

4 January 2010

Mr Martin Moynihan
Chair
Crime and Misconduct Commission
GPO Box 3123
BRISBANE QLD 4001.

Dear Mr Moynihan

Review of Ministerial Office/Public Servant Interaction

I refer to the CMC's call for public submissions into its review of Ministerial Office/Public Servant interactions. I respond in my capacity as an academic with considerable expertise on this matter, having published extensively on the issue, including the only book in twenty years on the topic in Australia: *Power Without Responsibility: Ministerial Staffers in Australian Governments from Whitlam to Howard* (UNSW Press, 2007).

In addition to my research, I have significant practical experience of ministerial staffing arrangements and the interface between staffers and public servants. I have long been involved in providing education and professional development for public servants at different levels through programs offered to mid-level public servants at Griffith University and at more senior levels through Griffith and the Australia and New Zealand School of Government (ANZSOG) across Commonwealth, State and Territory jurisdictions and New Zealand. I have also designed and delivered professional development programs for groups of ministerial staffers, including an ANZSOG program delivered recently in Queensland. You may be aware that I am a member of the Board of Commissioners of the Queensland Public Service Commission and that I sat on the Premier's Integrity and Accountability Roundtable of experts.

My submission to the Integrity and Accountability in Queensland discussion paper, enclosed at Attachment A, addressed issues concerning ministerial staff and the importance of regularising and professionalising their role and status within executive government in Queensland. It recommended the adoption of separate legislation for ministerial and electorate office staff and a review of government staffing arrangements. The Queensland government's response to the discussion paper committed to introduce legislation that will govern ministerial staff and electorate officer employment and disciplinary processes by mid-2010.

Given I have canvassed issues of ministerial staff accountability, management and professionalism extensively in publications (for a full list see Attachment B), my submission to the current CMC review is relatively brief. I note that while problems of accountability, conduct and behaviour, management and 'fit' are endemic to personal staffing systems, there are particular challenges at the State level, where ministerial offices are collocated in departments. Closer, more frequent interactions can help foster effective working relationships, but it can be difficult to maintain an appropriate professional distance when partisan and non-partisan advisers are located in such close proximity.

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I am of the strong, empirically-informed view that solutions lie not in excessive prescription or regulation, additional oversight or investigatory mechanisms, but in education and professional development for the key parties to the advisory relationship: Ministers, ministerial staff and public servants; in clear frameworks to govern relationships among core executive actors; and in improved 'political governance' – a theme raised consistently by former Senator for Western Australia, Andrew Murray, who visited Brisbane as a guest of Griffith University in February 2009 and delivered an ANZSOG public lecture on the topic (the text of which I enclose as Attachment C). In the ministerial staff context, this would include establishing institutional structures to improve staff recruitment, selection, induction, professional and performance management, but I would stress that responsibility for the management of ministerial offices rests squarely with ministers and particularly the Premier and the Premier's Chief of Staff.

The issue under review by the CMC is an important and complex one. The Commission's final report should take account of the substantial literature that now exists on this topic and reflect an appropriately evidence-informed understanding of both the problems and potential of the role of ministerial staff, and their shared responsibility with public servants for ensuring that ministers are well supported. It will be particularly important to avoid appeals to formal legalistic and normative ideas about Westminster principles as characterised, for example, the Gomery Commission in Canada. Rhodes, Wanna and Weller have demonstrated convincingly that notions of Westminster governance are strongly contested and reflect the beliefs, interpretations and experiences of elite actors.¹ 'Westminster' is not a fixed set of constitutional arrangements but rather an evolving, adaptable set of beliefs and traditions that frame understandings about the nature of relationships between ministers and public servants, their respective responsibilities and accountabilities. The Commission should be cognisant of this subtlety and nuance when considering the interface between ministerial offices and public servants. It would be well worth engaging in a public debate about these understandings, perhaps through an appropriate parliamentary committee.

In the Commonwealth, the relationship between ministerial staff and public servants has been investigated by two Senate Committees, both of which produced substantial reports: The *Senate Select Committee on a Certain Maritime Incident* in 2002 and the Senate Finance and Public Administration Committee's 2003 inquiry into *Staff Employed under the Members of Parliament (Staff) Act 1984* (the MOP(S) Act). These inquiries drew on public submissions but also heard evidence from relevant experts: researchers, senior officials and former staffers. Australian public servants' understanding of their roles and responsibilities in respect of ministers and their offices is supported through the values outlined in the *Public Service Act 1999*, through continuing professional development coordinated by the Australian Public Service Commission, and is monitored and reported on in the annual *State of the Service Report*.

Informed by the findings of these Senate inquiries and data presented through *State of the Service* reports, the Rudd government has implemented a range of reforms to ministerial staffing arrangements, including publication of an Annual Report on staff employed under the MOP(S) Act (the legislative framework that governs ministerial and electorate office staff in the Commonwealth). These are described in a recent research paper by Nicholas Horne from the Parliamentary Library,² and in a book that I have written with Professor Patrick Weller, *Learning to be a Minister: Heroic Expectations, Mundane Realities* (Melbourne University Press, forthcoming).

¹ Rhodes, R. A.W., Wanna, J. and Weller, P. 2009, *Westminster Compared*, Oxford University Press

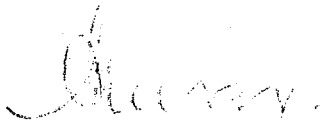
² Horne, N. 2009, *The Members of Parliament Staff Act Framework and Employment Issues*. Parliament of Australia Department of Parliamentary Services

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Ideally, proposed reforms to ministerial staffing arrangements will have bipartisan support. The issue of Opposition staffing is important and also warrants attention. My submission to the Integrity and Accountability green paper recommended that the government initiate a review of government staffing arrangements to identify the support needs of ministers and opposition office-holders in terms of staff establishment needed to manage private office workloads; the qualifications and professional experience appropriate to positions on private office staffs; remuneration and employment arrangements that would ensure high quality applicants are attracted to on government and opposition personal staffs; and management arrangements that would ensure all staff have access to appropriate induction and professional development opportunities. I continue to believe there would be value in such a review in Queensland.

I outline some other issues in the submission that follows. I would of course be happy to discuss any aspect of it or matters raised here should you so wish.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'Anne Tiernan', written in a cursive style.

Dr Anne Tiernan

Introduction

The practice of appointing partisan personal staff to the private offices of ministers is a comparatively recent development in Queensland. The staffing system has become progressively institutionalised in the Australian Commonwealth since the mid 1970s, and in other state jurisdictions from the late 1970s, but has become part of Queensland's core executive only since the election of the Goss government in 1989.

The growth in size, influence and importance of the ministerial office has evolved rapidly, mostly as a response to ministers' demands for more support to cope with the demands of an increasingly complex and dynamic policy and political environment, but there has been little consideration of its implications and practical consequences and only limited attempts to regularise and support the professionalism of ministerial staff. Neither have there been systematic efforts to ensure ministers have the necessary skills to manage their ministerial office, or to cope with the pressures and demands of their roles, which have increased under the weight of a 24 hour news cycle, a rise in public expectations and the wicked nature of many of the policy problems now facing governments. Ministerial staff are a mark of their minister. In our forthcoming book on Commonwealth ministers, we quote a former senior Chief of Staff who noted:

Good staff help a good minister to be better and a bad minister to remain in office. Bad staff will retard a good minister and will be unable to protect a bad minister from him/herself.¹

At the same time, 'political management' reforms that have sought to make the career public service more responsive to political direction and more attuned to the priorities and preferences of the government of the day have challenged the role conceptions of public servants, particularly those at senior levels employed on contracts. Two decades of almost continuous change, devolution of responsibility for induction and professional development, high levels of temporary employment, staff turnover and high rates of lateral recruitment may have left some public servants uncertain about their professional obligations in respect of advising ministers and working with their staff.

Role confusion and a lack of certainty over the respective responsibilities and accountabilities of partisan staff and public servants are evident across staffing systems internationally,² and indeed some tensions are inherent and indeed healthy, reflecting the different imperatives and motivations of key actors, as well as the relentless demands of modern politics. Relations between ministerial offices and public service departments are not assisted by the myths and stereotypes that have proliferated through the popular media in programs such as *Yes Minister* and *The Hollow Men*. It has long been my view that dealing in myths and stereotypes about ministers and their staff on one hand, and public servants on the other does nothing to address the substantive challenge of ensuring ministers, and through them citizens, are well served.

