

**COMMONWEALTH OMBUDSMAN  
GOOD > BETTER > BEST - NATIONAL CONFERENCE  
23-24 September 2009**

**REMARKS FOR PLENARY SESSION  
“OPENNESS IN A SECRET WORLD”**

- Much of the public commentary that we hear about freedom of information is a blunt understandable democratic demand to know more about how government is working and how government decision making might be influenced.
- And much of the discussion focuses on the dilemma that that democratic demand makes against some of the features of the Westminster tradition. I am thinking there particularly of the doctrines of ministerial responsibility and collective cabinet responsibility.
- While I would not wish to diminish the importance of the democratic demand, we should not lose sight of the substantial other benefits which generally come from greater openness.
- Some of these benefits reflect concern about how public power should be exercised. That is, that public power should be:
  - exercised for the good of community, rather than for personal or crony gain
  - exercised in an equitable and impartial way, rather than capriciously or subjectively, and
  - that where government bodies are allowed to use coercive powers or intrude into people’s private lives, this should be done only to the minimum extent that is absolutely necessary to achieve an important public good.
- In addition, openness encourages efficiency and cost-effectiveness, reflecting the need for government to not be wasteful or to conduct activities which fall well short of the sort of benefit they ought provide to the community.
- I particularly emphasise the full set of benefits that can come from openness because it is important to keep them in mind when considering how we deal with situations where there can’t be complete openness.
- It ought to be self evident that on occasion some public and private interests can trump that general importance of openness.
- Openness is all very well when information is made available to people who are acting in good faith and with the interests of the community concerned in mind, but there are others who are not acting in this way and whose interests are

harmful to that community.

- Hence persons of any sense accept that there should be limitations on release of information which for example, is likely to prejudice a current investigation, or prejudice the defence of the community as a whole. As an extension of this we look to protect the safety of individuals who play an important role in the relevant activities - for example, we have witness protection programs, secrecy around the identity of intelligence agents, and secrecy around those who report suspect financial transactions.
- Nor should openness be to the extent that it endangers the trust of individuals that the privacy of the personal information they have provided to a government agency will be maintained - for example taxation information or census information.
- What we need to devise are special arrangements which still achieve the range of those benefits which openness usually brings.
- In the case of the position I occupy - Inspector-General of Intelligence and Security - the activities of my office are specifically intended to achieve some of those benefits that would otherwise come from openness, particularly about how public power should be exercised, in relation to the six Australian Intelligence Community agencies.
- Not that I am the only mechanism that seeks to do that in respect of the AIC. The Auditor-General also has a mandate in respect of the AIC agencies, and their finances and administration are subject to scrutiny by a special committee of the Parliament - the Parliamentary Joint Committee on Intelligence and Security.
- The more general question here is that in all those areas, not just intelligence activities, where there cannot be complete openness, what are the special arrangements that need to be put in place? Perhaps particularly for this audience, what are the best ways by which Ombudsman offices can further tackle at least some elements of that challenge?
- One interesting development in the evolving role of the Inspector-General of Intelligence and Security is that as part of the legislation which will abolish conclusive certificates in the Commonwealth FOI and Archives arenas, the Inspector-General will be available as an “expert witness” for the Administrative Appeals Tribunal and for the Information Commissioner where an agency claims a national security exemption from release of documents.
- In addition to special external arrangements for agencies who have activities which cannot be fully open, I would always emphasise that attention must be given to the internal governance that agencies themselves have in place. However, at the same time there will always be suspicion that institutional issues

may, in practice, limit the full identification of what needs to be done for the proper exercise of public power and the efficient and cost effective operation of the agency.

- This is where I see the issue of whistleblowing or public interest disclosures as it is better termed, comes in to play.
- I imagine that for at least some in this audience there is appreciation that some whistleblowers are simply ill informed or misguided, some have lost objectivity and perspective, and with some it is really personal interest rather than the public good which lies at the heart of their agitation.
- But even where motivations are muddled or not pure, examining such disclosures can still lead us to some important issues within agencies, and the challenge is to devise arrangements which identify those issues and ensure they are dealt with properly.
- While not always by way of a formal complaint, my office does receive a number of contacts from employees or former employees of the six AIC agencies each year. In some instances they are looking for a sounding board and a discussion is sufficient for them, in a number of instances they are pursuing what is essentially a personal concern and we try to facilitate their access to other mechanisms which can deal with those. In a few instances there are general issues I can pursue in some way.
- Disclosures that can be challenging to deal with are anonymous complaints, and approaches where the person insists that their identity be kept completely confidential.
- Anonymous complaints often lack sufficient detail and a very careful approach is needed in working one's way into an issue.
- With confidential approaches, while sometimes with imagination we can find ways of probing the concern whilst keeping confidentiality, it often limits the extent of what can be probed. There are instances where, because of the small number of people who might be concerned in the matter raised, it is very difficult to realistically think the necessary degree of confidentiality can be maintained.
- I would like to finish on one point which springs more from my prior experiences in the Commonwealth Public Service rather than my current position.
- This relates to the question of complaints and what feedback can be given to a complainant where the conduct of a particular public official or officials is involved in the matter. In practice - and here I am referring to the Commonwealth level - what is seen as the privacy of the public officials seems to

essentially trump giving a full measure of feedback to the complainant.

- In my view this is the wrong way round. I believe that the conduct of a person in carrying out official duties should not in itself be seen to attract privacy rights, and that the public interest lies in providing adequate feedback to a complainant.
- This is not to say that there can't be difficult cases where there may be a connection between what are genuinely personal affairs of the public official and how they have conducted themselves in carrying out official business. And some complaints concern subject matter where there can't be full openness. However, those can only be dealt with on a case by case basis.
- The simple starting proposition which I would advocate is that one's conduct as a public official should be open to full scrutiny and disclosure.