

Parliamentary Scrutiny of Executive Government[#]

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Introduction

As we are talking about accountability of the Executive Government in relation to the Parliament, it will be helpful for your understanding to have some indication of the approach that I have taken in dealing with this subject. Although my commentary is related to this jurisdiction (South Australia), the issues that I have identified do have relevance, to varying degrees, with respect to other Australian legislatures.

David McGee QC, the Clerk of the House of Representatives in New Zealand, in his book *The Overseers — Public Accounts Committees and Public Spending* when discussing ‘What is Accountability’ in relation to Parliament, stated, inter alia, as follows:¹

Accountability is about instilling or re-enforcing an ethos of legal compliance and efficient practice. . . . At its highest level, if a government is required to answer on the floor of the House for its actions there is a real incentive for ministers to avoid improper or imprudent actions that are likely to be revealed by parliamentary scrutiny.

I am in agreement with David McGee that it is only ‘if’ a government is required to answer on the floor of a House of Parliament for its actions that it can be held accountable. In my opinion, in Australia Parliamentary scrutiny of Ministerial and official actions, whilst not totally ineffective, is certainly not as effective as it should be. This is a matter of no minor moment if the community is to be protected from excesses and/or abuse of official power.

Regrettably Executive government accountability is often undermined through the legislative arrangements agreed to by Parliament itself.

[#] Key Note Address ASPG 2007 Conference

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¹ Commonwealth Parliamentary Association, 2002:10

It is the constitutional responsibility of all Australian Parliaments to ensure that Executive accountability is a reality and not an illusion. This is our Westminster heritage.

It is also my view, and the view of many others in the community, that our Parliaments, right across Australia are becoming increasingly marginalised. The evidence is readily found in those legislatures where there is no Upper House of the Parliament, or where the Upper House is controlled by the government of the day.

In these situations the Parliament, generally speaking, does as the Executive determines. It is simply a case of who has the numbers and the application of party discipline.²

Unless the respective Parliaments themselves take action to address the matter, this trend of Executive domination will continue. Notwithstanding the fact that this situation will not readily be changed in the foreseeable future, there are, nonetheless, some avenues available to enhance the ability of Parliament to be more effective in discharging its constitutional responsibilities.

I will mention some to them. I will also refer to some other matters relating to government operations that I consider relevant.

Some Relevant Background Considerations

One unfortunate element of our Westminster heritage is that much of the activities of government are conducted in secret. Further, internal political party discipline often prevents individual members publicly raising issues that may be of concern to them or their constituents but may be an embarrassment to their party's political interests.³

It is often said that 'sunlight is the best disinfectant'. When it comes to the processes of government a lack of transparency has the potential to give rise to concern in the public mind. This is particularly the case when what is being stated by public officials does not appear to accord with the publicly known facts.⁴

² See Philip Laundy, *Parliament and the People — The Reality and the Public Perception* (1997) Ashgate Publishing Ltd. Mr Laundy makes the following observation at page 4:

... in countries operating the British parliamentary system, party discipline can be strong and even rigid. MPs have only limited scope for independence if they wish to retain the favour of their parties. The party system has become inseparable from modern government, to the extent that, provided the government has a majority, the powers of the parliament have in effect become the powers of government.

³ Justice Thomas, 'Secrecy and Open Government', in P.D. Finn (ed.), *Essays on Law and Government* (1995) Law Book Co.

⁴ The Dr Haneef case is an example of this situation.

Some of the legislative models that confer powers and provide for the accountability of ministers and officials were the outcome of what is now being considered to have been a more benign era. This was a time when the powers exercisable by the Executive agencies of government were conducted within generally accepted boundaries.

In my opinion, just as in the case of the market models that have recently been in the news⁵ we in this State need to revisit some of the legislative models that we are using. Some of them, in my opinion, have passed their use-by date. The experience in other Australian jurisdictions in comparable situations has shown them to be flawed. As the saying goes ‘those who do not heed the lessons of history are doomed to repeat them’.

