

# LOCAL GOVERNMENT ASSOCIATION OF SOUTH AUSTRALIA

## ANNUAL GENERAL MEETING

30 October 2009

### SPEECH NOTES

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#### Acknowledgements

I've been asked to provide some reflection on good governance, perhaps with a focus on practices which minimise or deal well with complaints, and on general observations since coming to South Australia.

Putting together the phrases 'good governance' and 'observations since coming to South Australia', it's very difficult to avoid the debate on the establishment of an Independent Commission Against Corruption (ICAC).

I've noted the extent to which this issue, and other governance issues, appear on your AGM agenda.

I'll express some thoughts about good governance here today, but I won't express a view about whether an ICAC should be established in South Australia.

The reason for that is that nobody elected me as Ombudsman. I was appointed to implement the *Ombudsman Act 1972* - independently, and in the public interest.

I think the elected representatives of the people of South Australia should decide whether we need an ICAC, and I don't think it's appropriate for me to express a view one way or the other, because that might be perceived as prejudicing the independence of the office.

However, I would like to provide some observations on our current governance arrangements, particularly as they relate to local government. Whether or not you believe that an ICAC is desirable, there are some features of our current arrangements that I think warrant comment.

So I'd like to talk a little about:

- What my office can and can't do, and the powers that it has
- Some observations about the governance framework in South Australia
- Some reflections on how people access complaints bodies; and
- Some thoughts on effective complaint management.

#### Firstly, about my Office.....

We investigate administrative action by or on behalf of public sector agencies. That includes:

- Dealing with complaints;
- Undertaking investigations generated elsewhere;
- Making recommendations for change in procedures and legislation;
- Reviewing decisions about release of information under the FOI Act; and
- Providing advice and training.

We don't investigate complaints against Ministers, or against private citizens, businesses or companies unless they're acting 'in performance of... a contract for services with the Crown or an agency'.

Nor do we investigate complaints against police, which are dealt with by the Police Complaints Authority, nor:

- Legal advisers to the State Crown
- Judicial authorities
- Employees complaining about their employers
- Commonwealth bodies

My office investigates administrative action, and that can include conflicts of interest and misconduct. We don't investigate policy - that's the result of a 1990 Supreme Court decision<sup>1</sup> - but we can investigate the administrative acts behind the creation of a policy.

We investigate 'agencies':

- a person who holds an office under an Act;
- 'administrative units' under the *Public Sector Management Act 1995*;
- councils, and development assessment panels;
- any body established for a public purpose by an Act, or subject to control by the Crown or a council;
- any body declared by the Regulations.

Because local government does not have an independent constitutional existence, we can investigate decisions by elected members of councils.

Also, we don't investigate fraud or corruption allegations, which may amount to criminal offences. Because of the provisions of the *Whistleblowers Protection Act 1993* s5(5), like any other agency we must refer any such complaints to the Anti-Corruption Branch of SAPol.

My office has the powers of a Royal Commission, but they have only been exercised rarely in the past. This is because - for the most part - agencies cooperate with our investigations.

However, the Ombudsman's Royal Commission powers are exercised more frequently in Victoria. The Ombudsman there undertakes major investigations - such as one into the Brimbank Council - using similar powers to ours, to examine witnesses on oath.

The Victorian office also operates under a law requiring strict confidentiality for its investigations, which it uses - for example - to require witnesses not to tell their bosses they have been interviewed. This is a powerful investigative tool.

We have a similar confidentiality provision in our Act, although to my knowledge our provision hasn't been used in the same way as the Victorian one.

It's interesting to note that the Law Institute of Victoria is reported recently as saying that 'the coercive powers of the Victorian Ombudsman run the risk of eroding the rule of law in the state and should be reviewed by an independent judicial inquiry'. The Victorian Government has rejected that view<sup>2</sup>.

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<sup>1</sup> *City of Salisbury v. Biganovsky* (1990) 54 SASR 117

<sup>2</sup> The Sunday Age 18 October 2009

(THE coercive powers of the Victorian Ombudsman run the risk of eroding the rule of law in the state and should be reviewed by an independent judicial inquiry, according to Victorian lawyers.

