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"Integrity in practice in the Public Sector"

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I am in the middle of a wonderful book about Abraham Lincoln and his presidency of the United States by Doris Kearns Goodwin entitled *Team of Rivals: The Political Genius of Abraham Lincoln* - I can recommend it to you. Apart from fascinating tales of how Lincoln managed the 'team of rivals' in his cabinet during the Civil War period and the gruesome details of casualties during that war, I was interested and amused to read that, as soon as Lincoln was elected president in 1860, he had to contend, first in his hometown of Springfield, Illinois, and later in Washington DC when he arrived to officially take up his new job, with lines of citizens each day entreating him to recognise their claims for appointment to various public offices. Political patronage counted. Nepotism was alive and well. Even the First Lady, Mary Lincoln, was given to arming acquaintances with letters recommending their appointment to some job or another! Times change – or do they?! At least the *Public Sector Management Act 1994* (WA) actually says that 'nepotism' and 'patronage' are out and 'merit and equity' are in, in relation to human resource management in the Public Sector.

Bearing these introductory thoughts in mind I thought it might be instructive to consider some of the key recommendations of the 1992 WA Inc Royal Commission Report Part II designed to ensure open and accountable government and the good practice of government in Western Australia. One set of key recommendations of the Royal Commission in this regard included the creation of an anti-corruption commission, a state administrative appeals tribunal, and the enhancement of the powers of the Auditor General, the Ombudsman and the State archivist. Importantly, it also included the proposal to review the management of the public sector and establish a public sector standards commissioner. I will return to these initiatives.

The 1992 Royal Commission Report Part II noted what it considered to be various failings of the state government during the period of the 1980s. This led the Commissioners to state what they considered to be the fundamental principles of government. They have a certain Jeffersonian ring to them. I for one subscribe wholly with my hand on my heart! The first principle the Commissioners called the *democratic principle*, that:

> **It is for the people of the State to determine by whom they are to be represented and governed**.

The second they called the *trust principle*, that:

> **The institutions of government exist for the public, to serve the interests of the public.**

With these principles steadfastly borne in mind the Commissioners dealt with nearly all aspects of government that had caused them concern, many of which continue to have a contemporary ring to them:

- open government;
- accountability;
- integrity in government;
- the Parliament; and
- the administrative system.

As to open government, the Commission encouraged the early enactment of an FOI Act, which WA did not then have. However, it recognised that FOI does not always produce the openness that citizens expect, because of the application of the exemption provisions. Accordingly, a commitment by public officials to be open with citizens is critical. It also recommended a review of secrecy provisions and limits on the capacity of government to avoid scrutiny through claims of commercial confidentiality. One great concern of the Commission was with the use of government media units and the tendency to run government through media release. It recommended review of these practices.

As to accountability, the Commission recommended that citizens be able to obtain merits review of administrative decisions through a state administrative appeals tribunal and that the system of judicial review be improved through the enactment of a judicial review act along the lines of the Commonwealth AD(JR) Act. The Commission also recommended that the parliamentary committee system be developed and that question time be made more effective. It also proposed the enhancement of the position of the Auditor General.

Overall the Royal Commission recommended that five agencies be 'Independent parliamentary agencies', namely the:

- Auditor General
- Ombudsman
- Electoral Commissioner
- New Commissioner for Public Sector Standards
- New Commission for Investigation of Corrupt or Improper Conduct (CICIC).

As to integrity of government issues, the Commission was particularly concerned about the lack of proper record keeping within government, as well as the need for express codes of conduct for a range of officials, namely:

- Ministers
- Members of statutory authorities
- Press secretaries/media officers

- Ministerial staff.

It recommended the enactment of new archives legislation and an inquiry into the establishment of appropriate codes.

The Commission also dealt with the question of 'whistleblowers' in the integrity context. Recognising that there is value in encouraging proper disclosure from within the public sector of matters of concern, but also that persons against whom allegations are made have relevant interests, the Commission recommended the establishment of disclosure legislation.

Additionally, the Commission expressed concern with conflict of interest issues and recommended the establishment of appropriate interest registers.