In this submission I argue it is time to move beyond diagnosis of what might be wrong with arrangements as they have developed, towards a focus on ensuring the advisory systems that support government decision-making perform better and more effectively. I outline some specific suggestions by which this might be achieved, before responding specifically to the questions posed by the CMC. First though, I provide a brief outline of the staffing system both in theory and in practice.

¹ Tiernan and Weller (forthcoming).

² See Tiernan (2007, particularly Chapter 9).

A hybrid advisory model

As a consequence of the reforms noted above, the advisory system that now supports Australian ministers is a hybrid. It comprises on the one hand, a professional and impartial career public service, and on the other, a network of partisan staff in ministerial offices whose primary loyalty to their minister and the government of the day, on whom their tenure depends. Ministerial staff and public servants share responsibility for supporting ministers to make informed and defensible policy decisions. The model is premised on the belief that these two groups bring *distinct* but *complementary* skills to this shared endeavour. The public service is assumed to provide impartial advice and options based on deep knowledge and expertise of the policy area, including advice on how a minister might achieve his/her policy goals; information and advice about emerging problems and issues and so on. Once decisions are taken, the public service is responsible for their implementation and delivery.

Ministerial staff roles have evolved substantially since the 1990s, particularly in Canberra. Maria Maley's study of ministerial staff in the Keating government identified five roles played by staffers.³ These include:

1. Personal support: this encompasses managing the minister's time; being the ministers 'eyes and ears'; and assisting ministers in the discharge of their responsibilities by providing intellectual and emotional support.
2. Political support: assisting ministers with parliamentary work; liaising with the political party and stakeholders; managing issues.
3. Steering policy: directing, mobilising and supervising the work of departments towards the minister's goals and priorities; providing an alternative source of policy advice to ministers, including by generating ideas, developing policy proposals and having input at other stages of the policy process.
4. Communication: political communication and articulation, including speech writing, media presentation, packaging of policy initiatives and decisions; media management. Staffers also serve as key communication channels - acting as conduits for information exchange within and outside of government.
5. Executive coordination: coordinating within and across portfolios, the ministry etc.

Ministerial staff in Queensland play broadly similar roles, though the policy role is less well developed than is the case in the Commonwealth.

Despite three decades of experience in Australian jurisdictions, there remains contention over what constitutes an appropriate role for ministerial staff. Although they are key actors in contemporary governance, their position within Westminster systems is constitutionally anomalous. Traditionally the public service enjoyed a monopoly over the provision of advice and support to ministers. Now arrangements are more porous and contestable.

To the extent there is a theory of ministerial staff, it is that staff are an extension of their Minister. They provide additional capacity to assist ministers, but have no personal power or authority. Instead, they act as 'surrogates' of the minister – exercising *delegated authority* on the minister's behalf. They have no power to direct public servants – public servants are answerable to their agency head, whose responsibilities and accountabilities are prescribed in

³ Maley, M. *Partisans at the Centre of Government: the Role of Ministerial Advisers in the Keating Government 1991-96*. Unpublished PhD thesis, School of Social Sciences, Australian National University, Canberra

legislation and whose relationship is with the minister and through their contract, with the Premier/Prime Minister.

My research has identified four problems with ministerial staffing arrangements in their current form. These are problems of accountability, conduct and behaviour, management and 'fit' within a Westminster model that assumes a close, cooperative relationship between ministers and public servants. As my later comments address questions of management and how best to accommodate the important and legitimate role played by ministerial staff, I focus here on accountability and behaviour.

Accountability

Ministerial staff are accountable to their minister and through the minister to Parliament. Under the convention of individual ministerial responsibility, staff act with the knowledge and authority of their minister. Thus advising the staff is the same as advising the minister. There is a vacuum of accountability if ministers are unwilling to accept responsibility for the actions of their staff.

In practice this can be problematic. It can be difficult for officials to know whether a staffer is acting with the authority of their minister. Equally, as staffs have become larger, and their workloads have intensified, questions have arisen about the capacity of ministers to supervise and manage their staffs. But, as things currently stand, there is an accountability problem if they fail to do so. The Senate Finance and Public Administration Committee recognised this potential and adopted a recommendation suggested by former Chief of Staff to Prime Minister Keating, Dr Don Russell, that if a minister refuses to take responsibility for the actions of one of their staff, the Chief of Staff should be accountable. Federally, the major political parties have accepted that ministerial staff should not be called before parliamentary committees; and there is no equivalent of the CMC.

In Queensland, accountability arrangements for staff are far stronger than in comparable jurisdictions, but the tenet that ministers are responsible for the actions of their staff is an important one that should continue to apply, since staffers are constitutionally an extension of their minister. There is a danger, noted elsewhere, that otherwise staff may, whether by choice or coercion 'take a bullet' on behalf of their minister, with significant, even potentially criminal implications. Knowing they are ultimately responsible for the actions of their staff would create a powerful incentive for ministers to ensure their staffers operate in accordance with the parameters established between the minister and agency head, who are formally accountable for administering the department.

Conduct and behaviour

Ministerial staff have been accused of arrogance, imperiousness and bullying in their dealings with public servants. Such incidents point to inherent tensions in the relationship. Far from being complementary, they are sometimes competitive, and potentially asymmetrical, given staff often enjoy close personal relationships with ministers and can shape their attitudes towards departments and officials. Recent scandals and controversies suggest such problems are more likely to occur among less experienced, junior staff and with media advisers, who operate under significant pressure to respond to journalists and may have limited prior experience in government.

The persistence of problems of staff conduct and behaviour over time and across different administrations and governmental systems suggest an organisational cause. I argue that

problems of behaviour are attributable to the operating environment in which ministerial staff work. They work long hours, face intense workload pressures, are in precarious and dependent employment relationships and may have limited skills or experience for the positions they occupy. Many staff are selected on the basis of their loyalty to the minister, as a reward for political service, or in the expectation they will soon contest pre-selection for political office, rather than because they have specific skills or expertise. Given they are often young, temporary and receive limited induction or professional development, it is not surprising there are occasionally problems in relationships with officials.

Staff attitudes and behaviour towards departments are the responsibility of ministers. Senior officials should feel confident that they can raise issues of inappropriate behaviour with senior ministerial staff and/or with ministers and that they will be dealt with accordingly. Separate legislation for ministerial staff in Queensland will clarify the issue of disciplinary responsibility for staffers, which under current arrangements, rests with the head of DPC.

Some suggestions for improvement

The Queensland government's decision to adopt separate legislation for ministerial and electorate office staff is a welcome development that, together with reforms to Queensland's integrity and accountability framework, should address many of the concerns that have prompted the CMC's review. I offer three additional suggestions, based on my research and experience, aimed at improving performance.

First, all parties to the advisory relationship (Ministers, ministerial staff and public servants) should each have a thorough understanding of their professional role, responsibilities and importantly, accountabilities, and how these relate to those of the other parties. This would assist those coming into key roles, and those who work with them, to understand and appreciate the pressures and demands that each confronts; the skills and motivations that each brings to their task; and would ensure each has realistic expectations as a basis for building effective relationships. Very little has been written on arrangements in Queensland. I suggest that as in other jurisdictions, notably the Australian Commonwealth and the United Kingdom, a parliamentary committee may be the most appropriate forum for considering these issues. It is important that there be a clear and ideally, a bipartisan view of how these relationships should operate in the contemporary Queensland context.

Given there are high rates of turnover among ministers, ministerial staff and public servants, it would be important to ensure that there is a mandatory requirement for all new appointees to undertake relevant induction and professional development programs. Some of the submissions to the Integrity and Accountability discussion paper canvassed ideas drawn from other sectors, about how to ensure professional knowledge remains current.

