



## The Separation of Powers in Queensland

*Includes commentary by Honorary Research Fellow Dr Paul Reynolds.*

### Background

The concept of the Separation of Powers was first developed in Eighteenth Century France by the French political philosopher Baron de Montesquieu (1689 - 1755). The Government of France at the time was an Absolute Monarchy, ruled by the most absolute of all sovereigns, Louis XIV, the so called Sun King who famously declared *L'état c'est moi, I am the state*. Such arbitrary rule is effectively a dictatorship, or, in a term much used at the time, "tyranny". Montesquieu had studied the British system of Government and evolved his theory in response to his understanding of British constitutional arrangements.

The fundamental rationale of the theory is that it separates power among the Executive, the Legislature (Parliament) and the Judiciary. Montesquieu erroneously believed that this was characteristic of the British system. The reality was (and is) that the former two are more interconnected than separate, while both are divided from the Judiciary, the independence of which is strongly protected.

Montesquieu also had a profound influence on the American Founding Fathers, especially Thomas Jefferson. The US Constitution represented a conscious attempt to translate the theory of the Separation of Powers into practice. The Executive (Presidency) is separated from the Congress, which consists of two separately constituted Chambers (Senate and House of Representatives), while both are set apart from the Supreme Court. The necessary linkages are provided by explicit constitutional provisions which regulate the complex

arrangements each must have with the others. For example, the President (Executive) sends the Budget to Congress (Legislature) which must pass it but can alter and amend it. The President nominates Supreme Court judges, but they cannot be appointed unless the Senate (using its power of "advice and consent") ratifies the nomination.

### The Queensland Position

In common with other Westminster systems, Queensland possesses an Executive, Legislature and a Judiciary. But, in respect of the first two, there is an inherent paradox. The Executive owes its existence and legitimacy to its domination of the Legislature, yet the role of the latter is to hold the former to account. How can it do this when it can be overridden, on the floor of Parliament, by the Executive using its numerical superiority? In practice, and over time, a series of developments (both constitutional and conventional) have occurred to regularise and orchestrate Executive/Legislature relationships.

### The Legislative Assembly

The formal provisions concerning the Legislative Assembly are established in the *Queensland Constitution 2001* and the *Parliament of Queensland Act 2001*. These Acts represent a consolidation of constitutional enactments produced by a series of uncoordinated legislative initiatives made over the years following the original *Constitution Act 1867*. The 2001 Constitution Act lists the Legislative Assembly's functions as:

- Providing the state government;
- Introducing, debating and passing laws;
- Providing scrutiny of Government by various parliamentary procedures; and
- Providing avenues for popular representation of citizens' interests.

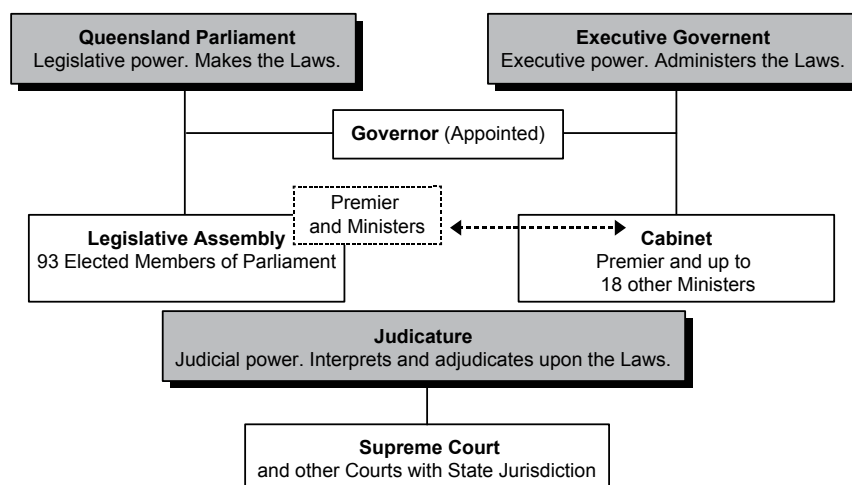


Diagram of the Doctrine of the Separation of Powers as applied in Queensland.



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## Tertiary Factsheet 2.1

In practice, since the 1980s, and especially since the Fitzgerald Report<sup>1</sup> (1989) opportunities for scrutiny of Government and governmental accountability have been greatly expanded through:

- Revision of Standing Orders to provide greater opportunities for private (i.e. non-government) business;
- More resources for the Opposition;
- An expansion of the number and role of the parliamentary committees (commencing in 1988 and continuing through the 1990s);
- The establishment of Estimates Committees to cover the whole range of Government revenue raising and expenditure;
- Reform and modernisation of the parliamentary committee system in 2011, instituting portfolio committees and thus enhancing the Parliament's oversight and examination of legislation.