Finally, the Commission confirmed its view that the establishment of an anti-corruption commission was vital to receive and investigate complaints of corrupt or improper conduct by public officials. Its recommended model for the anti corruption commission had close regard to the then established models of the ICAC in NSW and the CJC in Queensland. It recognised that while the new body might inquire into allegations of such conduct, it should not itself undertake the task of making concluded findings against affected persons. This body was seen as an important new parliamentary accountability agent as it would have the capacity and function to reveal to the Parliament, then government and the public any misdeeds of public officials which others with relevant authority at law could act upon. For example, a relevant finding might lead to a disciplinary proceeding against an official, political action by the Premier in relation to a Minister or perhaps criminal proceedings. Or it may simply involve revealing practices that are inappropriate and recommending change through improved standards. The Commission considered that unless such a body were established much improper, though not necessarily unlawful, conduct may go unnoticed and have a corrosive effect on the practice of government.

In this general context, the Commission also dealt with the vexed question of political financing and government advertising. It recommended new rules to cover political donations and that all government agencies disclose in their annual reports the expenditure made in various ways on government advertising.

As to the administrative system the Commission observed the changes in public administration that had occurred and were then occurring around Australia. It considered that the means of control of the public sector needed to be clearly set out in a modern act and that merit protection was vital. The Commission was concerned that the controls that were assumed in the existing system were not in fact there. The Commission strongly recommended the creation of a Public Sector Standards Commissioner. South Australian legislative provisions to this end were referred to. In particular the Commission drew attention to the need for appointments to the positions of chief executive officers in the public service not becoming one of the 'spoils' of a political party winning government. To protect against this happening the Commission recommended that the Commissioner for Public

Sector Standards should be responsible for nominating the proposed appointees.

The Commission also made recommendations as to the appointment of ministerial staff and political appointments.

Following the Royal Commission's report, a number of the matters requiring further consideration were referred to a Commission on Government, as proposed by the Royal Commissioners. Subsequently a number of legislative initiatives followed based on Royal Commission recommendations or more developed proposals of the Commission on Government.

For present purposes I would like to highlight those initiatives that involved the creation of the Corruption and Crime Commission, the State Administrative Tribunal and the passage of the new Public Sector Management Act and the creation by it of the Public Sector Standards Commissioner and the introduction of whistleblowers legislation. These were each important proposals flowing from the WA Inc Report Part II.

For a time the government and Parliament were content to amend the terms of the old *Anti Corruption Commission Act 1988* (WA). The old ACC had been criticised by the Royal Commission as being nothing more than a 'post box' for complaints and having no real investigative authority. The new *Corruption and Crime Commission Act 2003* (WA) changed the position dramatically. Now the new CCC is sometimes criticised as having too much power, a 'law unto itself'. However I think it is fair to say the CCC is exactly the sort of body the Royal Commission had in mind. As recent inquiries concerning the conduct of members of the public sector show, the conduct by the CCC of public hearings into matters of concern has the advantage of bringing to public attention matters of concern in the practice of government. Without entering into any detailed discussion of one recent report concerning the conduct of a local government in relation to a private sector coastal development proposal, the influence lobbyists may have in the decision-making of local governments and public sector officials was brought to the attention of the Premier, the Parliament and the public. One Minister lost his position during the hearing as a result of disclosures made in the course of the hearing. Three local government councillors are currently under pressure to leave their posts. Disciplinary proceedings against certain public sector employees are about to be commenced under the Public Sector Management Act.

While some commentators have noted the CCC did not find that anyone had acted unlawfully, in terms of committing a criminal act, this rather misses the point of the creation and success of the work of the CCC in a case like this. The fact that government and local government practices of the type revealed by the recent inquiry have in fact been brought to public attention, is a measure of the success of the inquiry. Much conduct revealed in this way may never amount to a breach of the Criminal Code, but it may be recognised by all as unwanted practice by public officials. At the same time particular allegations against public officials will still have to be dealt with according to

due process under the existing law. The CCC findings are not self executing. The Premier of the day may have to make political decisions. Disciplinary proceedings may have to be commenced under the Public Sector Management Act to deal with allegations against public sector employees.

However, if the CCC didn't exist there would be relatively few effectual means for bringing the sorts of issues it dealt with in the recent inquiry to the light of day. Parliamentary question time doesn't work in such cases; nor usually do Parliamentary committee inquiries. Police investigation may never occur, as there may be no 'crime'. And the authorities responsible for public administration and maintenance of public sector standards may never be informed about issues of concern. Additionally, they may not be fully equipped to conduct the sort of inquiry the CCC conducted in the recent case, replete with telephone intercepts of conversations between relevant officials and lobbyists.

In short the promise of the CCC is that it can conduct appropriately detailed inquiries that can reveal instances of corrupt or improper behaviour to the government, the Parliament and the public. By bringing matters into the light of day, sunshine may do its disinfecting trick.