Second, we need to foster the professionalism of each group. Professionalism connotes specialist skills and expertise. More systematic effort and attention should be given to recruitment and selection, induction, professional development and support for ministers and ministerial staff. Responsibility for such initiatives would rest most appropriately within the executive – perhaps, as in the Commonwealth, through a central capacity for strategic human resources management, supported through the Premier's office. A starting point for this process would be a review of government staffing, as recommended in my submission to the Integrity and Accountability in Queensland discussion paper, since levels of remuneration for senior staff here are much lower than in comparable jurisdictions, making it difficult to recruit and retain individuals with requisite professional skills and experience, particularly to Senior Policy Adviser (Chief of Staff) positions. Experience suggests that the leadership provided by

Chiefs of Staff is crucial to the performance of ministers and their offices and to the fostering of effective working relationships with the bureaucracy and stakeholders. These senior positions need to be appropriately classified and remunerated to attract the highest quality candidates to these roles.

Increasingly, professional development for public servants will need to address the disruption and uncertainties to the roles and professional norms of career officials wrought by successive waves of public sector reform. Senior and mid-ranking public servants need to develop skills in working effectively with ministerial offices. As in the Commonwealth, this responsibility sits most appropriately with the Public Service Commission, drawing on relevant expertise.

Ministers have significant potential to drive improved performance in the advisory systems that support them by demanding professionalism from their partisan as well as from their non-partisan advisers. Effective ministers recognise that they will be better served by arrangements that are well organised and managed, and which draw deliberately on the complementary skills, expertise and perspectives that the hybrid advisory system offers. Less effective ministers don't necessarily appreciate this. The challenge is to ensure good practice becomes systematically the norm.

Finally, it is important to recognise that making the hybrid advisory model work depends on the quality of relationships that develop between ministers, their staff and departments. Effective relationships cannot develop in the absence of respect – where the contribution of each of the parties is not recognised and valued.

Although personalities are inevitable, I think all parties to the advisory relationship should recognise their potential to help improve it, and take responsibility for doing so in the interests of good governance. I would observe that in many jurisdictions, including Queensland, responsibility for developing effective relationships has been borne disproportionately by public servants. Ministers and their staff have a reciprocal obligation to approach relationships openly and positively, and to work to ensure relationships of mutual professional respect and trust are developed. Formal protocols and arrangements for managing contact between the ministerial office and department can be helpful in this regard, particularly where they are negotiated cooperatively and refined over time.

Fundamentally, effective relationships between ministerial offices and the public service reflect the quality of leadership shown by Ministers, Chiefs of Staff and agency heads. First ministers have particular obligations to intervene where there are difficulties in relationships between a minister and their department. As notional head of the staffing system, the leader's Chief of Staff has responsibilities in respect of difficulties within and between ministerial offices, and agency heads, particular the head of the first minister's department have responsibilities in respect of difficulties agencies may have with ministers and/or their staff. There must be mechanisms within government to support and assist relationships when problems or issues arise. This leadership has sometimes been found wanting, to the detriment of all concerned.

Questions raised by the CMC

In the call for public submissions to its review of ministerial office/public servant interactions, the CMC has sought responses to three specific questions. In the section that follows, I respond to each of these in turn.

1. *What protocols, procedures or constraints should be in place to guide ethical and mutually respectful interactions between a minister's office and public servants?*

As noted above, ministerial staff and public servants share responsibility for ensuring ministers receive the advice and support necessary to make informed and defensible decisions in the interests of the citizens they serve. Protocols and procedures, though desirable and useful, will only be effective if all parties have a clear conception of their professional role and obligations, including importantly, its limits.

In professional development sessions for public servants and ministerial staff, I encourage both groups to:

- Resist myths and stereotypes – stories they may have been told about a particular minister or staffer, or about a department and its 'tricks'; to take people as they find them; and to suspend judgment until they have their own experience to go on.
- Embrace the principle of complementarity – by understanding and appreciating where each other is coming from, as suggested above.
- Negotiate a clear and mutually agreed division of roles and responsibilities, that is respectful of the different roles, obligations and accountabilities of ministers, their staff and public servants; and that recognise the knowledge, skills and capabilities that each side can contribute to their shared task.
- Understand and accept the potential for conflict, recognising that tension is inevitable and even healthy. Contestability is intended to sharpen the quality of advice to ministers and the performance of partisan and non-partisan advisers.
- Take all opportunities to communicate: about goals and priorities, about the minister's support needs, preferred style of work and briefing – whether on paper, by presentation and discussion etc.
- To keep talking, even and perhaps especially, when things go wrong. Andrew Podger argues this persuasively in his recent monograph on the role of Departmental Secretaries and offers useful advice on maintaining relationships even during a crisis.⁴

While the development of protocols to guide the interface between ministerial offices and departments is often desirable, such arrangements should be developed in negotiation between ministers, the SPA and agency head, usually as part of an incoming minister's brief. The sharing of good practice is to be encouraged – among ministers; between SPAs and ministerial offices; and between agency heads and departments across government.

The question of 'constraints' is more problematic – it implies rules and prescriptions that would be unnecessary if all parties understand and observe their professional roles and have access to appropriate advice and assistance should problems or difficulties arise.

2. *How may public servants be empowered to challenge or question a request or direction from the minister's office that they consider to be inappropriate?*
3. *What needs to be done to ensure that public servants at all levels maintain their obligation to provide independent, apolitical and impartial advice, and to maintain the freedom to do so?*
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These questions are oddly framed, since they imply that public servants are not currently empowered to do so. It is recognised there are tensions and difficulties in relationships

⁴ Podger, A. 2009, *The Role of Departmental Secretaries: Personal Reflections on the Breadth of Responsibilities Today*. ANU ePress, Canberra.

between offices and departments from time to time, but public servants have a clear obligation in legislation and the code of conduct to provide advice and support that is professional and impartial. Sometimes that advice will not be welcome. It may put a minister in a difficult position or reveal problems or issues that have their origins in the department. Nonetheless it must be provided. All parties must recognise and understand that. As noted above, it is a matter of professionalism and for leadership if they do or can not. As noted, the Premier, the Premier's Chief of Staff and the Director-General of the Department of the Premier and Cabinet have a responsibility to intervene if efforts to resolve problems are not successful.

Public servants should respond to legitimate requests for advice and support from ministers' offices. If they are uncomfortable or uncertain about a request, or are concerned it is not authorised by the minister, they should refer the matter to a more senior officer and, if necessary, to the agency head, who in turn would raise it with the minister. It may be a matter of poor or unclear communication, reflecting a lack of experience or understanding of what is appropriate, rather than nefarious intent. Professional development can address these kinds of problems, as sometimes too can a request to put the request in writing so as to be clear about what is being sought.

In the Commonwealth, it was common until the mid-1990s for ministerial (and key Opposition) offices to be staffed by public servants seconded under the MOP(S) Act. It was recognised as a strategic professional development opportunity for officials who harboured aspirations for career advancement, because it enabled them to develop an appreciation of the demands on ministers and to hone their advisory skills. Many of the current cohort of Secretaries served on ministerial and/or Opposition staffs.

This professional pathway seems less common in Queensland, perhaps because of classification and remuneration differentials, or out of fear of being seen as 'partisan'. It is to be hoped the introduction of separate legislation for ministerial staff might encourage the practice of offering secondments to up and coming public servants, who while in ministerial office roles can help build policy capacity and understanding there of how to work effectively with departments, and on return to a non-partisan role, can assist in fostering effective relationships from their agency. It is worth noting too that many Chiefs of Staff in the Commonwealth have extensive public service and other career experience. Public administration in Queensland will be best served if ministers and opposition office-holders have access to advice and support from an appropriately diverse talent pool of appropriately qualified professionals, both in their private offices and the bureaucracy.

Introduction

I am pleased to offer this submission in a private capacity. Given my professional interest and expertise in public administration, and on the systems of advice and support to decision-makers, my comments focus primarily on the Queensland Public Service (QPS) and on the staff of ministers (ministerial staff) and other office-holders (opposition staff, electorate office and parliamentary staff).

Table 1.1 on page 4 of the Green Paper documents the extensive range of legislative and institutional architecture aimed at ensuring the integrity and accountability of Queensland's system of governance. These are supplemented by a variety of guidance documents and codes of conduct that seek to promote professional and ethical conduct by those whose role is to serve the people of Queensland. These measures and the oversight and investigative mechanisms designed to ensure compliance and prevent misconduct in the exercise of official duties have developed and been augmented in the twenty years since the Fitzgerald Inquiry.

