

The Imperative of Good Governance: what communities deserve and expect

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This forum looks at the vital issue of good governance from a number of angles – how to build and maintain good governance, how it must adapt to the regulatory and digital environment, and case of studies of successful practice and innovation.

The angle that I will address – not surprisingly – is good governance through the eyes of the public. In striving for good governance there will be pressures coming at local councils from many directions – from supervisors, colleagues, elected councillors, central government agencies, regulatory and oversight bodies, and the parliament.

All those pressures must be addressed. At the end of the day, however, there is one accountability pressure that is central and ongoing – accountability to the community that you serve and the broader public. While we talk of this accountability being owed to a group – to an unstructured, amorphous or faceless body of people – it is important to view it as an accountability owed individually to members of the community.

Every member of the community has individual or personal issues or a belief that their issue is distinctive. From a council perspective, the community can be disaggregated into individuals who apply to the council for an approval or permit, who pay a fee for council services, who enjoy council sporting and recreational facilities, or who rely on the council to maintain the environment or resolve a problem.

Councils are the level of government that has the greatest day-to-day impact on the lives of most citizens. At the end of every council decision or action is an individual who may be affected, beneficially or adversely. Their core expectation in each individual transaction with a council will be good governance and accountability.

How do we measure if this expectation is being met? Clearly, elections play a vital role, but the four year electoral cycle is a crude mechanism for individually reassuring members of the public that good governance is being practised. We have to look both deeper and more broadly.

A great deal of empirical research¹ demonstrates that the level of trust citizens have in government is strongly influenced by three matters:

- whether people perceive decision making procedures to be fair, reasonable and ethical
- whether people feel they are treated with respect and courtesy by an organisation, and
- whether a decision or action affecting them is explained (directly or indirectly) and supported by adequate explanatory information.

The common thread in those three expectations is transparency. Transparency is central to shaping perceptions, managing expectations, and building trust.

Put another way, it is not alone sufficient that your organisation – your council – is well governed and well managed. Organisational integrity depends as much on the community's knowledge or belief that this is the case.

Without that knowledge there will be doubt, suspicion or misgiving. Even worse, if there is a publicised mishap there may be distrust. Reputations, once damaged, are difficult to restore, and knowledge of the mishap may continue for some time to undermine the public's perception of good governance. Any of you from a council that has been touched by a corruption scandal will know this from experience.

An interesting national case study is the 2016 Census. After the extraordinary computer breakdown on Census night, the Australian Bureau of Statistics and the Government were in damage control for many weeks to reassure the public that the national Census – that had been conducted for over a century – was not threatened. And yet a third of people surveyed by the ABS straight after the census agreed that, to some extent, the data collected from the census was unreliable.²

The results of the Census were released this week. This snapshot of the nation has generated enormous public interest. The early signs are that the integrity of the Census data is not under question. If so, that is surely to be explained by the steps taken by the ABS over many decades – indeed, over a century – to explain what it was doing, to address questions and criticisms, and to build community support. As this reminds us, however good our internal governance, occasions will arise when we need some capital in the bank.

¹ Eg, TR Tyler, *Why People Obey the Law* (1990, New Haven, Yale); J Braithwaite & T Makkai, *Trust and Compliance, Policing and Society* (1994) Vol 4(1), pp 1-12; TR Tyler & YJ Huo, *Trust in the law: Encouraging public cooperation with the police and courts* (2002, New York: Russell Sage); JC Chebat & W Slusarczyk, *How emotions mediate the effect of perceived justice on loyalty in service delivery situations: an empirical study*, *Journal of Business Research* (2005) Vol 58, pp 664-673; TR Tyler, *Why People Cooperate: The Role of Social Motivations* (2011, Princeton, NJ: Princeton University Press); J Jackson, B Bradford, M Hough, A Myhill, P Quinton, & TR Tyler, *Why do people comply with the law? Legitimacy and the influence of legal institutions*, *British Journal of Criminology* (2012) Vol. 52(6), pp 1051-1071.