In this way then the CCC is an important adjunct agency in the maintenance of acceptable standards in the public sector.

The State Administrative Tribunal came into operation on 1 January 2005, replacing or assuming the functions of a web of separate boards, tribunals, courts and public officials. It was modelled on the Victorian Civil and Administrative Tribunal and the Commonwealth Administrative Appeals Tribunal. It makes review decisions as well as original decisions. It means that nearly all reviews of state administrative decisions and much expert administrative decision-making occurs in the SAT. Reviews of mental health decisions, resource and development decisions, local government decisions and state revenue decisions, for example, occur in the SAT; as do original decisions to do with guardianship and administration, strata titles disputes and retirement homes. All vocational disciplinary applications are now determined by the SAT as well.

The SAT has a full time member contingent of three judicial members and 14 non-judicial members, with a sessional membership of some 105 persons who bring a variety of special skills and experience to the tribunal. The full time membership resources of the SAT place it in a good position to devise optimal decision-making processes for particular types of proceedings, as well as to provide high quality decision-making. It also facilitates the continuing professional development of its members.

The SAT's statutory objects are, in short, to make good decisions, as quickly as possible, keeping down the costs to parties and using the experience of its members appropriately. The *2007 Annual Report* of the SAT has been given to the Parliament and outlines the full range of decision-making carried out by the SAT and its measure of success in meeting its objectives.

The work of the SAT has the potential to intersect with that of the parliamentary accountability agencies identified earlier, although in practice there is not all that much overlap with the work of those agencies. The SAT provides the opportunity for citizens to obtain an independent review of decisions affecting them personally. It also has the opportunity to overview the performance of the public sector in those areas of decision-making that fall to the Tribunal for review. This means it has the opportunity to identify systemic issues where they are revealed in the course of exercising its jurisdiction. But the Tribunal does not have a 'roving' brief to review public sector performance. That falls to other agencies such as the Ombudsman, the Auditor General, the Public Sector Standards Commissioner and the CCC. The Tribunal's primary responsibility is to provide citizens with the opportunity to seek administrative justice in relation to first-tier government decisions affecting them personally, as well as resolve a number of other matters of importance to citizens in their daily personal, commercial and professional lives.

The work of the Tribunal is identified by individual 'enabling acts'. The Public Sector Management Act is not one of them. As a result, the SAT does not exercise any jurisdiction in respect of public sector disciplinary proceedings, as it does in vocational disputes arising under a range of enabling Acts. Similarly, it does not have jurisdiction in respect of disciplinary matters affecting other public sector employees, such as schoolteachers. The basic distinction between these public sector proceedings, when they arise, and the vocational matters the SAT does deal with, is that the public sector matters may have an industrial component to them, whereas the vocational matters arise in a distinctly professional context in which the protection of the public as the consumer of services is at stake. While that distinction may be illusory in many cases, the Tribunal has not been considered an appropriate jurisdiction for the determination of what are often workplace disputes.

Nonetheless the procedures that govern the workings of public sector employees' proceedings, to my understanding, are similar to those that govern SAT proceedings. While neither the Minister nor delegates who deal with these matters under the Public Sector Management Act, nor the SAT is a 'court', notice provisions, procedural fairness and natural justice are prerequisites to the successful conduct of proceedings. The Tribunal must act according to equity and good conscience by reference to the substantial merits of the case. They may inform themselves as they think fit. The decision-making processes are therefore intended to be flexible but fair. The position generally speaking is no doubt the same when disciplinary action is commenced under the Public Sector Management Act.

One then comes to the Public Sector Standards Commissioner and just how this position seems to fit into the broader system of public administration. It was created in WA as a result of the recommendation of the WA Inc Royal Commission as noted, and came in with the operation of the new Public Sector Management Act in 1994. The position fits neatly into the framework

of the 1994 Act as the principles set out in the Act (section 8(1) (a), (b) and (c)) are principally designed to ensure:

- appointments to the public sector on merit and with regard to equity;
- selections are not on the basis of nepotism or patronage; and
- all employees are to be treated fairly and consistently and not subject to arbitrary or capricious administrative acts.

Under section 9, public sector bodies and employees are explicitly required to act with integrity.

The functions of the Commissioner include:

- to establish public sector standards setting out minimum standards of merit, equity and probity to be complied with in, broadly speaking, selection and termination, and monitor compliance with those standards;
- to establish codes of ethics;
- to monitor compliance with the principles set out in section 8(1)(a),(b) and (c) and section 9;
- to report to the Minister and the Parliament from time to time on compliance issues; and
- to report annually to Parliament on compliance issues.