Just like the markets Governments too must change and adapt to changing circumstances. This is especially the case when the reality of experience demonstrates that the current models or methods of operating are inadequate in protecting the public interest.

This era was also a time when the courts were more ready than what appears to be the case today to intervene to protect the individual and, indeed, protect the community from the excesses of Executive power.⁶ There is, however, a need for caution in being critical of the courts. Parliament may have passed legislation in terms that leave the courts no authority to intervene. Where the legislative intention is clear the courts must apply the law as passed by the Parliament.

As Jeremy Bentham once pointed out, resort to the courts in some matters can be a black lottery — every player wins a prize but all the prizes are losses.⁷

By revisiting some of our legislative models, particularly those that do not allow for the degree of accountability that is necessary in the public interest today, we may pre-empt the potential for major problems in the future.

The legislative frameworks must be sufficiently robust to deal with both the community expectation that government procedures are capable of addressing issues that are inimical to the public interests, especially when there is a perception of a cover-up, and that when problems are identified, corrective measures will be taken. This process should also be transparent. If transparency is not able to be achieved in an open public manner then, in my opinion, independent external assurance to the Parliament is essential.

⁵ For example, the sub-prime housing mortgage markets in the United States.

⁶ The powers of the ministers and officials under the immigration laws are potentially draconian. That they can seriously miscarry is amply demonstrated by the cases of Cornelia Rau who was wrongfully imprisoned here in Australia and Vivian Solon who was wrongfully deported to the Philippines. Both of these matters will result in an impost on the public purse that could, with a great application of diligence on the part of the government, have been avoided.

⁷ Jeremy Bentham, *The Elements of the Art of Packing [Juries]*.

The Constitutional Principles

I have always found it prudent before taking any substantive steps to deal with a problem or issue to identify the principles that inform the proper approach that should be taken.⁸ In constitutional matters those principles can be found in legal authority i.e. decisions of the courts or statutory provisions⁹ and/or long standing constitutional conventions.

Under a system of responsible government, apart from the obvious requirement that the Executive is accountable to the Parliament, it is also well established as a constitutional principle that there are no actions of the Executive government for which a minister or an official is not responsible. 'Responsibility' is meaningless unless the minister and/or the official involved as the case may be, can be held accountable and made subject to appropriate sanctions when this is necessary. In this sense 'responsibility' and 'accountability' are synonymous.

As I noted above, the Parliament has itself often been a willing participant in granting powers to the Executive without ensuring that there are in place proper mechanisms for accountability back to the Parliament. At the very least there should be capacity for independent review by an agency, independent of the Executive, that reports directly to the Parliaments, and further, that independent agency must have the statutory authority to inform the Parliament regarding matters of public interest importance.

This capability for independent scrutiny external to the government agency concerned must, in my opinion, be across the whole spectrum of Executive activity.¹⁰ Whilst this would necessarily include matters of non-compliance with a legal requirement, it must also extend to notifying the Parliament where there is a failure to meet the moral exemplar standards that are required of those charged with governmental responsibilities.

Obviously there are many matters that cannot, and indeed, should not be placed in the public domain. Matters of national security, some issues concerning the maintenance of law and order, and the confidential information held by government concerning individuals and business entities are some examples that fall into this category. There are of course numerous other matters where the confidentiality of Executive government communications must be protected.

The underlying point of principle is that, notwithstanding, the need for secrecy and confidentiality of information, the activities of those public officials who are

⁸ The matter of the response by Government to 'terrorism' is interesting. Is it to be characterised as a case of combating 'criminals' or 'waging war' or possibly a combination of both if this is feasible? The proper characterisation of the issues has implications for the nature of the response and by what institutions that response should be primarily undertaken, i.e. the police or the defence force.

⁹ For example, The Bill of Rights 1688.

¹⁰ Refer to *Olmstead v US*.

involved in internal confidential matters of government must not be above proper scrutiny. Further, this scrutiny must be in a form that allows for public confidence in the integrity of the processes that are adopted.