² Catherine Hanrahan, *Census results are coming out, but can we trust the data?*, ABC News online, 26 June 2017, www.abc.net.au/news/2017-06-26/census-results-are-coming-out-can-we-trust-them/8594132

Another recent national example of a good governance and integrity challenge has been the problems with Centrelink's robo-debt recovery system. This was a highly sophisticated system that had been developed with enormous resources and by many fine minds. And yet a Commonwealth Ombudsman investigation report in April this year, that was critical of the debt recovery program itself, was particularly critical also of Centrelink's poor service delivery in administering the program.³

People had problems getting a clear explanation about debt recovery decisions and processes. A simple oversight – such as forgetting to include in customer letters a dedicated helpline number – resulted in people calling the general customer service number, and having to wait a long time to speak to someone. The general customer service staff who received the calls may not have understood the system adequately to respond knowledgeably to enquiries. The individual frustrations grew into a storm of protest that undermined the community's trust in Centrelink, and distracted the agency greatly from its other business work.

I noted earlier that transparency underpins the community's expectation and belief in organisational integrity, accountability and good governance. People must feel that they know how a council is governed, how decisions are made, the council's values and ethical standards, and how these are upheld.

Clearly, a council can play a large role in promoting transparency by the way it communicates with the community. This must be done in many ways – through reports, the web, stakeholder management, public relations, online responses, explaining decisions and complaint handling. More broadly, two-way communication between government and citizens should be understood as essential to a functioning democracy. Interestingly, the High Court has held that freedom of political communication is an implied constitutional guarantee.

Having the trust of the community can impact on a council's ability to gain acceptance for changes, initiatives and other decisions that rely on wider community support. Losing that trust can cause the community to greet decisions with suspicion, and to perceive sinister intentions where there are none. Where there is mistrust and suspicion, it is more likely that people will complain or express their criticisms with a passion that may seem overstated.

Practical experience, as well as scholarly research, teaches that people are more likely to accept an outcome they see as unfavourable if they understand the process, have an adequate opportunity to express their views, and decisions are explained. Again, that precept has been distilled as a legal principle – the doctrine of natural justice, or procedural fairness.

Undoubtedly there are situations in which people expect miracles, or will be unmoved by even the most considered and polite explanation. Some damaged relationships may seem

³ Commonwealth Ombudsman, *Centrelink's automated debt raising and recovery system: A report about the Department of Human Services' online compliance intervention system for debt raising and recovery* (April 2017).

irreparable. It is nevertheless the case that transparency, including robust and candid communication, is integral to good governance.

Let me now turn to the practical side of this issue. How can councils ensure that the community, as well individuals within the broad community, are kept informed? I have four observations.

Firstly, I encourage councils to make as much information as possible available to the public. The revolutionary development in our time is that the internet enables us to do that efficiently, helpfully and seamlessly. I am not talking here only of the publication of formal rules, reports and decisions. Every item of information held by a council is likely to be of some interest to one or other members of the public. Clearly, there are confidentiality, privacy and practical constraints on what can be made available publicly, but generally government agencies err far too much on the side of reticence and secrecy.

In particular, government agencies have generally been slow to publish documents that they regard as of internal interest only, such as their policies and procedures, organisational charts, templates and role descriptions. However, a core principle in the open government/freedom of information reforms that swept around Australia from 2010 onwards was that all government information should be viewed as 'public sector information'.⁴ The federal *Freedom of Information Act 1982*, that I formerly administered, declares in the objects clause that 'information held by the Government is to be managed for public purposes, and is a national resource'.⁵ Similarly, the *NSW Government Information (Public Access) Act 2009* declares that one of the objects of the Act is to encourage the proactive release of government information.⁶

The right to know is not a one-dimensional right, of benefit only to the public. It is distinctively in the self-interest of government agencies to be transparent. If you've got strong internal governance systems, tell the world – as the internet now enables you to do.

Being transparent will reassure the community that they can trust you. There are no secrets. You're an open book. You know what you're doing, and are happy to publicise how it's being done. As you have probably experienced also, the very need to be transparent can be a significant motivating factor to do some spring cleaning of your internal systems.

My second point is to be responsive each time a member of the public contacts you. Individuals need to feel they have been treated with respect and courtesy. Without exception, people feel insulted when they do *not* receive a timely response.

How long is too long? There is no bright line answer to that question. Probably, too, it is a shifting answer in an online world where you can ask yourself a question one minute, and Google the answer the next. Our common experience is probably that people have higher expectations about response times than they did in the past.

⁴ Eg. Office of the Australian Information Commissioner, *Principles on open public sector information* (2011).

⁵ *Freedom of Information Act 1982*, s 3(3).

⁶ *Government Information (Public Access) Act 2009*, s 3(1)(a).

When people complain to the Ombudsman about a council without first having approached the council, we tell them to complain first to council and only come back if they have not received an answer in six weeks. The good news is that we don't hear from some of them again. The bad news is that seven weeks later we still hear from a lot of people!