On paper, Queensland's integrity and accountability framework presents as one of the most wide-ranging in the nation, yet anxiety persists that public institutions and decision-making processes in the state are less than optimal. It is difficult to gauge the strength of perceptions of official misconduct or malfeasance; however since public trust and confidence are fundamental to the health of any system of governance, I take the opportunity to offer some thoughts on how current arrangements might be improved and enhanced.

Any integrity and accountability framework is built on premises and assumptions – a theory for want of a better phrase, about the consequences that will flow from the measures implemented. Queensland faces a choice about whether its integrity and accountability model should be premised on an *inherent distrust* of people in public office: Members of Parliament, ministers, their staff, public servants and the police, or whether it is premised on *trust* in the motivations of individuals drawn to the service of the public.

While safeguarding against the potential for use or indeed abuse of office, a trust model would seek to ensure that appropriate professional norms and standards pertain to public office-holders, and that they are well supported to discharge their significant responsibilities through appropriate employment and professional development arrangements. The trust model emphasises prudence and professional judgment in dealing with matters of ethics and integrity. It recognises international evidence that ethos and culture are as important as frameworks of regulation in the attainment of standards likely to engender and sustain confidence and trust in public institutions and decision-making processes.

I believe there is significant scope to improve and strengthen Queensland's accountability and integrity framework through a model premised on trust. Key to this would be:

- the articulation of professional standards for office-holders across the spectrum of publicly funded positions;
- the development of appropriate employment and professional development arrangements for different categories of public office-holders; and
- transparent and accountable reporting in respect of each of these categories.

In the sections that follow, I illustrate how these ideas could be applied to Queensland public servants and to the staff of ministers and other office-holders.

Service delivery and public service performance

I attended several of the public forums on Integrity and Accountability as a member of the Roundtable. Those consultation processes have revealed a level of dissatisfaction with frontline service delivery, with interactions between citizens and government and particularly the QPS's capacity to respond to the needs of specific client groups. Concerns were expressed about aspects of public service performance and efficiency; about what several thought was a tendency for public servants to be risk-averse; for agencies to value process over outcomes, and about the culture and morale of public service agencies, particularly in complex areas of service delivery.

These are common complaints, expressed consistently across Anglo-American political systems.⁴ At some level, they reflect a mismatch between citizen expectations and the capacity of large, often demand-driven and resource constrained service systems to deliver services at a time and in a manner that meets the needs of individuals. But these concerns suggest there are areas of policy disconnect, inflexibility, or genuine underperformance, which needs to be more fully investigated, analysed and responded to.

Transparent and accountable reporting through, for example, a *State of the Service Report* would assist. But if citizens are to have confidence and trust in Queensland's public sector, it is important to address such concerns, including through systematic evaluation, monitoring and review of the policy and delivery settings of government programs, and where necessary, targeted reviews of the performance of key service delivery agencies.

Such reviews should harness relevant expertise: of policy-makers, front line workers, of clients, of area experts and of agencies (in the public, private and not-for-profit sectors) with a record of achievement in service delivery. They should be focused towards the goals of enhancing delivery capacity and fostering a culture of client service. There are many local examples of policy design and service delivery excellence that could inform this process, and models that could be adapted from other jurisdictions. Further, Queensland should monitor the outcomes of the Prime Minister's blueprint for public sector reform which has prioritised the need to achieve significant improvements in the service delivery capacity of the APS.

There is a need to reconcile current and emerging performance reporting frameworks (including notably those associated with the COAG reform process⁵) towards the goal of fostering a robust culture of evaluation and policy learning. The challenge will be to do so in ways that support innovation in policy and service delivery (for example, through designated pilots or trials); that don't create additional reporting and compliance burdens; and which encourage citizen participation in and engagement with both processes and outcomes.

Ministerial staff, opposition staff and the staff of other office-holders

Ministerial staff – the personal staff who work in the private offices of ministers are a comparatively recent development in Queensland. The staffing system has become progressively institutionalised in the Australian Commonwealth since the mid 1970s, but has become part of Queensland's core executive only since the election of the Goss government in

⁴ For a comprehensive analysis of why citizens have become increasingly frustrated with their governments, see Stoker, G. 2006, *Why Politics Matters*.

⁵ The COAG Reform Council has a substantial evaluation program that will report on performance on intergovernmental agreements which cover the major areas of service delivery.

1989. There has been significant growth in partisan staffing in all Westminster-style systems, but despite three decades of experience in Australian jurisdictions, there remains contention over what constitutes an appropriate role for staff, particularly in their relationship with the public service.

The governance framework for ministerial staff has been far stronger in Queensland than comparable jurisdictions. As the Green Paper observes, ministerial staff in Queensland are subject to the *Public Sector Ethics Act 1994* and a separate Code of Conduct. As public sector employees, ministerial staff are subject to the disciplinary provisions of the *Public Service Act 2008*. Staff who breach the Code of Conduct or who are suspected of official misconduct may be investigated by the CMC, consistent with the provisions of the *Crime and Misconduct Act 2001*.

Importantly, and in contrast to other jurisdictions, the investigative powers of oversight agencies (in Queensland the CMC) extend to ministerial offices. As such, concerns about the lack of accountability of ministerial staff expressed in other jurisdictions have tended to be less of an issue here.⁶ The Queensland government has invested in training and professional development for ministerial staff, including a recent program convened through ANZSOG.

However, there is scope to regularise the position of ministerial staff within our system of government and to address some of the difficulties and uncertainties associated with their constitutionally anomalous position. In my view, reforms should focus on the employment framework for ministerial staff, developing appropriate arrangements for managing ministerial staff and building the professional skills and capacity of the ministerial staff cohort.

Employment framework

Ministerial staff are appointed under section 147 of the *Public Service Act 2008* under contracts with the Premier (rather than with individual ministers) and in accordance with terms and conditions determined by her. Their status as notional employees of DPC means that technically, responsibility for staff management and discipline rests with the Director-General of DPC. This responsibility more appropriately rests with the Premier's Chief of Staff, the titular head of the ministerial staff group, who in practice is responsible for staff selection and deployment. Ministers are responsible for the actions of their staff, and have a say in their appointment, but the practice of appointing them centrally recognises that staff may work for several ministers in the course of a career and encourages a whole-of-government view among ministerial staff.

Separate legislation for ministerial staff and the staff of other office-holders would address the anomaly of staff being engaged as temporary public servants. This has been long-standing practice in the Commonwealth, and is under development in the United Kingdom. The Commonwealth *Members of Parliament (Staff) Act 1984* creates an employment framework for electorate office staff, ministerial consultants, ministerial staff, opposition staff and the staff of other office-holders.⁷ The Commonwealth legislation is far from perfect, but creates a clear

⁶ See Tiernan, A. 2007, *Power Without Responsibility: Ministerial Staffers in Australian Governments from Whitlam to Howard*. Sydney, UNSW Press.

⁷ See Horne, N. 2009, *The Members of Parliament (Staff) Act 1984 framework and employment issues*. Research paper no. 3, 2009/10, Australian Parliamentary Library, 4 August. Available at: http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/ZKBU6/upload_binary/zkbu60.pdf;fileType=application/pdf#search=%22VR3%20publications%20horne,%20nicholas%22

institutional framework for the appointment of such staff. Importantly, it also enables a clear distinction to be drawn between partisan and non-partisan staff and for secondments to occur between ministerial offices and public service departments – traditionally the dominant recruitment ground in the Commonwealth, although this has been less so at sub-national levels.

Management arrangements

Arrangements for managing of ministerial and the personal staff of other office-holders (opposition staff and electorate office staff) should also be strengthened, since they interface directly with the public and are funded from public sources. Such staff provide essential support to decision-makers, but often work under conditions of great stress, and sometimes without the benefit of specialist human resource management support. Elected office-holders may not have prior management experience, nor the skills necessary to effectively manage staffing issues.

In terms of ministerial staff, I believe there would be value in adopting the Commonwealth model of establishing a Government Staffing Committee and an Opposition equivalent, to focus attention on the recruitment and retention of high quality staff to ministerial and opposition staff roles; to consider issues of staff performance, promotion and career development opportunities.

The Review of Government Staffing in Commonwealth government also noted the potential for improvements through more systematic sharing of information, knowledge and 'good practice' across offices. Though its conclusions reflected a concern with ministerial offices, they are equally applicable to the offices of other office-holders. The Queensland public would be better served if the staff of office-holders are supported to run their offices as effectively, efficiently and accountably as is possible.

