protection analogously to why the judiciary is protected, as impartial administering of those who seek remedies is necessary for a free society.[61] This is now largely ensured by integrity agencies.

Ensuring greater protection

Accepting that 'profound' change has occurred from the original separation of powers and its envisagement of holding the government to account,[62] it is clear that integrity institutions now perform vital functions for our democracy. But there is a question as to how these functions should be protected. Whilst the separation of powers is no longer reflective of how our government functions, this article argues that what is vital is that their existence and functioning is ensured, more so than a coherent theoretical arrangement, as would be achieved through constitutional separation of powers.

Integrity institutions do in part fulfil the original role of the judiciary. The AAT, for example, 'in reality … inhabits an uncomfortable limbo somewhere between the judicial and executive branches'.[63] However, they could not be moved out of the executive and into the judicial

60 Brown, 'The integrity branch' (n 1) 320.
61 Brennan, 'Judicial independence' (n 3).
62 McMillan and Carnell (n 6) 43.
63 Peter Cane, 'Understanding administrative adjudication' in L Pearson, C Harlow and M Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 273, 293.

branch. '*Boilermakers'* is now a very stable constitutional doctrine and one on which the stability of Australia's separation of powers is directly based.'[64] Thus as integrity institutions are not exercising judicial power (and converting them to Chapter III courts that could exercise such power would impede their unique ability to provide administrative justice), there is no scope for them to be brought within the protection of the judicial branch. However, as they provide the vast majority of remedial assistance for people affected by government decisions, they need to be afforded some greater protection.

Fourth branch

As mentioned above, one proposal for ensuring greater protection is that the integrity institutions should form a new, fourth branch of government.[65] Creating a fourth branch allows theoretical coherence in that these institutions are exercising a power different to the other three branches, namely 'to ensure integrity in the manner that laws are made, executed and adjudicated upon'.[66] And it is plainly more coherent and desirable that such bodies are not embedded within a branch on which it is exercising this power. It would also likely ensure integrity institutions greater independence and protection from government interference. Further, as McMillan has made clear, and this article has highlighted, 'fundamental changes have occurred in government and society [in that] courts no longer stand alone in checking and curbing government power', which 'require[s] us to update our constitutional thinking'.[67] Thus, as Brown stated, analysing integrity institutions' 'nature and legal position … provides some justification for considering that clearer constitutional recognition of their shared function and independence may be advantageous'.[68] Creating a fourth branch acknowledges this change and grants integrity institutions desirable (and arguably justifiable, through judicial analogy) independence to perform these functions. As McMillan has clarified, in response to critiques of a fourth branch, that the objective is not 'to accord a special constitutional stature … nor to suggest that they are transposable with courts'.[69] A fourth branch requires a change in our separation of powers and constitutional reform (notoriously difficult in Australia); however, it would acknowledge the profound change that has occurred and ensure greater protection of integrity institutions due to their role.

Former Chief Justice Martin of the Supreme Court of Western Australia, in arguing not to create a fourth branch, acknowledged that

> integrity agencies have an important role to play in contemporary Australia. However, they are and must remain firmly within the executive branch of government, subject to the scrutiny of Parliament, and to laws passed by the Parliament and enforced by the courts.[70]

64 Boughey, Rock and Weeks (n 19) 170, referring to *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
65 See, eg, McMillan, 'Re-thinking the separation of powers' (n 35).
66 Brown, 'The integrity branch' (n 1) 320.
67 McMillan, 'Commonwealth oversight arrangements' (n 4) 37.
68 Brown, 'The integrity branch' (n 1) 325.
69 Ibid.
70 Chief Justice Wayne Martin, 'Forewarned and four-armed — administrative law values and the fourth arm of government' (Whitmore Lecture, Sydney, 1 August 2013) 40.