More generally, a major theme in complaints to the Ombudsman about councils, as indeed about government agencies generally, is that people are frustrated at the lack of a response, or at a poor response.

Practical steps can be taken to bridge this expectation gap. One is to educate the public about what they can expect in terms of response times – for example, on your website, and in acknowledgement emails and letters. Internal systems should also have inbuilt benchmarks, flags and alerts to ensure that response times are being monitored.

A good way of locking yourself into best practice is to include information about response times in the automatic email response that advises people their email has been received. Email responses can also include information about processes – what will happen with the email, and when the person can expect to hear from council.

My office recently asked every council whether they had a policy or practice as to the time frame in which replies will be sent to complainants. We wanted to know so that we could tell complainants how quickly they could expect to hear back from the council after we referred a complaint to the council. The responses (that we are still receiving) tell an interesting story.

The response and acknowledgement benchmarks vary from one council policy to another, but the pleasing news is that the focus overall is on giving an efficient response:

- Each policy we have seen envisaged a response or acknowledgement of a complaint within 4 weeks.
- 60% of policies envisaged a response within 2 weeks.
- The most ambitious policy required a response within 4 days!
- Some policies speak only of an acknowledgement (usually 4-10 working days), while some said an acknowledgement should be given within the first week, followed by a response within 3.

We did not ask whether these policies are available on the web or are noted in automatic email responses. Clearly they should be, as a practical step in managing people's expectations when they contact you. This is a matter you may care to review. And, if you've not yet responded to the Ombudsman's request for your policy, please do so promptly or we will draw the conclusion that you have no policy on timeframes for responding to public enquiries!

My third point is own up to mistakes or errors of judgment when they happen. Being transparent is never more important than when things have gone wrong. It demonstrates honesty to the community, and is an essential precondition to building trust. The community will also be reassured that you are prepared to remedy the wrongdoing, and of your commitment to good governance. The damage caused by not owning up to mistakes

will be even greater when the whole story is inevitably exposed, and the public will then find it difficult to forgive what they sense to be a cover-up.

The most obvious area where this applies is with complaints. Seeing complaints as an opportunity to deal with a problem, not a nuisance, is a way of acknowledging that mistakes and errors of judgment can and do happen, and that a council would rather know, so the problem can be fixed. You will all be aware of the aftermath of accusations that has followed the recent tragic fire at the London apartment block, with residents and advocates saying they had raised multiple concerns about safety, but these were “brushed away”.⁷ While this may only be their *perceptions* of what happened, perceptions are nonetheless critical when it comes to trust in government agencies.

The need to confront problems when they are first raised was a major theme in the 900 page *Operation Prospect* report that I published in December last year. The report dealt with a covert police investigation that occurred between 1999-2002 and that had been the subject of intense public controversy ever since. My report stressed a number of times that our four year investigation may have been avoided had concerns about the police operation that were first raised in 2002 not been glossed over or explained away. Had senior management said at the time – ‘Houston, we’ve got a problem’ – more than ten years of anguish and recrimination may have been avoided.

The fourth and last thing I want to talk a bit more about is the importance of giving reasons for decisions.

My Deputy Ombudsman, Chris Wheeler, has been speaking for a number of years about justice theory, and the idea that people are more likely to accept an outcome that is unfavourable to them if they perceive that the processes the decision-maker followed were fair, *and* they were treated fairly.

In many complaints we receive about council decisions, the person continues to be aggrieved because either:

- the council has not given reasons for the decision
- the reasons were not communicated clearly enough
- the person has misunderstood what council told them, or
- the person is unable to accept what council told them.

It is also not uncommon that a person’s dissatisfaction is compounded when they receive a decision they are unhappy with after a lengthy wait.

Based on our Ombudsman experience, there are a few issues that lie behind many complaints and that councils could work on.

One is to be proactive in informing the community about *the functions of council*. This provides context and background for the myriad of decisions that councils make. You can draw attention to this contextual information in your communications with individuals.

⁷ Robert Booth and Calla Wahlquist, *Grenfell Tower residents say managers ‘brushed away’ fire safety concerns*, The Guardian Online, 14 June 2017, www.theguardian.com/uk-news/2017/jun/14/fire-safety-concerns-raised-by-grenfell-tower-residents-in-2012

Generally, a more informed community is likely to be more understanding and empathetic. This can help manage expectations about limits on the council's influence and power – for example, so that you don't get blamed for decisions of the State government.