Professional development

It was noted above that Queensland is ahead of other jurisdictions in terms of its investment in professional development for ministerial staff. It is my strong view that the professionalism of all those engaged in 'public service' is potentially the best safeguard against concerns about integrity and accountability. As professionals engaged in the service of the public, ministerial staff and the staff of other office-holders should receive access to appropriate professional and career development opportunities. In contrast to the experience of public servants, there are few resources or role models to assist staffers in developing an understanding of the parameters and limits of their roles and how to perform their duties professionally and well.

There has been considerable research into and deliberation over reforms to improve the transparency, accountability and performance of ministerial staffing arrangements at the Commonwealth level over the past decade, including two Senate inquiries, reforms initiated by Senator John Faulkner as Special Minister of State and, more recently, an independent Review of Government Staffing.⁸

It has been 20 years since the issue of ministerial staffing in Queensland was addressed. Reforms to staffing arrangements need to be evidence-informed and locally appropriate. Accordingly, it is recommended that:

⁸ Henderson, A. 2009. Review of Government Staffing.

1. The government initiate a review of government staffing arrangements, to identify:
 - the support needs of ministers and opposition office-holders in terms of staff establishment needed to manage workloads in the private office;
 - appropriate professional qualifications and
 - remuneration and employments arrangements that would ensure high quality applicants are attracted to ministerial and opposition staff positions;
 - management arrangements that would ensure ministerial and opposition staff have access to appropriate induction and professional development opportunities; that there is sharing of good practice in office systems
2. Queensland adopt separate legislation for ministerial and opposition staff, electorate staff and the staff of other office-holders in the interests of creating a clear institutional framework for the employment of such staff. The legislation would aim to improve on the framework established by the *Members of Parliament (Staff) Act 1984* at the Commonwealth level.

Concluding remarks

The conclusion to the Green Paper notes that it is both a privilege and a responsibility to hold public office in Queensland: as a Member of Parliament, a Minister, a ministerial or opposition staffer, an electorate officer, a public servant, a police officer, or indeed any position funded from public sources. A proper sense of 'public service' recognises that responsibility and pursues it diligently. In this submission I have outlined briefly some ideas about this in respect of the Queensland Public Service and ministerial staff.

I note in conclusion that there is a reciprocal obligation on the public and the polity: to eschew cynicism and distrust of those drawn to public service, and to embrace a model premised on trust which acknowledges and recognises the many strengths of our system of governance – the times when Ministers and public servants get it right, and that most are doing their best within the resources and information available to them at any given time. Appropriately skilled and qualified officials who clearly understand the responsibilities and values of their profession, and are supported by appropriate systems, frameworks and professional development make the best servants of the public.

- 2010 *Learning to be a Minister: heroic expectations, mundane routines*. Melbourne, MUP. (with Patrick Weller).
- 2009 'Un trop fort mouvement de balancier ou l'angoisse existentielle des hauts fonctionnaires australiens' (with Patrick Weller). *Télescope*, Vol 15 (1) pp 35 – 49.
- 2008 'The Rudd Transition: continuity and change in the structures of advice and support to Australian Prime Ministers', *Papers on Parliament*, Number 49, August 2008, pp. 59 – 77.
http://www.aph.gov.au/Senate/pubs/occa_lect/transcripts/300508/index.htm
- 2007 *Power without Responsibility: Ministerial Staffers in Australian Governments from Whitlam to Howard*. Sydney, UNSW Press.
- 2007 *Caretaker Conventions in Australasia: Minding the Shop for Government*. Canberra, ANU ePress (with Jennifer Menzies).
- 2006 'Ministerial staff' entry in B Galligan and W Roberts eds, *Oxford Companion to Australian Politics*. Oxford University Press.
- 2006 'Overload or overblown? Ministerial staff and dilemmas of executive advice' *Social Alternatives*. Volume 25, No. 3, December 2006, pp. 7-12.
- 2006 Advising Howard: interpreting changes in advisory and support structures for the Prime Minister of Australia' *Australian Journal of Political Science*. Vol 41 (3), September, pp. 309-324.
- 2005 Trials of Apprenticeship: the Limits of Vicarious Power. *Griffith Review* (3), Webs of Power – Online Edition, March. www.griffith.edu.au/griffithreview
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- 2003 If It's Broke: It's Time to Fix It. *The Canberra Times*, 5 August.
- 2003 *Ministerial Staff: A Need for Transparency and Accountability?* (with Patrick Weller). Submission to the Senate Finance and Public Administration Committee Inquiry into Staff Employed under the Members of Parliament (Staff) Act. 23 May.
- 2001 Problem or solution? The role of ministerial staff. In Fleming, J. & Holland, I. (eds) *Motivating Ministers to Morality*. London. Ashgate.

**Essential Linkages – Situating Political Governance Transparency
and Accountability in the Broader Reform Agenda**

Public Lecture Tuesday 17 February 2009 at 17h30
Australia & New Zealand School of Government
Ian Hanger Recital Hall Queensland Conservatorium of Music
16 Russell Street South Bank Brisbane

Andrew Murray BA Hons (Rhodes) MA (OXF)
Senator for Western Australia 1996-2008

Check against delivery

I¹ was pleased to accept the commission by the School of Government to give a public lecture on *Essential Linkages – Situating Political Governance Transparency and Accountability in the Broader Reform Agenda*. The lecture will be available electronically.

I shall take the broader reform agenda as a given. It would be a strangely uninformed Australian who wasn't aware of the intense focus on infrastructure, climate change, education, the extensive COAG agenda, and so on, all set in the current maelstrom of financial, fiscal, and economic troubles.

The economic social and environmental reform contemplated is very large. The reform is intended to make Australia more productive, more efficient, more competitive; a better society, and to better safeguard the future. Noble plans which embrace nearly every sector in Australia, but leave the political sector largely untouched, as if only the political class at the

¹ Former Senator Andrew Murray has direct experience of complex and difficult environments, including those affected by war, economic sanctions, and major political social environmental and economic problems. Pre-Senate his business career included that of an executive and director in large public and private corporations, and owning and managing his own businesses. He has also been in the armed forces, a consultant, occasional media writer, and occasional academic, and is a published author. He is best known in politics for his work on finance, economic, business, industrial relations and tax issues; on accountability and electoral reform; and for his work on institutionalised children.

apex do not need to be more able, a higher calibre, more productive, more competitive, professionally more suited for the future.

In times of trouble it is as important to stay true to the integrity and principles that will make reform lasting and sustainable. Money is scarcer than in good times. My thesis is that better political governance more transparency and greater accountability will materially assist in troubled times and will add to the effectiveness of reform. It will assist the realistic measurement of reform achievements.

This point should not be lost in an atmosphere of crisis. A succinct slightly crude business saying is apt: *Even when you are up to your arse in crocodiles it is important to remember that your objective is to drain the swamp.*

These are times of reform opportunity. In times of trouble the populace give governments and parliaments greater latitude to act. These are good times to bed in major long-term reforms that would otherwise attract greater resistance, especially from vested interests.

My brief was to promote debate about how public sector performance and efficiency improvement can help meet the higher expectations of Australians. Debate is good, but persuasion is my aim; if you are persuaded of the merits of my arguments I hope you have the determination to make change happen.

Australians are demanding much more of their Governments. They want peace prosperity and a good life. They want respect internationally and growth domestically. They want jobs and opportunities. They want their governments proactive, responsive, professional, far-seeing, productive, and performance driven. They want their needs met. The push for higher standards and better performance is strong. The cry for economic, social, and environmental reform is loud. Governments have said they will respond with a broad reform agenda. Expectations have been created. Success in meeting those expectations needs achievable plans, an accepted timeline, constant credible reporting, and measureable results – through key performance indicators, targets, benchmarks, review and analysis.

The gap between expectation and performance has to be addressed.

The major theme of this lecture is the essential linkage between the need to reform political governance; the need to improve accountability regimes – financial and informational; and the democratic and managerial case for transparency and accountability resulting in more efficient, effective, responsive and sustainable business government and not-for-profit² organisations delivering public services.