Ensuring accountability of these bodies is vital (concerns are discussed below). Such a branch would still be within the remit of the courts; it would not make sense for them to be able to operate outside the rule of law. McMillan makes clear a fourth branch is not about according 'a special constitutional … immunity'.[71] Thus it seems Martin's concern about lack of court enforcement is misplaced. However, the accountability produced by parliamentary oversight is valuable, particularly by committees which are not controlled by the government (such as Senate references committees). The types of bodies that would be included in the integrity branch and their relationships to their parliaments would vary (eg, the Victorian Ombudsman is a parliamentary officer in the state constitution while other bodies are creatures of statute with varying degrees of independence).[72] The inclusion of parliamentary oversight is in tension with giving these bodies greater independence especially where the executive has such control over the Parliament. Martin's insistence that '[t]hey must apply standards of conduct stipulated in the statutes which create them, rather than possibly idiosyncratic notions of public purposes and values',[73] can be addressed. The protection offered by a fourth branch does not exclude the institutions applying specific standards and operating for specific purposes. There is scope for some aspects to be regulated by statute while an institution's existence and purposes are constitutionally enshrined. The extent of parliamentary oversight of a fourth branch is unclear but would logically be reduced due to their greater independence. This highlights the benefits of ensured funding (discussed below) as it allows bodies to have clear statutory purposes which can be interpreted by the courts and still allow greater parliamentary oversight as they remain within the executive branch (with greater protection).

Thus, McMillan is likely correct that 'we need a new constitutional theory to explain the more complex dispute resolution and accountability framework that has evolved'.[74] What is vital to ensuring people have access to effective remedies is the ensured funding of integrity institutions. The following sections consider if this can occur in a way that requires less of a restructuring of our system and thus is more plausibly possible.

Ensured funding

This article does not regard the creation of a fourth branch as critically as Justice Gummow, who stated he saw 'little utility and some occasion for confusion'.[75] Undoubtedly there would be greater theoretical coherence and protection afforded by a fourth branch. However, ensured funding appears to allow adequate recognition of the profound change that has occurred while requiring smaller changes to our current system, compared to the rethinking of our separation of powers. It also allows parliamentary oversight (as above) and eases concerns about complete independence of very powerful bodies (as below), balancing the need for independence and representative government. Ensured funding would involve integrity institutions with clear statutory purposes being protected by guaranteed funding (adjusted appropriately with changes in consumer price index ('CPI') and workload) such

71 McMillan, 'Commonwealth oversight arrangements' (n 4) 37.
72 Brown, 'The integrity branch' (n 1) 310–11.
73 McMillan, 'Commonwealth oversight arrangements' (n 4) 37.
74 Ibid.
75 William Gummow, 'The 2012 National Lecture on Administrative Law: a fourth branch of government?' (2012) 70 *AIAL Forum* 19, 19.

that they could not be defunded or abolished without a super majority of Parliament — more than the executive and government of the day is likely to control. This strikes the appropriate balance between respecting representative government and acknowledging the executive's great control over the Parliament and the interests in protecting integrity institutions so they can fearlessly investigate, and provide remedies against, the government. Although the placement of these institutions would remain conceptually odd — those holding executive to account remain within it — the underlying concern is alleviated as they could not be diminished by the executive alone.

Unfortunately, how this could precisely be achieved is unclear. Implementing a manner and form provision (such as seen at a state level) appears attractive. This would bind the powers of the Parliament such that defunding or dissolution of integrity agencies could only occur with the support of a special majority of Parliament. However, it appears that the 'Commonwealth Parliament cannot enact "manner and form" legislation requiring laws to be passed by specified majorities in Parliament'.[76] There is little authority in relation to' whether the Commonwealth can 'entrench certain legislation which it wishes to protect from hasty amendment or repeal but it would seem that unless the legislation is incorporated into the *Constitution* pursuant to the amendment procedure in s 128, no entrenchment is possible'.[77] Thus it appears only a referendum and constitutional reform can ensure greater protection from repeal than a majority vote in each chamber. Alternatively, the Commonwealth Parliament has the power to establish an 'alternative legislature for the enactment of legislation on subjects within Commonwealth legislative power'.[78] This could be used to create a special chamber whose approval is required for changes to an integrity institution's functions and funding. However, this is likely even more controversial and impractical than creating constitutional reform, considering the media and political fury that occurred following an Indigenous Voice to Parliament being (incorrectly) characterised as a 'third chamber'.[79]