In performing these functions the Commissioner has powers of investigation including those of a 'special inquirer' under the Act. However the powers are necessarily related to the performance of the functions of the office. The Commissioner is not, like the SAT for example, dependent upon a party applying under the Act for a remedy. But, by the same token, the Commissioner's powers of investigation are limited to the office's functions and the 'remedies' the Commissioner can grant are limited.

The Commissioner is not however charged with dealing generally with matters of substandard performance and discipline that go to the heart of the employment relationship of an employee in the public sector. This falls to the Minister as employing authority in most cases, with rights of appeal to the WA Industrial Relations Commission.

Accordingly, as the Commissioner notes on her webpage, the Commissioner only has power to address claims for breach of the standards, but not for redress for other human resource or integrity matters. The Commissioner does not, like the SAT, have the power to 'hear and determine' a 'complaint'. Rather, attempts are made to conciliate a complaint made. If unsuccessful, the Commissioner is powerless to require an employing authority or public sector organisation to take any particular action. Plainly the specialised monitoring and reporting functions of the Commissioner, as a watchdog not a workplace dispute resolution agency, may lead to some confusion, at least in the minds of persons bringing their complaints to the attention of Commissioner. This has lead to the Commissioner noting in the *2006 Annual Report* two major challenges for the office:

- The need for an effective and clearly understood mechanism for individuals to gain relief for complaints in human resource matters.

- The confusion between the roles of the Commissioner and the WA Industrial Relations Commission.

While the Commissioner is perceived under the Act as a watchdog, along the lines of the Ombudsman, powers to grant remedies for breach of standards to individual complainants will be resisted, I would suggest, for the reason that, if this is not so, the Commissioner will begin to exercise an industrial dispute resolution role that is currently committed to the Minister and on appeal the WA Industrial Relations Commission. Whether or not there is some halfway house whereby the view of the Commissioner that a standard has been breached might be a factor in the decision-making of the Minister and the WA Industrial Relations Commission is something that might be debated.

Another role of the Commissioner, not mentioned in the primary list of functions of the office, is in relation to the appointment of chief executive officers. The WA Inc Royal Commission recommended that the appointments should be made at the nomination of the Commissioner. Under the Public Sector Management Act in Part 3 Division 2, the Commissioner is to act on the request of the Minister to fill a CEO vacancy. The Commissioner eventually must submit a name or names for appointment. Section 45 (9) – (13) provides the Minister with these powers in relation to appointment:

> (9) After consulting the Minister of the Crown responsible for the agency in which the office of chief executive officer to which the nomination relates is located, the Minister shall decide whether or not the person or one of the persons, nominated by the Commissioner is to be accepted.
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> (10) If the person or one of the persons, nominated by the Commissioner is accepted, the Minister shall recommend to the Governor that the person accepted be appointed.
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> (11) If the person, or both or all of the persons, nominated by the Commissioner is or are rejected, the Minister may request the nomination of another person by the Commissioner and shall deal with any further nomination in accordance with subsections (9) and (10).
>
> (12) If the Commissioner does not nominate any person suitable for appointment to the relevant office or a nomination or further nomination by the Commissioner is rejected, the Minister -
>
> (a) may recommend to the Governor that -
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> (i) in the absence of a nomination by the Commissioner, a named person; or
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> (ii) a named person other than a person nominated by the Commissioner,
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> as the case requires, be appointed to the relevant office; and
>
> (b) shall cause notice of the making of that recommendation, together with the reasons for recommending the named person, to be published in the Gazette as soon as practicable.

(13) In deciding on a person to be nominated or recommended for appointment as a chief executive officer, the Commissioner or the Minister, as the case requires, shall have regard to the need for the appointment of a person who -

(a) is able to discharge the specific responsibilities placed on the chief executive officer;

(b) will imbue the employees of his or her agency with a spirit of service to the community;

(c) will promote effectiveness and efficiency in his or her agency;

(d) will be a responsible manager of his or her agency; and

(e) will maintain appropriate standards of conduct and integrity among the employees of his or her agency.

These provisions plainly mean that chief executive officer appointments can be made, in some circumstances, of persons not nominated by the Commissioner.

The Royal Commission's intent as outlined earlier was to introduce a system of senior appointments that was not amenable to political influence of the government of the day. Whether or not this has been successful, assuming the policy is still considered desirable, is an interesting issue. In her report entitled *Ten-Year Review – Four* dated May 2007, the former Commissioner Maxine Murray addressed the strengths and weaknesses of WA's current public sector integrity system. In her report she considered the current arrangements under the Act and the general awareness of the state's integrity system disclose certain weaknesses.