Another area for proactive communication is in informing the public about decisions that have been made, and the reasons for those. For example, explain why large developments have been approved or, if council refused consent and lost in court, make that information public. Be on the front foot, rather than reacting to negative public opinion or complaints.

Proactive communication could also lessen some complaint issues we see around enforcement action taken by councils. Our recently-updated enforcement guidelines⁸ note that a great way of encouraging compliance by the public is to actively educate them. It is also a way of proactively addressing complaints that individuals have been unfairly singled out for enforcement action.

It is similarly important to educate the public about *their* obligations, for example, to abide by conditions attached to development consents.

There is great scope also for improvement in one-on-one communication with individuals. When a decision has an immediate and direct impact on a person, invest time in thoroughly communicating the reasons for that decision, particularly if you expect the person to be unhappy with the decision. Help them understand the reasons for that decision.

When you have a full in-tray, it's tempting to make a decision, take whatever action flows, and move onto the next thing. But telling the stakeholders why you made that decision, rather than just sending them a form letter advising them of the outcome, is not just something that is 'nice to do' if you have time. It is an integral part of good governance. It is an additional quality control mechanism. The need to publicly explain and justify a decision serves to ensure those reasons are sound. It's a good communication skill to have and saves time in the long run.

We all deal with serial complainants who are easily triggered to make a fresh complaint. However, the Ombudsman experience is that most people are only motivated to complain where something has affected them directly and indignation has pushed them over their pain or frustration threshold. Unfortunately we commonly receive complaints where this situation has resulted not because the decision itself was unfair or unreasonable, but because the complainant did not know why the decision was made. The person didn't have any information, or did not understand the information they have been given. This led them to perceive problems with governance – alleging that a decision maker was biased or unfair or corrupt – when instead what happened was the decision maker did not communicate effectively.

⁸ NSW Ombudsman, *Enforcement guidelines for councils* (December 2015).

You will see buried in the appendices of every annual report of my office for the past decade that the most common outcome of complaints about councils is that we provided advice or an explanation where there was insufficient evidence of wrong conduct. Commonly we have closed a quarter of our council complaints on this basis. In one year, it was almost *half* of all complaints! Clearly we can see room for improvement in those numbers.

Common communication gaps that we see in our work arise from the fact that government is confusing and complicated to many people. Many people simply don't *know*:

- how complicated legislation is
- how a council may be restricted in what it can do
- how council may not be the ultimate decision-maker, particularly when it comes to development
- things that are outside the council's responsibility
- how much deliberation council went through before making the decision, methodically weighing up all the competing interests and trying to be fair to all parties
- the role of discretion or fixed rules in decision making
- why decisions take so long to make.

Let me give a common example. A complainant perceives that a council sat on its hands by failing to take enforcement action, because council told the complainant that no enforcement would be taken. The truth in many cases was that council had tried, but the subject of the action threatened to take further legal action. Council looked at the potential legal bill and decided to deal with the matter in a different way, which it did. Throughout this process the complainant was kept in the dark.

An impediment that councils frequently refer to is privacy law. It is true that privacy law may impede what you can say to a person who has complained about the actions of another person (such as a neighbour), but privacy laws also include qualifying language and exceptions (such as 'unreasonable disclosure of personal information'). There is often more room for movement than is appreciated, and privacy regulators generally acknowledge that government agencies have a competing public interest to provide reasoned decisions or explanations. My own officers face the same issue, but are experienced in finding ways to share enough information to satisfy a complainant that a council, for example, is not as incompetent or corrupt as the complainant thought, without revealing personal information in a way that breaches privacy laws. So it can be done!

Important amendments to the privacy legislation a few years ago assist public sector agencies to meaningfully communicate with complainants. Subsections 24(1), (5) and (6)(a) of the *Privacy and Personal Information Protection Act 1998* enable councils to disclose information to a complainant that is reasonably necessary to report on progress into an investigation into the complaint or provide advice as to the outcome of the complaint or any action taken as a result of the complaint. It is important to focus on the opportunities that privacy laws afford you to provide more information, rather than on the obstacles they present.

In conclusion, participants in this forum have a challenging program ahead that engages with many perspectives on good governance. I have addressed the topic from the perspective of a regulator who deals with complaints from the public about councils. I have stressed the importance of transparency and effective communication in building a good governance culture.

That is a valuable perspective, but it is one perspective only. The comprehensive program for this forum enables you to develop a rich tapestry of ideas and examples of good governance.

Thank you for the opportunity to contribute to this analysis.