There are mechanisms that have been legislatively developed in several common law jurisdictions that ensure accountability of the relevant Executive agencies whilst protecting secrecy where this is in the public interest.¹¹

An Example of a Legislative Model that did NOT Provide for Adequate Independent Scrutiny

It is the legislative model that does not provide for proper accountability of Executive agencies that, in my opinion, has the potential over time not only to undermine our rights and freedoms that have been developed to protect us from the misuse/abuse of Executive power, but it can also seriously damage the very fabric of the State. I am not referring only to the regulatory agencies, although they are certainly within the ambit of this comment.

The need for adequate arrangements for review is aptly demonstrated by the case of the failure of the State Bank here in South Australia. In his excellent book that examines this matter, *Things Fall Apart — A History of the State Bank of South Australia*¹² Dr Greg McCarthy shows what can happen when the political process deliberately establishes a legislative model that places activities for which the taxpayer is ultimately responsible outside of the accountability arrangements that are necessary to protect the public interest.

Where public interest considerations are involved, in my opinion, public sector audit requirements should always be in place. In my opinion, this should also apply to Local Government. Local Government exercises Governmental powers and at the present time it is not, in my opinion, subject to the level of scrutiny that is necessary in the public interests.

The matter for the former State Bank is a classic example of a 'hands off' approach. Shortly after being appointed to the position of Auditor-General in June 1990, I raised with the then Public Accounts Committee (now the Economic and Finance Committee) the view that having regard to the fact that the State guaranteed its liabilities, the Auditor-General should be the auditor of the State Bank.

The Committee, and that includes both major political parties, was firmly of the view that it was the policy position of the Parliament that the operations of the Bank

¹¹ NZ Official Information Act.

¹² (2002) Australian Scholarly Publishing, Melbourne.

were to be at 'arms length' from the Government and that this was a bi-partisan position.¹³

In no circumstances did they want the Auditor-General involved. The Bank was already audited by the private sector. 'Arms length' from the influence of the government is one thing — 'Arms length' from scrutiny on behalf of the Parliament is an entirely different matters.

'Arms-length' from the Government in the case of the Bank 'morphed' into 'arms-length from the Parliament'.¹⁴

Members of Parliament were loath to raise concerns about the Bank even in the Parliament. One can readily understand why this was the case: nobody wants to be blamed for starting a run on the bank. However the eventual loss to this State was in the order of \$3 billion.

In government we have our scandals, then we have an inquiry, sometimes a Royal Commission, we may make some changes to the law, then the cycle starts all over again. This is often because the changes that are made to deal with the specific issue that gave rise to the need for the inquiry in the first place leave untouched the underlying weakness in the constitutional framework that applies to similar situations.

In my opinion one of those weaknesses is the failure to ensure that the Parliament can properly scrutinise Executive government actions either itself or through its Committees, or through independent bodies that are accountable directly to it and that are required to inform it of public interest concerns.

Parliament is of course a 'deliberative' and not an Executive body. When I refer to Parliament itself scrutinising the Executive this would be through Questions and debate in the Parliament. Committees of the Parliament are in a different situation. Committees can directly interrogate witnesses.

I mention the former State Bank as an example of the need to ensure that any agency that is a public body, regulatory or otherwise, must be the subject of proper scrutiny and accountability **to the Parliament**. It is, in my opinion, simply unacceptable for any public body to claim that its operations are not to be open to scrutiny by a proper independent external process that is itself accountable to the Parliament.

¹³ In relations to audits the Auditor-General is independent of the Executive government.

¹⁴ The current arrangements for the audit of Local Government in South Australia do not, in my opinion, allow for all necessary public interest requirements to be brought to the attention of the Parliament.