It needs to be remembered that Parliament is an evolving institution. There is no ideal model. Just as there never was a "golden age" of Parliament, neither has one Parliament been an exact replica of any other. In Queensland this was conclusively demonstrated in 1922 when the Legislative Council was abolished, thereby making Queensland the only unicameral Australian state; a situation shared with the Northern Territory, Australian Capital Territory and, more recently, New Zealand.

### The Executive

The *Queensland Constitution 2001* details the role and position of the Governor. He/she represents the formal legitimacy for all governmental activity. Since 1688, in all Westminster constitutional monarchies, the wielding of power and all decision making has been done in the name of the Crown. Its local manifestation in Queensland is the office and person of the Governor. But because the Governor is appointed by the Crown on the advice of the Premier and while, by long established convention the Governor discharges his/her duties solely on the advice of the Premier and Cabinet, the Government is the only source of political power in the state. For example, while the Parliament has the authority to pass the Budget, the Constitution states that, "Any bill seeking authorisation to spend money from the consolidated fund must be recommended by the Governor. The Governor's message is sent on advice of the Premier; thus only Appropriation Bills that have Government support can be passed." (*Constitution of Queensland*, annotated, 2002, p.65).

The Executive is composed of the Governor (representing the Sovereign) and the Cabinet. The two arms of the Executive are the Executive and the Cabinet. Governor in Council is the Governor acting on the advice of the Executive Council. In practice, this is a weekly meeting of several Ministers with the Governor presiding. This is the formal and legal decision making body to make statutory appointments, approve significant expenditure and subordinate legislation. (*ibid*, p. 33)

Cabinet is specified in the Constitution to consist of the Premier and a maximum of 18 other Ministers including the Attorney General. While the different parties have their own mechanisms for deciding the Cabinet's composition, the appointments are made by the Governor on the Premier's recommendation with the latter allocating the portfolios. (*ibid*, pp. 44 -45).

While the Legislative Assembly must meet at least twice a year (it generally averages 40 - 50 sitting days), and at least every six months, the Executive's business takes precedence in all parliamentary proceedings save for a few specified and limited occasions. Government backbenchers share Question Time equally with non-government MPs. However, Government backbenchers currently have the casting vote on all parliamentary committees, including Estimates Committees, and governmental numerical superiority ensures that it will generally win all divisions on the floor of Parliament. Thus tight party discipline, together with the inherent power that accrues to the Executive means that the Legislature, in all but rare and exceptional cases, is subordinate.

Finally, it should be observed that the electorate has been conditioned to expect two simultaneous outcomes: that Parliament should be representative of the wider community; and that Government should act decisively and have the wherewithall to govern effectively, always remembering that, every three years, it will be held to account by the voters.

### The Judiciary

The section of the *Queensland Constitution 2001* dealing with the Judiciary is comparatively brief, reflecting the separation of the legal and political processes. It provides an outline of the judicial structure, namely a Supreme Court and a District Court; and the mechanisms for the appointment and removal (only for proven misdemeanours or incapacity) of judges and their retirement at age 70. This last provision follows an amendment to the federal constitution, passed by referendum in 1977, which changed the appointment of High Court judges from for life to age 70.

Judicial appointments to both courts, together with Magistrates and Justices of the Peace are made by Executive Council and are not therefore the subject of parliamentary debate. Once appointed, such persons, their activities and conduct are regulated by the legal system. In short, the political processes keep their distance from the workings of the judicial system.

### Conclusion

There is no doubt that, as Montesquieu theorised, concentration of political power in one institution (or person) is an invitation to tyranny, with many examples of a contemporary and international nature as testament to this. The solution he proposed, namely the Separation of Powers, deserves serious consideration because of its inherent worth as a solution to an undesirable situation. However, in Queensland as in other Westminster jurisdictions, the Separation of Powers will never be fully implemented, at least between the Executive and Legislature, because these two units will constantly interact at any number of levels—some formal, but mostly informal according to convention and practice. It is entirely appropriate that the Judiciary stands to one side of this essentially political process. However, a full Separation of Powers between the other two elements is neither necessary nor desirable, particularly when the mechanisms of the political system are both well understood and widely practised.

### References

Carney, G., Separation of Powers in the Westminster System, Paper read to the Australasian Study of Parliament Group (Queensland Chapter), 13 September 1993.

The Constitution of Queensland (Annotated), Constitutional and Administrative Law Services, Governance Division, Department of Premier and Cabinet Queensland, 2002.

<sup>1</sup> G.E. Fitzgerald, 'Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct', Report of a Commission of Inquiry pursuant to orders in council.