It is almost 20 years since the Fitzgerald Inquiry reported. The 'moonlight' state took a leap into the sunlight and there have been quantum improvements in politics and public administration in Queensland since. In terms of my broad argument, Queensland is living proof that there is a clear link between transparency and openness, better governance and improved outcomes in terms of economic performance, status, competitiveness and national influence. So the system works and major accountability reform really does help - it's scary and at times painful, but the long term benefits can be quickly realised.

The problem is it took a horrible period and a remarkable judicial inquiry³ to get such real change. We don't want that repeated to get more change. The benefits can be forecast and foreseen; more transparency and accountability will materially help Queensland and other Australian governments. The Australian people want more transparency and accountability – that is why each election campaign sees renewed promises, too often followed by later backsliding.

Essential Linkages. I was educated in the doctrine of the political economy, a holistic approach to the functioning of the state and society that respects specialisation ('silos' in modern parlance), but believes the virtue of specialisation is to provide depth and understanding to overarching integrated objectives and programmes. Such an approach

² For analytical purposes the scholarly literature often divides society into four sectors: Business (First Sector); Government (Second Sector); Not-For-Profit, non-government, voluntary, intermediary (Third Sector); Family (Fourth Sector): Senate Economics Standing Committee *Disclosure regimes for charities and not-for-profit organisations* report, Canberra, December 2008 page 11.

³ A judicial inquiry into Queensland police corruption, political corruption and the abuse of power was presided over by Tony Fitzgerald QC: 1987-1989 the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct.

requires linkage analysis; not just what will make the parts work better as a whole, but what linkages are essential to make it work well.

There are intangible links like ethics and culture, but usually the links dictating consistent performance are tangible, bedrocked in statute, regulation, codes, guidelines, procedures and the like. The continuity and maintenance of standards requires such tangibles, but without the intangibles standards will decline. So the personal calibre quality and character of political and public service leaders in government matter greatly in holding ethics and culture together, as well as in delivering performance.

In that context a recent federal whole-of-government survey that says 45% of employees agreed their agency was well-managed and 46% agreed that their agency's leadership was of a high quality, implies that over 50% did not;⁴ a worrying way to go therefore, on that front.

And the poor opinion the community has of politicians in general, with exceptions for some individuals, creates a large gap between expectation and performance.

Which leads me on to political governance; I have been anxious about the state of political governance for years.⁵

Governance through law regulation and process makes power subject to performance and accountability and leads to better outcomes and conduct; which is why so much effort was put into better governance in the bureaucratic⁶ union and corporate sectors, with great improvements resulting.

Political governance matters because political parties are fundamental to the Australian democracy, society and economy. They wield enormous influence over the lives of all

⁴ Australian Public Service Commission State of the Service Report, State of the Service series 2007-08 Canberra November 2008.

⁵ Recent work on political governance includes two public submissions: by Andrew Murray February 2009 in response to the Australian Government's December 2008 Electoral Reform Green Paper DONATIONS FUNDING AND EXPENDITURE; and by Senator Andrew Murray to JSCM's inquiry into the conduct of the 2007 federal election April 2008.

⁶ For instance see definition in page 13 of ANAO and PM&C 2006 *Implementation of Programme and Policy Initiatives: Making Implementation Matter*, Better Practice Guide Commonwealth of Australia, Canberra.

Australians. They decide the policies that determine our future, the programmes our taxes fund, the Ministers that government agencies respond to and the representatives in parliaments they are accountable to.

Political parties must be accountable in the public interest because of the public funding and resources they enjoy and because of their powerful public role.

Conflict of interest and self-interest has meant minimal statutory regulation of political parties. It is limited and relatively perfunctory, in marked contrast to the much better and stronger regulation for corporations or unions.

We have law and governance in the public interest for corporations and unions because it makes a real difference to their integrity and functioning. When I last looked, there were 2,262 pages of laws to regulate the conduct of companies, 1,440 pages to regulate unions but few rules regulating political parties.⁷

The successful functioning and integrity of an organisation rests on solid and honest constitutional foundations. Corporations and Workplace Relations laws provide models for organisational regulation. Political parties do not operate on the same foundational constructs.

Political governance includes how a political party operates, how it is managed, its corporate and other structures, the provisions of its constitution, how it resolves disputes and conflicts of interest, its ethical culture and its level of transparency and accountability.

Increased regulation of political parties is not inconsistent with protecting the essential freedoms of expression and from unjustified state interference, influence or control.

⁷ As entities political parties sit within the Third Sector – see - Senate Economics Standing Committee *Disclosure regimes for charities and not-for-profit organisations* report, Canberra, December 2008; ONE REGULATOR ONE SYSTEM ONE LAW, The Case for Introducing a New Regulatory System for the Not for Profit Sector, Senator Andrew Murray, Canberra, July 2006, available from the Parliamentary Library Canberra; Public submission by Andrew Murray February 2009 in response to the Australian Government's December 2008 Electoral Reform Green Paper DONATIONS FUNDING AND EXPENDITURE.

Greater regulation offers political parties protection from internal malpractice and corruption, and the public better protection from its consequences. It will reduce the opportunity for public and private funds being used for improper purposes. The federal electoral committee has previously agreed with many of these points, but nothing has been done.⁸

I haven't time to go into other areas of political governance that could help materially via constitutional and electoral law change, and better remuneration and career opportunities.

Improved political governance will over time lift the overall calibre of the political class by requiring greater professionalism, better pre-selection recruitment and training, a sustainable career path for professional parliamentarians as well as those that aspire to an executive ministerial career, and by reducing the opportunity for patronage, sinecures and dynastic factionalism. Australia is fortunate in having many very able politicians, but the overall quality and ability of politicians and ministers – local, state, territory, and federal – needs to be lifted.

A trained professional experienced political class that is subject to the rigours of regulation, due process, and organisational integrity will always perform better than one that is not.

If you are still resistant to the idea of political governance ask why the best talent is attracted to business, the professions, or the public sector – all of which have strong governance - but not (with exceptions) to politics, which has little. Ask yourself if you are satisfied with the overall quality of political candidates, representatives and ministers; or with the branch-stacking in political parties, their murky processes, the donations system, their standards.

Transparency. Transparency is usually bracketed with accountability, but it is not the same thing. Transparency means easily discerned, seen, open. Accountable connotes formal reporting and being 'responsible for' and 'to'.

The democratic case for transparency is that the public's right to know are essential principles and protections in a democracy. It is a right, like voting, or a fair trial. It aids efficiency.

⁸ See Chapter 4 Joint Standing Committee on Electoral Matters (JSCEM) report into the 2004 federal election: September 2005.

Why is transparency often resisted? In essence, transparency means giving up power and freedom of action in the political market. In another context Joseph Stiglitz recently alluded to this: *"Those working in markets see information as power and money, so they depend on a lack of transparency for success."*⁹

The managerial case is that transparency means activities and processes are easily seen; automatically providing an efficiency incentive and less opportunity for corruption, waste, mismanagement, incompetence, or any other potential sins of public administration. Inefficiency mismanagement and corruption can thrive in the absence of transparency.

As the saying goes – sunlight is the best disinfectant.

Right at the heart of my thinking is this: more transparency, clearer accounting, continuous disclosure will actually mean less need for scrutiny, because close and detailed scrutiny will not be necessary – and therefore more focus on what is relevant.

Sunlight does not need torchlight.¹⁰

There are many good examples of improved transparency: legislation and forms that are in plain English; websites that are user-friendly informative easy-to-navigate and with analytical aids; public access to information that is provided helpfully and promptly.

Then there are the impediments: freedom-of-information systems that are nothing of the sort, whistleblower laws that are instruments of suppression, budget papers that are deliberately obtuse; and appropriations whose design permits licence and impropriety.

Fundamental is the minimal use of secrecy by government. Secrecy is necessary for genuine reasons of security and privacy, but too much secrecy is unacceptable if parliament is to fulfil its oversight function and if government is to remain open and accountable to the people.¹¹

⁹ Joseph Stiglitz Columbia University USA economist and Nobel Prize winner, quoted in the Australian Financial Review Thursday 29 January 2009, page 14.

¹⁰ Report to the Australian Government: Review of Operation Sunlight: Overhauling Budgetary Transparency Senator Andrew Murray June 2008, Canberra, Chapter 3 page 17.

When information is blocked it must genuinely be in the public interest, not in the political interest or in the private interest of those who would otherwise be exposed for mismanagement waste or impropriety.