If it is often said that the State Bank affair is now in the past and that we must move on. This is certainly true and it is not profitable to dwell on the past other than to learn its lessons. The State Bank experience should, however, be understood as a warning of what can happen when a public body is not subject to the level of scrutiny that is appropriate to protect the public interest. Where the potential for Parliamentary oversight is, for whatever reason diminished or excluded there is, in my opinion, a serious defect in the administrative structural arrangements that apply in those matters.¹⁵

It is my observation that where a public body is not subject to external scrutiny, over time, there can develop a culture that has a tendency towards arrogance and dismissiveness to criticism. At the extreme end of the spectrum is the attitude that they are above the law and that there is nobody who can bring them to account.

There are some matters in which the Minister responsible for a particular area of government activity is not advised of what is happening because it is an 'operational matter'. This is often the case in relation to law enforcement matters. The underlying issue of principle is, in my opinion, similar to that of the former State Bank. If the responsible Minister cannot be fully informed then there is, in my opinion, a disconnect in the accountability chain of the Executive to the Parliament.¹⁶

In the absence of the existence of an independent entity with authority to oversight the law enforcement agency there is no accountability other than those internal to the agency itself. History is evidence to the fact that these arrangements are unsafe and particularly so in the case of the policy. In those jurisdictions where there is no independent review body the position is unacceptable. In these situations there is no alternative but to rely on the assurances of the agency involved and it can hardly be expected to be critical of itself.

It is now a case of applying some of these observations to the issues before this Conference. I will start with Parliamentary Committees.

¹⁵ As mentioned elsewhere in this paper the potential for oversight can be by an institutional office established by the Parliament to advise it of matters of importance that should be brought to its notice in the public interest. In my opinion, notwithstanding the recent amendments that have been made in South Australia to the Local Government Act, the accountability of this area of government responsibility remains a matter for concern. I have been advised of instances where injustice is occasioned by the unlawful exercise of the authority of Council staff that is not addressed by the existing institutional arrangements. These matters could be examined by a Parliamentary Committee as an addendum to the recently completed report of the Economic and Finance Committee if the Committee were interested in doing so.

¹⁶ Refer to David Marr and Marian Wilkinson's book *Dark Victory* (2003) Allen & Unwin. This book discusses the statement by certain Commonwealth Ministers at the time not to have been informed of the fact that children from a refugee boat were not thrown into the sea in the circumstances as were originally suggested by them.

The Role of Parliamentary Committees

My own personal experience in having attended as a witness before many Parliamentary Committees over the years is that political partisanship is always close to the surface. To be fair, this is not always the case. Nonetheless it occurs often enough to undermine the effectiveness of the Committees in receiving information and investigating matters. This is especially the case when it is perceived that the information likely to be conveyed may prove politically damaging to any of the parties represented on the membership of the Committee.

Committees of the Parliament can be very effective in bringing Executive agencies to account. The Midford-Paramount case that was undertaken by the then Public Accounts Committee of the Commonwealth Parliament some years ago resulted in a substantial injustice being corrected. It also resulted in a major re-organisation being undertaken of the then Commonwealth Department of Customs. The Commonwealth DPP was also criticised by the Committee in its report.

The first thing that I would suggest is that before commencing any formal hearings, the Committee secretariat obtains all relevant documents from the parties involved. An examination could be made of these documents by the secretariat and the Committee members to identify issues that are relevant to its terms of reference.

In matters where there is likely to be some contention the Committee should obtain this material using its formal powers. In this event, should a party wilfully withhold information the contempt powers of the Parliament could be brought in aid of ensuring compliance.

The daily sitting times of the Committees, in my experience, are far too short and some members absent themselves at regular intervals during the hearings. It is impossible to be effective in assessing witness credibility if the judges are not present when the witness is giving evidence. The review of the transcript is not the same thing as being there.

I have often thought that Committees could be more effective with the assistance of counsel. This may require legislative amendment, but in my opinion it would certainly sharpen the focus of the process on the objectives for the hearing. Under present arrangements there is often no real focus on the issues at all. Any change of this type will necessarily have resourcing implications.

However I am fully aware that this is often deliberate and simply political game playing.