To my mind, there are some questions about our confidentiality provision. I don't think it's precise scope is clear.

And both my predecessor and I have suggested that it sometimes operates to prevent the Ombudsman from telling people about things which it might be in the public interest to disclose<sup>3</sup>.

The annual budget for my office is just over \$1.5m. We have 14 FTE staff. Whilst the allocation of resources to different tasks within the office is being adjusted, and we are filling some vacant positions, I believe this level of resources is appropriate for what we currently do. But if we were to seek to do more, we would need more resources.

### **Moving on to my second topic, some observations about the public sector governance framework in South Australia....**

I think its very important that we recognise that people need guidance about governance issues.

Jerrold Cripps QC, head of the NSW ICAC was interviewed on radio a couple of weeks ago and when asked about his office he said:

*The ICAC was established to do two things, firstly to investigate and expose corrupt conduct in the public sector, and the second one was to educate the public against the dangers of corruption and how to avoid it ....*

He went on to say;

*Most education that goes to the public authorities derives from the many public investigations we have. Those public investigations will reveal an aspect of corruption when it's found and that's how you find out what's gone wrong<sup>4</sup>.*

I interpret that comment as suggesting that conducting an investigation educates all the other agencies that aren't being investigated - a deterrent effect, if you like.

Contrast that approach with the recommendations of the Tasmanian Parliamentary Joint Select Committee on Ethical Conduct<sup>5</sup>, which proposed an Integrity Commission for that

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*The Government immediately rejected the call, saying it would do nothing to weaken the powers of the Ombudsman's Office.*

*Law Institute of Victoria chief Michael Brett-Young said Ombudsman George Brouwer had powers that "shouldn't exist".*

*Among these powers was the ability to deny people legal representation when they were being interviewed. The Ombudsman has also asserted the right to direct people not to tell anyone they have been interviewed, a power disputed by the Law Institute.*

*"It's a very strong power, and it's also contained in the anti-terrorism legislation," Mr Brett-Young said. "We'd be very concerned about that being used by the Ombudsman." Protections such as the right to legal representation "in all circumstances" were checks and balances in the system that made Australia a civilised country, he said. They were also part of Victoria's Charter of Human Rights and Responsibilities.*

*The Law Institute has called for a probe into the powers of all bodies fighting corruption and crime in Victoria.)*

<sup>3</sup> Ombudsman SA, *Annual Report 2007-08*, p4; *Annual Report 2008-09* p1

<sup>4</sup> ABC Radio, 15 October 2009

**(Conlon:** *To the basics of what's the job of an ICAC in your state?*) The ICAC was established to do two things, firstly to investigate and expose corrupt conduct in the public sector, and the second one was to educate the public against the dangers of corruption and how to avoid it etc **(Conlon:** *It's interesting that in that second one to educate, it's actually to educate the public authorities as well, how do you do that?*) Most education that goes to the public authorities derives from the many public investigations we have. Those public investigations will reveal an aspect of corruption when it's found and that's how you find out what's gone wrong)

<sup>5</sup> Tasmanian Parliament, Joint Select Committee on Ethical Conduct, *Final Report - 'Public Office is Public Trust'*, ('TPJSCEC') No 24 of 2009,

State. The legislation implementing these recommendations was tabled in the Tasmanian Parliament yesterday. Whilst the Bill wasn't available on the Tasmanian Parliament's website when I checked this morning, press reports indicate that it fairly closely implements the Committee's recommendations.

I'll read the Committee's major recommendations:

*The objectives of a Tasmanian Integrity Commission are to:*

1. *Improve the standard of governance in Tasmania;*
2. *Enhance public trust that misconduct, including corrupt conduct, will be investigated and brought to account; and*
3. *Elevate the quality of, and commitment to, good governance by adopting a strong, symbolic and educative role.*<sup>6</sup>

*The Commission will achieve these objectives by:*

1. *Educating public officials in Tasmania on integrity;*
2. *Investigating allegations of corrupt or inappropriate behaviour made against public officials in Tasmania; and*
3. *Making findings in relation to those investigations and taking the appropriate action.*<sup>7</sup>

The Tasmanian Integrity Commission would encourage ethical behaviour by developing - in consultation with relevant university bodies - training courses, resources, and civic education<sup>8</sup>.