Freedom of Information is vital. Alan Rose, former President of the Australian Law Reform Commission, made the point succinctly: *"In a society in which citizens have little or very limited access to governmental information, the balance of power is heavily weighted in favour of the government. It is doubtful that an effective representative democracy can exist in such circumstances."*

The New Zealand Court of Appeal once described New Zealand's FOI legislation as of *"such permeating importance"* that *"it is entitled to be ranked as a constitutional measure."* The 1996 Constitution of the Republic of South Africa provides for a constitutional right of access to information held by the State. British Columbia's FOI regime requires the government to disclose, among other things, *"information which is clearly in the public interest."* This is a mandatory duty to disclose which arises even where no particular individual has specifically requested the information.

In contrast, Australia's commitment to freedom of information has been disappointing.

The provision of information is a public duty. The FOI Act should be the final resort for obtaining information, not the only means of doing so. Many agencies refuse to provide information without sound reason, forcing recourse to the Act.

I have had a bit to do with freedom of information issues over the years, including producing my own bill in 2003.¹² At that time our FOI laws were in serious need of reform; and the Howard Government had no intention of delivering that reform.

¹¹ There are useful chapters on government and cabinet secrecy that remain relevant today, in Report No 1 Commission on Government Western Australia August 1995, Perth.

¹² Senator Andrew Murray Private Senator's Bill: FREEDOM OF INFORMATION AMENDMENT (OPEN GOVERNMENT) BILL 2003.

Recently Queensland led the way on FOI with the impressive Dr David Solomon having 116 of his 141 recommendations supported by the Queensland Government in full (and either partially or in principle supporting another 23 recommendations).¹³

Solomon¹⁴ attacks the costly, legalistic and adversarial FOI culture and attends to such vital issues as having an independent FOI Commissioner to oversee and monitor the Act; broadening the scope of information that can be accessed under the Act; creating a fairer, more reasonable fee structure; reducing the time limits for the processing of FOI requests to 25 days; limiting the right of refusal to essential public interest grounds, and so on.

The Queensland Government has issued two draft bills for simultaneous public consultation – the *Right to Information Bill 2009*, and the *Information Privacy Bill 2009* – for the very good reason that privacy is the flip side to public disclosure, and one should not be considered in isolation of the principles and practices of the other.

I won't deal with it here, but elsewhere I have had much to say about the misuse of privacy rules to prevent adults institutionalised as children from finding out their past or their identity.¹⁵

FOI laws exist to help achieve open and accountable Government, to allow access to certain personal information held by government departments, and to provide a general right of access to government information.

Former Prime Minister Malcolm Fraser said that *'too much secrecy inhibits people's capacity to judge the government's performance'*, neatly encapsulating the very reason later

¹³ Right to Information: Explanatory Guide: *Right to Information Bill 2009* [&] *Information Privacy Bill 2009*. Queensland Government Brisbane December 2008 page 4.

¹⁴ See the report by the FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* Brisbane June 2008.

¹⁵ See for instance *The Forgotten Australians: Identity, records and their search for the past* Andrew Murray: Public lecture for *The Fourth International Conference on the History of Records and Archives (ICHORA 4)* a conference organised in conjunction with the Institute of Advanced Studies, University of Western Australia Perth August 2008.

official accused of the leak.¹⁷ Such outcomes are perverse and mean that the active disclosure of corruption and wrongdoing is inhibited.

The Rudd government has accepted the view that genuine whistleblowers perform a valuable and essential public service. They have asked a federal parliamentary committee to come up with a better approach. This is another accountability area that I have my own bill.¹⁸ This bill was used as a submission to the parliamentary inquiry.¹⁹

Whistleblower legislation must be carefully crafted to ensure that unworthy causes cannot be pursued in the name of good public administration and that there are sufficient safeguards to weed out the inappropriate use of complaints procedures.

Any public interest disclosures regime should incorporate three principles: create a framework to facilitate the disclosure of information in the public interest; create a framework that ensures such disclosures are properly dealt with; and provide – including relief from legal liability and workplace victimisation – practical protection for people who disclose information in the public interest.

Whistleblower legislation must create an effective and transparent framework through which genuine public interest disclosures are managed from initial reporting to appropriate people, through the life of the investigation and ultimately to the appropriate resolution of the issue.

It is important that the focus should be on the disclosure itself. This shift is designed to place primacy on addressing the issue raised rather than the person who raised it. This does not imply a lack of protection for those who raise the issue – quite the reverse.

¹⁷ Allan Robert Kessing was convicted under the *Commonwealth Crimes Act* of leaking Customs reports on drug offences and security breaches at Sydney Airport. Prior to the leak the reports had not been acted upon - one had been buried for two years and was never even seen by Ministers or senior bureaucrats. Following the leak the Australian Government appointed Sir John Wheeler to conduct a review on airport security operations which resulted in an exposure of serious problems, and an extra \$200m expenditure to improve aviation security. Despite exposing a real and immediate danger to Australians at large Allan Kessing was made a criminal.

¹⁸ Senator Andrew Murray Private Senator's Bill: *Public Interest Disclosures Bill 2007*.

¹⁹ This House of Representatives Committee's report is due to be tabled late February 2009:

<http://www.aph.gov.au/house/committee/laca/whistleblowing/index.htm>

A unique element of my bill is that it supports the role of parliamentarians and journalists in the whistle blowing process. After other options have been exhausted, a disclosure may be made to a senator or member if under all the circumstances it is reasonable for the official to do so and the disclosure has already been made to a proper authority but to the knowledge of the official has not been acted upon within 6 months; or the disclosure was acted upon by the proper authority but it was not adequate or appropriate; or the disclosure concerns especially serious conduct, and exceptional circumstances exist to justify the making of the disclosure.

After the disclosure to a parliamentarian, a public official may make a public interest disclosure to a journalist if they do not make the disclosure for the purposes of personal gain, whether economic or otherwise; and under all the circumstances it is reasonable for the public official to make the disclosure; or the disclosure has already been made to the senator or member but to the knowledge of the public official the response was not adequate or appropriate; or the disclosure concerns especially serious conduct, and exceptional circumstances exist to justify the public official making the disclosure.

A culture of secrecy is damaging to the integrity of public administration and expenditure.²⁰

Two examples of how apparently small transparency measures can bring about big changes. The Senate was constantly frustrated by the lack of a systematic filing and record keeping system, abetting secrecy and hindering accountability and freedom of information requests.

The Senate continuing order (the Harradine motion) of May 1996 required that an indexed list of all files from each agency be tabled in the Senate annually.

The result was the entire government had to get its filing and record keeping system into a rational accessible order, and those file titles were now on the record. If my memory serves me correctly, Defence reviewed its entire secret classification, and halved the number of matters formerly designated secret.

²⁰ The Australian Law Reform Commission (ALRC) has been requested by the Commonwealth Attorney General, the Hon Robert McClelland MP, to review secrecy provisions in federal legislation. The ALRC will provide its final report and recommendations to the Attorney-General by 31 October 2009.

Hundreds of billions of dollars of contracts are let annually by Australian governments. Strong independently audited procurement and tender processes are essential.

Because 'commercial confidentiality' clauses in government contracts were often not genuine and were designed to avoid scrutiny, the June 2001 Senate Continuing Order (known as the Murray Motion) required ministers to table letters annually confirming that their departments and agencies have posted on their websites a list of contracts entered into in the preceding 12 months (or before, if not yet completed) worth \$100,000 or more. They have to show, among other things, the name of the contractor, the value and duration of the contract, the subject matter, the commencement date, whether it contains confidentiality provisions and if so, why.

This key accountability measure ensures all Commonwealth contracts are public, prevents the over-use of confidentiality claims, and promotes more efficient competitive and open contract practices.

The Senate Finance and Public Administration Committee noted in 2007: *Two notable achievements are the general decline in the use of confidentiality provisions and the now commonplace inclusion of standard disclosure provisions in government contracts [but] concerns remain about the continued misuse of confidentiality provisions in contracts and the reliability of the reported data in departmental and agency lists.*

Sunlight has helped, through the devices of reporting transparency and regular audit.

All government agencies should conduct a thorough audit as to just how transparent their processes and public interactions are. In my experience this is almost never done in any holistic way, and never in a whole-of-government sense.