The use of counsel to assist the Committee process would be a radical change but it would in my opinion make the Committee procedures more effective. There is no suggestion in this proposition that members could not also pursue a line of questioning on particular matters of interest to them.

I have been surprised just how little the Committees used the knowledge of the Auditor-General and other independent statutory officers in assisting them to identify relevant issues and principles. These officials can provide invaluable advice to the Committees of the Parliament.¹⁷ These officials are not the ‘gofers’ for the Committee but their knowledge and experience can be valuable in analysing public sector issues.

Of course where Committees are established to advance a partisan political purpose there will always be a potential for problems. This is, of course, apart from the waste of taxpayers’ money. This is not something that I believe will be overcome in the short term.

The Role and Reporting Responsibilities of the Auditor-General and the Ombudsman.

The parliament and the community are heavily reliant on the intellectual and moral courage of the holders of these independent statutory offices to impartially ‘call it as it is’, even in the face of hostility from powerful political and other vested interests.¹⁸ These offices are independent of the Executive Government, and the Parliament is reliant on their independent assurance on matters within their mandate. My comments today will be limited to the Auditor-General.

In his book, *The Constitution of South Australia*¹⁹ the then South Australian Solicitor-General and later Justice of the Federal Court, Bradley Selway QC states: ‘... The accountability and integrity of the constitutional frameworks rests to a significant degree upon the honesty and ability of these officers.’

Until the changes in the audit mandate that followed the recommendations of the Coombs Royal Commission on Australian Government Administration in the 1970s the audit function was broadly speaking limited in scope to the regularity of the financial statement reporting by government departments and statutory bodies. The change in the audit mandate following the implementation of the recommendations in that Royal Commission Report significantly changed the role of the Auditor-General and the relationship of that office, not only with individual auditees, but also with the government of the day. Those changes were implemented in the audit legislation in all Australian jurisdictions.

¹⁷ See Report of the Commonwealth Public Accounts Committee, ‘The Auditor-General — Ally of the People and the Parliament’, Report 289. This report examines the relationships of the Auditor-General and the Parliament.

¹⁸ The reports of the former Commonwealth Auditor-General, John Taylor, readily come to mind. The ‘Whiteboard Affair’ and ‘The National Bankcard’ reports are well known.

¹⁹ Federation Press (1977) page 157.

A former Commonwealth Auditor-General, John Taylor, observed,

The relationship between governments and parliaments continues to change and it seems auditors-general are feeling the effects of the tensions. Auditors-general have become more vulnerable, sitting as they do precariously somewhere between the parliament and the government of the day. Not everybody in power seems to accept that they have a key role to play in the democratic system.²⁰

The Western Australian Royal Commission on WA Inc²¹ in its Report in 1992 did examine the Office of Auditor-General in some detail and made the following comments,

The office of Auditor-General provides a critical link in the accountability chain between the public sector, and the Parliament and the community. It alone subjects the practical conduct and operations of the public sector as a whole to regular, independent investigation and review. This function must be fully guaranteed and its discharge facilitated [Para 3.10.1].

The Auditor-General is no mere scrutineer of the financial affairs of the departments and agencies of government, notwithstanding the importance of this responsibility [Para 3.10.3].

No activity of government fails to involve some use or commitment of public resources. No activity of government can, in consequence, be allowed to be removed from the scrutiny of the Auditor-General [Para 3.10.6].

Effective and comprehensive audit is necessary as a basis for the legitimacy of all government activities. In fact no regulatory system would be effective in the absence of an audit system that drew to notice matters of non-compliance.

Of course there are many reasons why Parliament does not optimise the information reported to it by these officers. Parliamentary time is always at a premium and political issues can intrude at any time to deflect the course of events.