The inability of the Commonwealth to pass a manner and form provision on legislation presents a problem for ensuring funding. A Senate not controlled by the government would likely afford greater protection to these institutions, but this cannot be guaranteed and in fact it is likely that it is when the government has control of the Senate that the government accountability and administrative justice provided by integrity institutions will be needed most. Public announcements and bipartisan support of funding promises for extended periods (with appropriate CPI and workload adjustments) may provide slightly greater protection, but this remains at the mercy of political tides and administrative law does not appear to be a vote swinger. However, if it offers slightly greater protection, it may allow institutions to become part of the public consciousness in how our government is held accountable and people are provided remedies. It seems that some institutions, such as the ombudsmen or the NSW Independent Commission Against Corruption ('ICAC'), could not be abolished without creating public outcry and political cost. However, the strength of such outcry and its ability to protect, particularly the gradual curtailment of, integrity institutions remains unclear.

76 George Winterton, 'Can the Commonwealth Parliament enact "manner and form" legislation?' (1980) 11 *Federal Law Review* 167, 201.

77 Gerard Carney, 'An overview of manner and form in Australia' (1989) 5 *QUT Law Review* 69, 95.

78 Winterton (n 76) 201.

79 See, eg, Amy Remeikis, 'Peter Dutton rules out Voice to Parliament, labelling it a "third chamber"', *The Guardian* (online, 12 July 2019) <https://www.theguardian.com/australia-news/2019/jul/12/peter-dutton-rules-out-voice-to-parliament-labelling-it-a-third-chamber>.

Ensured funding would allow for minimal changes and for parliamentary oversight to continue for such institutions. However, it seems that it is infeasible under our current arrangements. Thus, constitutional recognition of key integrity institutions, an enshrinement of a fourth branch, is likely necessary to ensure the continued existence of such agencies.

Concerns arising from greater protection

Providing greater protection for integrity institutions raises the concern of 'who guards the guardians'.[80] Once we have created them 'we must take steps to keep them under control'.[81] Justice Gummow in a speech on the possibility of a fourth branch was concerned about placing bodies which 'oversee good governance and investigate corruption and malpractice … in islands of power where they are immune from supervision and restraint by the judicial branch of government'.[82] It is not envisaged that integrity institutions would be placed on any such islands of power. Rather, there are two main models of integrity theory: fourth branch theory and national integrity system ('NIS') theory.[83] As the name suggests, fourth branch theory considers integrity institutions as a separate branch of government, while NIS theory considers horizontal and vertical accountability. Both theories assert that the other branches, particularly the judiciary,[84] would perform 'an essential integrity task by ensuring mutual accountability *within* the integrity system [that] will hold watchdogs accountable'.[85] It has been concluded that 'extra-judicial involvement in the performance of integrity functions is, on balance, an acceptable element of modern government'.[86] And as Gageler notes, '[t]he availability of judicial review can provide a level of assurance that a non-judicial accountability body will confine itself within the scope of the statutory functions it is authorised to perform'.[87]

However, it is not enough to say the courts will oversee integrity institutions. Howe and Haigh make clear that the nature of 'watchdogs' (anti-corruption bodies) affects the effectiveness of 'traditional mechanisms for holding watchdogs to account, in particular the effectiveness of judicial review'.[88] These mechanism notably include their 'extraordinary coercive powers',[89] the confidential nature of their operations, the restricted availability of obtaining certain judicial remedies according to the nature of the decision, their inability 'to initiate review of decisions … [and] the lack of regular external review'.[90] It is important to note that not all integrity institutions have such coercive powers as watchdogs; thus for many integrity institutions judicial review will likely be adequate, but the case of watchdogs does point to the need for parliamentary oversight (eg, through committees that can instigate reviews of their work). Judicial review still has an important role in securing administrative justice as it