The former Commissioner's concerns are expressed at two broad levels, as I read her Ten-Year Review reports. First, that there is reason to be concerned that the Royal Commission's intent to minimise political influence in public sector advice and decision-making is not being adequately met by the working of the Public Sector Management Act. Secondly, that the office of the Public Sector Standards Commissioner itself is insufficiently protected in terms of independence and so is not as influential as it should be within the broader public sector.

My purpose in mentioning these observations in this presentation today is not to pass any opinion on the former Commissioner's observations, as I am not equipped to do so. Rather it is to draw attention, as did the Royal Commissioners in 1992, to how challenging the role of a merits protector in the public services of Australia is in the modern democratic world. Governments almost by definition usually desire to be 'proactive' in pursuing the policy platforms upon which they were elected, and 'responsive' to well based public criticism of their performance. In all of this governments often require quick, sound advice. Increasingly they call upon public sector employees to be the advocates for their programmes. The former Commissioner draws attention to the potential for incompatibility these practices can produce on occasions between the political needs of Ministers and their ministerial staff, on the one hand, and the ongoing responsibility of career public sector employees to give considered advice in the public

interest. I would observe only this, that the issue was real in 1992 when the Royal Commissioners drew attention to it. They didn't have all the answers then, and I doubt anyone has now. However, that there is a constant need for vigilance to ensure the integrity of government is undoubted.

For me the issues identified by the former Commissioner emphasise the importance of the public being able to rely on parliamentary accountability agents, like those mentioned in this paper, including the Public Sector Standards Commissioner, acting independently and effectively in the exercise of their given functions. In this context, the suggestion is that the tenure and remuneration associated with the Commissioner's office deserve close consideration. The most effective way for any government to undermine the effectiveness of any official is to deny them appropriate tenure and reward the office with inadequate remuneration, so that the best people are not attracted and their independence is not secured. Sometimes governments are well advised to put in place checks and balances that will ensure sectional or short term political interests cannot override the greater public interest.

Whistleblowers legislation came to WA with the *Public Interest Disclosure Act 2003* (WA). The Public Sector Standards Commissioner has an important role in the operation of the Act and monitoring compliance with its requirements. A 'public interest disclosure' occurs when 'a person discloses to a proper authority information that tends to show past, present or proposed future improper conduct by a public body in the exercise of public functions'. Private citizens as well as public sector employees can make disclosures under the Act. Disclosure must be to the proper authority to gain protection under the Act. So disclosure directly to the media, for example, is not protected. In investigating a disclosure, an agency must do what is necessary and reasonable including:

- preventing the conduct disclosed continuing or occurring again; and
- taking disciplinary action against any person responsible for the conduct.

While a discloser is to receive progress reports during an investigation and to be informed of the outcome of the investigation, the discloser cannot withdraw the disclosure or influence its progress once made. Additionally, there is no right of appeal or other review of the investigation process or outcome. The discloser can only make a further disclosure to another authority.

The Criminal Justice Commission in Queensland has noted in a booklet on the operation of the equivalent Act in that State, that 'Over time, whistleblowing will increasingly be regarded as a normal workplace responsibility.' To date in WA the use of the PID Act seems to have been relatively limited:

Year	Disclosures	Disclosures not investigated	Investigations completed	Disclosures substantiated	PID Act enquiries made of OPSSC
03/04	26	5	10	4	250
04/05	23	13	8	3	143
05/06	10	5	5	2	212
06/07	N/A	N/A	N/A	N/A	335

The report of the Public Sector Standards Commissioner from which these figures are drawn notes, however, that the apparent sudden drop in disclosures is due to the method of counting disclosures. Initially, reports which did not meet the definition of 'public interest information' were included as disclosures, but were not investigated. In 2005/06, the Commissioner ensured only 'true' disclosures were counted.

It is perhaps a little too soon to say just what success whistleblowers legislation like this will have in exposing improper practices in the public sector. Time will continue to tell.

From this overview of some of the initiatives taken in WA since the seminal 1992 WA Inc Royal Commission Report Part II, it is fair to comment that important steps have been taken to ensure the WA public sector acts in an open and accountable manner, and with integrity. The overview also shows that the responsibilities given to public sector accountability agencies are onerous and challenging and are unlikely to diminish over time. It also confirms the fundamental importance of the roles played by these accountability agencies.