It must be acknowledged that the conduct of Government is complex and it is easy to find fault. The point is, however, that government is required to act in the public interest and at all times to comply with the law. As I mentioned earlier the Government is the Moral Exemplar for the community.²²

Government can of course 'neuter' or limit an Auditor-General's mandate in a variety of ways. The Parliament should always be watchful of the potential for this to occur. It can happen under the guise of what on the surface appear to be quite benign amendments to legislation unrelated to the Auditor-General.

²⁰ Directions in Government, December 93/January 94, page 21.

²¹ Report of the Royal Commission into Commercial Activities of Government and other Matters, 1992.

²² *Olmstead v The United States*

Particular Matters of Public Interest Relevance Regarding Executive Accountability

Having regard to what I have already mentioned, there are five separate matters that I will briefly comment upon. There are (i) the matter of law and order, the Executive and the Parliament, (2) Confidential Settlements for Error and/or Abuse of Power, (3) An Independent Corruption Commission, (4) The accountability of Local Government in South Australia, and (5) Contractualisation and its implications for government accountability.

The Matter of Law and Order, the Executive Government and the Parliament

Law and order issues present complex and difficult decisions for Government. Serious anti-social and criminal conduct by certain individuals in the community has led to the need to introduce laws to deal with these matters. This has necessarily involved conferring wide-ranging powers on law enforcement agencies.

Whilst these powers may not be unreasonable having regard to the threats that face the community, the nature and the extent of the discretions that are vested in Ministers and officials does raise a number of public interest issues.

The grant of these powers has not on some occasions been accompanied with the necessary 'checks and balances' that are vitally important to protect the community from their misuse.²³ We must be vigilant that by a process of attrition we do not allow our Governments to revert to the arbitrariness of the Crown of the Stuart era when the liberty of the individual was seriously undermined.²⁴

²³ In my opinion the existing arrangements for the accountability of the Police under the Police (Complaints and Disciplinary Proceedings) Act 1985 do not allow for the transparency that is essential in the public interest. The secrecy provisions under this Act, whilst appropriate at the time of its original enactment are not, in my opinion, appropriate today in the light of developments since that time that confer wide discretionary powers on the Police. There have also been Royal Commission Reports in a number of Australian jurisdictions that have raised very serious issues concerning police administration. Policing is a complex and difficult responsibility and the community is entitled to have the assurance through the Parliament that Police powers are not being abused and/or misused. In my opinion the current secrecy provisions and accountability arrangements in South Australia do not provide this assurance.

²⁴ Wide discretionary powers vested in the law enforcement agencies has the potential for arbitrariness in the exercise of those powers unless there is in place an effective oversight institution that can independently review their exercise in individual cases.

The observations of Mr Justice Brandeis of the Supreme Court of the United States in *Olmstead's* case sound a warning that is apt in this context. He stated as follows,

The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding (277 US 438 at 479).

Confidential Settlements in Cases of Error and/or Abuse of Power

Oftentimes when there is an error and/or abuse by the Government authorities the matter is settled under the terms of a confidential agreement under which damages are paid. It should always be remembered that this is public money that is being paid out. Parliament has a responsibility to ensure that it is paid out for a lawful purpose and if there are problems that have given rise to the need for the payment that these have been addressed.²⁵

The role of the Auditor-General is important in these matters. In these cases the problem is nearly always held from public view. More often than not the whole matter is covered up and those responsible are never brought to account. In my opinion, it is necessary to regularly review all cases where there has been a confidential settlement as it is in these matters that the identification of serious managerial failures and possible abuse of power can often be identified.

Clearly the Auditor-General has the legislative authority to undertake such a review. In reflecting on this matter I am of the opinion that there should be a comprehensive report prepared by agencies of all these cases that fall within the financial reporting period. This information should be made available to the Economic and Finance Committee 'in camera' with the confidentiality associated with a particular case assured. This may require legislative amendments to the Parliamentary Committees Act.

In the absence of a process of this type there is the potential to consistently 'cover-up' what may be systemic failures in the administrative systems of government.