80 Field (n 10) 30.
81 Bruce Ackerman, 'The new separation of powers' (2000) 113(3) *Harvard Law Review* 633, 694.
82 Gummow (n 75) 24.
83 Sarah Withnall Howe and Yvonne Haigh, 'Anti-corruption watchdog accountability: the limitations of judicial review's ability to guard the guardians' (2016) 75(3) *Australian Journal of Public Administration* 305, 306.
84 Ibid 307.
85 Joseph Wenta, 'The integrity branch of government and the separation of judicial power' (2012) 70 *AIAL Forum* 42, 44.
86 Ibid 43.
87 Gageler (n 54) 24.
88 Howe and Haigh (n 83) 307.
89 *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 [4].
90 Howe and Haigh (n 83) 313.

allows independent scrutiny and serves as 'a constant reminder for observance of legality rationality and fairness'.[91] This fine balance between independence and oversight ideally points towards ensured funding; however, due to the near impossibility of ensuring funding, constitutionalising these bodies as a fourth branch is likely necessary.

So … what should be done?

Considering the impracticality of ensured funding and the importance of integrity institutions, the constitutional protection offered by a fourth branch is desirable. Also there appears to be scope for the Parliament to retain some oversight of such bodies through committees or processes such as Senate estimates (even the judiciary's independence allows judges to be appointed by the executive and High Court staff to appear before Senate estimates committees). The extent to which this oversight would be possible while having constitutional protection is beyond the scope of this article. Thus, this article recommends that a fourth branch of government is the desirable mode to ensure effective protection of integrity institutions, justifiable by their function in providing administrative justice analogous to the judiciary and necessary due to the vital role they play.

This conclusion is bolstered by changes in late 2021 to the South Australian ICAC, illustrating the ability for Parliament to remove important integrity institutions. The South Australian Parliament legislated that the 'ICAC will no longer be able to investigate misconduct or maladministration'; no Member in either House or of any party voted against the Bill; and the ICAC Commissioner, Ms Vanstone, described the proceedings as 'extraordinary' and that she was 'really worried' that the 'jurisdiction to investigate corruption has been decimated'.[92] This strengthens the argument for greater protection of integrity institutions and specifically the constitutional enshrinement of key oversight and corruption functions, as bipartisan support for the removal of such functions is not only possible but occurring.

Conclusion

There are legitimate debates about what integrity institutions should exist and the extent of their functions and powers. This article has not sought to resolve these issues. Instead, it has contended that the institutions which are the main supply of effective remedies to those aggrieved of government decisions and which seek to remedy government maladministration — supplying administrative justice — need to be afforded protection from government defunding or abolishment. It was argued that, in Australia's modern administrative state, the judiciary is inadequate for ensuring administrative justice (and in fact does not purport to do so), and that instead this function is supplied by integrity institutions. Concerns as to the current position of, and attitudes towards, the integrity institutions were explored to show a need for their greater protection; and this was justified as their role is analogous to judicial independence. Finally, mechanisms to ensure greater protection were considered,

91 Robin Creyke et al, *Control of Government Action: Text Cases and Commentary* (Lexis Nexis Butterworths, 5th ed, 2019) 40.

92 Michael Clements, ' "Extraordinary" Bill to reduce powers of SA's Anti-Corruption Commissioner passes Parliament', *ABC News* (online, 23 September 2021) <https://www.abc.net.au/news/2021-09-23/sa-icac-bill-passes-parliament/100487668>.

leading to a conclusion that, due to the expansiveness of government power in Australia, the executive's control of the legislature, and Parliament's inability to entrench an integrity body via a manner and form provision, the creation of a fourth branch of government, although difficult to implement, is likely required.

When so much of people's lives are affected by the government, the institutions that seek to secure the government's integrity and ensure effective and accessible remedies for those aggrieved needs to be protected. The bodies that do this are now predominantly our integrity institutions. The current position does not afford them enough protection. Thus, a fourth branch of government is recommended as it is in the best interests of ensuring administrative justice for all Australians … whether we are sick of the government being in our lives or not.