Generally speaking accountability is a matter of formal process or of legislation; Senate Estimates being of the first kind, and legislation requiring annual reports by agencies being of the second kind.

Accountability systems need review like anything else. The Productivity Commission and COAG red tape reviews focus on the regulatory burden on the private sector. I have proposed²¹ a similar approach to review the burden of over-lapping accountability reports and governance systems in the public sector. Ministers and parliaments often address issues in one portfolio that are isolated from effects across government. It is wise to periodically do some thorough housekeeping to establish whether reports, systems or processes are outdated, irrelevant or ineffective.

Governments and bureaucracies may relish the opportunity to rid themselves of requirements whose primary purpose is to satisfy Parliament, and which they regard as costly, time consuming or onerous, or as limiting their freedom of action. Therefore it is unwise to let the Government do this housekeeping, although obviously they must and should make proposals for periodic reform. It is the task of Parliament itself to periodically conduct a comprehensive review of cross-government accountability devices and measures, to ensure they remain both necessary and relevant to the Parliament.

Accountability is very often dictated by statute, but its force derives from higher law. This is what I had to say in the Murray report on budget transparency:

In important ways budget transparency and financial accountability are part of the rule of law, mechanisms which deliver integrity and a real underpinning to our political economy, and which enable law to operate effectively and affordably.

The Commonwealth's power to tax and spend is arguably its most important power of all. It is fundamental to the Commonwealth's ability to achieve its policy priorities and objectives.

A simple proposition informs my approach to budget transparency and financial accountability. That proposition is that budget transparency and financial accountability are not only ethically, morally, and managerially sound concepts with positive and beneficial consequences; they are not only the natural accompaniment of parliamentary democracy; but they are legal requirements that flow from the higher law of the Australian Constitution, as supplemented by statute.

²¹ Report to the Australian Government: Review of Operation Sunlight: Overhauling Budgetary Transparency Senator Andrew Murray June 2008, Canberra, Chapter 4 pages 60 to 63.

otherwise be independent agencies or institutions. External independent oversight bodies, staffed by people of skill, ability and integrity are essential to good government.

Nevertheless, if you do have an Auditor General; Solicitor General; Ombudsman; Equal Opportunity, Human Rights, Privacy, Freedom of Information and Public Disclosure Commissioners; an independent judiciary; an independent police force; and a Crime and Misconduct Commission - and effective laws and adequate resources to empower them and to ensure their integrity – then you are on your way to the protections needed in a civil society against abuse of power, waste, inefficiency, corruption and mismanagement.

Your parliament matters because it represents the sovereign people. If parliament has less talent, integrity or judgement than it should, everyone loses. Law which is the result of a parliamentary tyranny where a political party with half the popular vote gets all the say is not as sustainable or durable as one where there is plural cross-party input and support.

Do not tell me the ballot box cures all, if all it results in is changing one parliamentary take-all majority for another. Your constitution, electoral system and representative system matter in sorting this out.

In Queensland your unicameral system design is bad, because it raises the Executive above all else, and diminishes the checks and balances explicit in the separation of powers. If Queensland wants to remain unicameral it should either go to proportional representation or to having your Premier and Deputy Premier directly elected and letting them appoint Ministers outside of Parliament, so making your unicameral house a non-executive one.

The alternative is a bicameral system. An upper house is necessary for the nobler cause of the public good and public interest, by adding real value, ideally – heightened accountability, a restraint on executive and legislative excess, a repository of parliamentary good governance and standards, and fearless open and extensive consultation inquiry and review.

provide an effective avenue of external scrutiny. UK Prime Minister Brown later announced that even better scrutiny will be introduced for appointments in particular areas, including involving Parliament's select committees in the appointment of key officials.

APPENDIX for the electronic version of this Lecture: Expanding on Political Governance

In the Green Paper the Special Minister of State says²⁴ *...we rightly value core democratic values: fairness, transparency, political integrity. Australians also want a healthy political system, with impartial umpires and processes underpinning our electoral system, keeping our campaigning fair and transparent and ensuring our systems are free from corruption and improper influences.*

This is an argument for better political governance. Greater fairness transparency and political integrity require improved political governance.

Political governance includes how a political party operates, how it is managed, its corporate and other structures, the provisions of its constitution, how it resolves disputes and conflicts of interest, its ethical culture and its level of transparency and accountability. As the Green Paper implicitly acknowledges electoral reform also requires attention to aspects of political governance like transparency and accountability.

All registered political parties should be obliged to meet minimum standards of accountability and internal democracy. Given the public funding of elections, the immense power of political parties (at least of some parties), and their vital role in our government and our democracy, it is proper to insist that such standards be met.

At present there are two governance areas in politics that are regulated by statute to a degree – the registration of political parties, and funding and disclosure. The statutory registration of political parties is well managed by the Australian Electoral Commission (AEC), as a necessary part of election mechanics, but the regulation of funding and disclosure is weak.

²⁴ The Australian Government Electoral Reform Green Paper DONATIONS FUNDING AND EXPENDITURE, Canberra, December 2008, page 1.

Although they are private organisations in terms of their legal form, political parties by their role, function, importance and access to public funding are of great public concern. The courts are catching up to that understanding.²⁵ Nevertheless, the common law has been of little assistance in providing necessary safeguards. To date the Courts have been largely reluctant to apply common law principles (such as on membership or pre-selections) to political party constitutions, although they have determined that disputes within political parties are justiciable.

The AEC dealt with a number of these issues in Recommendations 13-16 in the AEC Funding and Disclosure Report Election 98. Recommendation 16 asks that the *Commonwealth Electoral Act 1918* (CEA) provide the AEC with the power to set standard, minimum rules which would apply to registered political parties where the parties own constitution is silent or unclear. This was a significant accountability recommendation.

The JSCEM's 1998 Report recommended (No.52) that political parties be required to lodge a constitution with the Australian Electoral Commission (AEC) that must contain certain minimal elements. This recommendation was a significant one, but it did not go far enough. In their report into the 2004 election, in Recommendation 19, to its credit the JSCEM again recommended that political parties be required to lodge a constitution with the AEC that must contain certain minimal elements.

Political parties exercise public power, and the terms on which they do so must be open to public scrutiny. The fact that most party constitutions are secret prevents proper public scrutiny of political parties. Party constitutions should be publicly available documents updated at least once every electoral cycle. (The JSCEM were once told by the AEC that a particular party constitution had not been updated in their records for 16 years.)

To bring political parties under the type of accountability regime that befits their role in our system of government, the following reforms are needed:

²⁵ *Baldwin v Everingham* (1993) 1 QLDR 10; *Thornley & Heffernan* CLS 1995 NSWSC EQ 150 and CLS 1995 NSWSC EQ 206; *Sullivan v Della Bosca* [1999] NSWSC 136; *Clarke v Australian Labor Party* (1999) 74 SASR 109 & *Clarke v Australian Labor Party (SA Branch)*, *Hurley & Ors and Brown* [1999] SASC 365 and 415; *Tucker v Herron and others* (2001), Supreme Court QLD 6735 of 2001.

- The *Commonwealth Electoral Act* should be amended to require standard items be set out in a political party's constitution to gain registration, similar to the requirements under Corporations Law for the constitution of companies.
- Party constitutions should specify the conditions and rules of party membership; how office bearers are preselected and selected; how pre-selection of candidates is conducted; the processes for the resolution of disputes and conflicts of interest; the processes for changing the constitution; and processes for administration and management.
- Party constitutions should also provide for the rights of members in specified classes of membership to: take part in the conduct of party affairs, either directly or through freely chosen representatives; to freely express choices about party matters, including the choice of candidates for elections; and to exercise a vote of equal value with the vote of any other members in the same class of membership.
- Party constitutions should be open to public scrutiny and updated on the public register at least once every electoral cycle.
- The AEC should be empowered to oversee all important ballots within political parties. At the very least, the law should permit them to do so at the request of a registered political party.
- The AEC should also be empowered to investigate any allegations of a serious breach of a party constitution, and be able to apply an administrative penalty.

Changes to political governance such as these do not need COAG approval although their support would be welcome. Such reforms to Commonwealth law would inevitably flow onto the conduct of state political participants, since nearly all registered state participants are also registered federal parties.