An Independent Corruption Commission

The subject of the need for an independent corruption commission has been raised here in South Australia. A range of different views has been expressed as to the need for such a body and all such views must be respected. When the experience of other jurisdictions suggests that such a body is essential to protect the community from official corruption, notwithstanding the existence in those jurisdictions of institutional arrangements similar to those that already exist in South Australia, in my opinion, it is prudent to consider whether such a need also exists in this State.

The fact there is no evidence of a need may simply be a result of there not being an appropriate mechanism to identify the problem and draw the matter to public attention.

²⁵ *Bardolph v New South Wales* (1934) 52 CLR 455.

The recent comment by the South Australian DPP that there were matters that he would have referred to a Corruption Commission should be a cause for concern.²⁶ The DPP is, after all, the very official in the constitutional framework responsible for the prosecution of offences under the criminal law of this States.

The issues raised by the Coroner on a number of recent occasions are also a further reason to question the adequacy of the present institutional arrangements to protect the community.

It is clear that had such a body not existed in Western Australia the activities that have been the subject of public disclosure by the Crime and Corruption Commission in that State would not have come to the light of day. The long list of matters the subject of reports by the ICAC in NSW on Local Government in that State would likewise not have been identified but for the existence of that Commission. The ICAC in NSW also reviews the matter of concerns relating to the DPP in that State.

To argue that there are institutional arrangements in this State that could address these matters is to fail to understand that in those other jurisdictions as already mentioned, there also exist the same institutions as we have in this State but these have been shown to be not up to the task and a corruption body was also required.

One has only to reflect on the recent past in Queensland where a former Commission of Policy in that State, Terry Lewis, was jailed for 15 years for corruption. Former Ministers of the Crown in that same State, Austin and Harvey, were also convicted of corruption and jailed. It is to be remembered that at that time Queensland had an office of the Ombudsman, an Auditor-General, and ostensibly, a Police Department that was responsible for protecting the community from official corruption.

The experience in New South Wales and Western Australia has been similar. In each of these jurisdictions there was a Royal Commission that identified the underlying corruption. It was the evidence from these Commissions that could not be denied that resulted in the establishment of an independent corruption body in each of those States. More recently in Victoria the Office of Police Integrity has been highly effective in bringing to justice those involved in serious corruption in that State's police force.

It may be suggested that there already exists in this State an 'Anti-Corruption Branch within the Police Department' and that therefore no further action is necessary. With great respect to those who so contend, I would point out that the Anti-Corruption Branch is a part of the Policy Department and although it may be

²⁶ Refer ABC 891 AM (9–9.30 am) Mr Pallaras QC stated in this radio interview that there were matters that he would have referred to an anti-corruption body in this State if one had existed.

independently audited, that audit report is to the Executive Government and not the Parliament.

In South Australia, short of a Royal Commission, there is no mechanism to address serious public interest concerns where the Police and the DPP are involved.²⁷

The further issue that arises in this context is that police reporting to police has unequivocally been shown to be fundamentally flawed as a matter of principle. The earlier comments noted from the DPP would seem to me to further support this position.

I know that there has been confidence expressed in the Auditor-General to be able to undertake this responsibility. I am appreciative of those members of the Government who expressed confidence in the office of Auditor-General whilst I held that Office. Nonetheless, to be objective about the capacity of the Auditor-General to deal with serious corruption, it must be admitted that the Auditor-General cannot realistically cover this responsibility to the extent necessary to protect the public interest. Whilst the powers of the Auditor-General may be extensive, the matter of corruption does require that there be the power to conduct covert operations. This is not a traditional role of the Auditor-General in the Westminster systems of Government.²⁸

The important of external oversight was made by the Commonwealth Ombudsman, John McMillan who has been acting as the Head of the new Commonwealth watchdog that has the responsibility of monitoring the Australian Federal Police and the Australian Crime Commission. This body is called the Australian Commission for Law Enforcement Integrity (ACLEI). Mr McMillan state as follows,

When the Government is so rapidly expanding the size and responsibilities of law enforcement agencies to counter the threat of terrorism, we must be able to reassure the public that those agencies operate with integrity. Active external oversight of policing by bodies that are adequately resourced is necessary to give that assurance.²⁹

The Matter of the Accountability of Local Government

One of the governmental areas in this State that is not, in my opinion, adequately addressed in terms of the appropriateness of the accountability that applies to its administrative affairs is that of Local Government. On the face of it there may

²⁷ The Kapunda Road Royal Commission did identify important matters concerning both the DPP and the Police administration in South Australia.