And a Tasmanian Commission would be a mentoring resource to - in the words of the Committee - 'provide advice on a confidential basis to individual public officials about the practical implementation of the rules in specific instances'<sup>9</sup>.

As I've said, I believe that an Ombudsman's office has a role in educating and promoting good governance practices amongst State agencies and local government - not simply investigating complaints.

The Government clearly takes a similar view, judging by the *Local Government (Accountability Framework) Amendment Bill 2009*.

So does your Association. I recognise and support the effort which you are making to improve ethical behaviour and governance in the local government sector, through initiatives such as the Good Governance Assessment Program and the Governance Panel.

I also acknowledge the work of the professional associations in this area.

Further, in this State we have a Public Sector Performance Commission which has a mandate to improve the State's public sector performance. I am aware that it sees promotion of ethical decision-making in the State sector as one of its tasks, and I support that.

All these initiatives demonstrate our shared responsibility for improving governance.

Before I leave the Tasmanian recommendations, let me make a couple of further observations which might be relevant in our context.

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<sup>6</sup> TPJSCEC Rec 29

<sup>7</sup> TPJSCEC Rec 29

<sup>8</sup> TPJSCEC Rec 6

<sup>9</sup> TPJSCEC Rec 16

The first is that several improvements to governance structures which are proposed for adoption in Tasmania are already features of our governance landscape here.

One proposal was for a Register of Interests for each local government council<sup>10</sup>. That mechanism, of course, will be well known to you already<sup>11</sup>.

Another recommendation was for a Parliamentary Committee to oversee statutory offices such as mine<sup>12</sup>. That seems to me to reflect a desirable relationship between the Parliament and independent watchdogs like my office.

Of course, we have such a Committee here - the Statutory Officers Committee - which has to report annually on how the Ombudsman's office is operating. I believe it is important that I should be accountable to the elected members of Parliament for the way I do my job.

A third proposal was that a Tasmanian Integrity Commission would also review Ombudsman recommendations which are not implemented, presumably with a view to encouraging their adoption<sup>13</sup>.

It seems to me that there's little need for a similar function here, because there is already a high level of compliance with Ombudsman recommendations.

For example, the Accountability Framework Bill - whilst doing many other things as well - implements some of the recommendations made by my predecessor, and I welcome that.

Similarly, I've been impressed by the way that your Association has established its Regulatory Services Program to improve procedures and training around regulatory functions. I recognise that this has stemmed from recommendations made by my predecessor.

I'd also like to acknowledge here that many individual councils have responded very positively to recommendations from my office. I appreciate that it can be an uncomfortable business being the subject of an Ombudsman intervention - I know it was when, in a previous life, I was on the receiving end - but our community benefits greatly through the improvements to public administration that are made as a result.

### **Turning now to my third topic - some reflections on how people access complaints bodies.**

The Commonwealth Government's Access to Justice Strategy<sup>14</sup> puts a lot of emphasis on access to all sorts of dispute resolution techniques, not just the courts. Of course that includes complaints bodies such as Ombudsmen.

The Strategy - which was released last month - proposes some principles to guide access to justice, then sets out a methodology by which those principles can be implemented.

A key element of the methodology is what it calls 'triage', or:

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<sup>10</sup> TPJSCEC Rec 2

<sup>11</sup> *Local Government Act 1993* ss64-72

<sup>12</sup> TPJSCEC Rec 19(1)

<sup>13</sup> TPJSCEC Rec 19(2)

<sup>14</sup> Commonwealth Attorney General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, 23 September 2009

*Enabling matters to be directed to the most appropriate destination for resolution, irrespective of how people make contact with the system.*

It goes on to describe this function as follows:

*All elements of the justice system need to have an inbuilt capacity to direct people to the most appropriate form of resolution. Without a triage capacity people's attempts to approach the justice system may be unsuccessful and they may be rejected; or the pathway through the justice system may not be the most appropriate pathway, being determined by how they first made contact with the system (or how the system made contact with them)<sup>15</sup>.*

It also suggests that a policy of 'no wrong number, no wrong door' ought to improve access to information for people with legal issues.