²⁸ The WA Crime and Corruption Commission inquiry into the operations of former Members of Parliament and public employees would not have been effective without the ability to undertake covert operations. The current inquiry by the WA CCC into the wrongful conviction and imprisonment of Mallard is also raising matters of serious concern associated with Police procedures in that State.

²⁹ *The Australian*, 12 July 2007, page 1.

appear to be processes that can ensure a degree of accountability. With great respect this, on closer analysis, is illusory.

Local Government is established by an Act of the Parliament in each of the States. As I mentioned in my Report to the Parliament last year, Local Government exercises governmental authority over the lives of those members of the community who live within their jurisdictional boundaries. This includes the power to prosecute individuals and to exercise discretionary power in a wide range of matters that directly impacts on the lives of those to whom it relates.

Local Authorities are bodies corporate i.e. statutory bodies corporate created by the Parliament. They are public bodies and the councillors and the administrative staff are public officers.

I know that there will be those who say that there is the Ombudsman who can and should address matters on behalf of the citizens who have an issue with a Local Authority. If this were the case then there would not be the need for the existence of the independent commissions against corruption that have been established in those States where there was already the office of Ombudsman. The matter of abuse of power at the Local Authority level of government is a fact of life. In other Australian jurisdictions remedial steps have been taken to address the matter. In South Australia that is not yet the case.

Contractualisation and its Implications for Executive Government Accountability

I mentioned earlier the matter of the increasing use of contracts by government as a means to deliver those public services that were at one time the responsibility of Departments of State or Statutory Authorities with direct Ministerial accountability to the Parliament. Governments can use the right to contract to avoid parliamentary scrutiny. A claim of commercial confidentiality can be readily made.

Except as may be mandated by statute, at common law there is no limitation on a Government's right to contract. Time does not permit a detailed comment on this matter today. The extensive use of contracts has far-reaching implications for future governments. Contracts are enforceable under the *Crown Proceedings Act 1992 (SA)* and as the late Justice Selway noted 'the principle of Executive necessity may no longer be available to enable the Crown to breach its contracts'.³⁰

³⁰ B. Selway QC, *The Constitution of South Australia* (1977) The Federation Press at page 195. Bradley Selway QC was formerly the Solicitor-General for South Australia.

Conclusion

The issue clearly arises as to the degree of checks and balances that is appropriate in our society. An approach of 'never trust, always check' is not a workable proposition. There is no need to have a senseless over-allocation of scarce resources committed to the matter of surveillance.

Nonetheless it is important that as a society we learn from past experience where expectations have been disappointed. It would be naive and unwise not to put in place arrangements that permit an appropriate degree of checks and balances to allow for the independent assurances that are essential to the public interest.³¹

My final thought is that where there is no transparency: 'beware'. When steps are actively taken to resist transparency, then to use a political colloquialism: 'be afraid'.³² ▲

³¹ Michael Power, *The Audit Society Rituals of Verification* (1999) Oxford University Press, page 2.

³² It is important to accept that our government institutions are not infallible. These institutions can and do make mistakes and that when this occurs it is essential that there be some process that can be brought to bear to review what has happened and if necessary recommend changes that may assist in similar errors not being repeated. The recommendations of offices such as the Coroner are an example of a review process. In my opinion, in a civil society where injustice and abuse of power by those who improperly exercise government authority is abhorred, it is essential to constantly review the adequacy of institutional protections. The current institutional arrangements in South Australia do not, in my opinion, provide for assurance that this is the case.