The Tasmanian Committee was also persuaded by the argument that there is a need for a triage function to be performed by an oversight body – to receive; assess; and either refer or investigate complaints received<sup>16</sup>.

The common experience is that there are quite a number of separate complaints bodies available, to the extent that it can be hard for people to identify the best avenue for their particular complaint.

Similarly, I've no doubt that many agencies have experience of responding to multiple 'complaints' bodies about the same basic complaint.

In the past year, my office dealt with over 2500 substantive complaints, but I estimate that we referred perhaps 5 times that number to other places – back to a complaints process established by the original decision-maker, for example, or to a more appropriate body such as the Equal Opportunity Commissioner or the Telecommunications Industry Ombudsman.

The State Government is putting effort into making it easier for citizens to contact the State, through the development of the *Service SA* website. On that website, one of the areas being developed is 'Citizens and your rights'.

I'd like to see it us make it easier for South Australians to get to the right complaints body quickly, easily and effectively - and not just through technology like websites. I think that would be in the interests of individual complainants, and of the agencies they want to complain about.

I don't think people mind which body investigates their complaint, as long as it's done fairly and effectively, but they can get frustrated by lots of referrals.

In Queensland, for example, the various State-level complaints authorities have very recently got together to establish a joint complaints approach, supplemented by multi-lingual brochures. That's the sort of thing we could look at here.

### **And it leads me to my final topic - some thoughts on effective complaint management.**

I believe that there's three persuasive reasons why it's a good idea to have an effective complaints handling process.

First, as you know, you're required to have a grievance procedure in place by the *Local Government Act 1993* s270. If and when the Accountability Framework Bill commences

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<sup>15</sup> *Access to Justice Strategy* p63

<sup>16</sup> TPJSCEC Summary of Findings p9

operation, your legal obligation will be extended to include the development and maintenance of policies, practices and procedures to deal with reasonable service requests, and complaints.

But quite apart from that legal obligation, complaints are a really good way to know your own business. They can provide an excellent pointer to areas where things can be improved.

And the third good reason is that my office will be much less inclined to investigate a complaint ourselves if we know that a fair and effective complaints handling process exists within the agency complained about.

I know that the self assessment tool in your Good Governance Assessment Program has a section on complaints management, and I think that's a good starting point in establishing the necessary standards.

Also, a number of Ombudsman offices in other places have published guides to good complaint handling - see in particular the Commonwealth, NSW, Victorian and Queensland Ombudsmen websites. The Queensland one also has a self-audit tool based on their requirements for complaints systems in that State.

As I've said, I see it as a proper and desirable role for an Ombudsman to publish these types of materials to promote good public administration, and I'll be looking to do that in the future.

According to the Commonwealth Ombudsman<sup>17</sup>, the key elements of a good complaint handling system are:

- Having a **culture** that acknowledges complaints as a means of strengthening their administration and improving their relations with the public
- Applying the **principles** of fairness, accessibility, responsiveness, efficiency and integration
- Having skilled and professional **people** (*particularly to deal with difficult complainants*)
- Having a clear **process** based on acknowledgement, assessment, planning, investigation, response, review and consideration of systemic issues
- Doing an **analysis** of the results of complaints.

And I say again that if you put such a system in place, not only will you have the benefit of less attention from my office, but you will also have the opportunity to use the learnings from complaints to improve the services which you provide.

I want to emphasise that my Office should be an exemplar in the way complaints are handled. We are working hard on this, and reviewing our internal processes is our principal focus for the current financial year.

### **So in conclusion....**

... there are many other things I could talk about.

For example, a number of Australian jurisdictions are reviewing their whistleblower and FOI legislation. But the content of those initiatives, and how our legislation stacks up against the current 'best practice' models, is a matter for another day.

I'll leave it by observing that when it was enacted the South Australian *Whistleblowers Protection Act* led the country in an important aspect of how we govern ourselves.

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<sup>17</sup> Commonwealth Ombudsman, *Better Practice Guide to Complaint Handling*, April 2009

I think that should be our aspiration today too, and I wish you well in your consideration of the governance matters on your AGM agenda.

ENDS