



Public Accounts and Estimates Committee

Submission No. 12 .

Executive Officer
Public Accounts and Estimates Committee
Parliament House
Spring Street
East Melbourne Vic 3002



17 May, 2007

Dear Executive Officer,

Re: Calls for Submissions--Strengthening Government and Accountability in Victoria

This is a brief submission. It is organized as a response to the document "Renewing Accountable Government; Reforming Government Accountability in Victoria", Australasian Study of Parliament Group, 2006.

First, permit me to say that I would welcome the immediate implementation of the suggestions for improvement made in that document. The principle that Ministers should have clear instructions as to what responsibilities have been assigned to them, coupled with the notion that they will be held accountable for acts and omissions of all those who act pursuant to the authority—constitutional, legal and contractual—that corresponds to those various responsibilities, is unexceptional. It is somewhat sad that this needs to be spelled out. Similarly, a call to the effect that unnecessary, self-serving secrecy should be prohibited, should not have been required but, if it is, the pertinent recommendations to clarify what information that belongs to the public and for the appointment of an Ombudsman to deal with the proper operation of Freedom of Information legislation, make eminent sense. So, too, do the mild suggestions made to inhibit obvious conflicts of interest and the proposals to ensure that questions asked in legislatures should be answered directly and honestly and that public servants should be allowed to act as public servants and be permitted to appear before legislative committees charged with conducting inquiries.

Accountability for the decisions and acts initiated by those entrusted with power, frankness and dignity are all virtues. These recommendations support them and I support these recommendations.

They are, however, recommendations that assume that, if we have more direct accountability with the odd attribution of culpability, more candour and politesse, we will have an enhancement of democracy and that the public will be satisfied. This is a leap in logic. This brief submission makes the argument that it might be useful to set out to do more than correct the bad 'optics' of contemporary arrogant, risk-avoiding and secretive legislative practices.

One of the more intriguing aspects of modern democracies is that only the electoral sphere is subject to the one person/one vote rule. It is this factor that leads to heightened expectations. Only in this sphere is there an acknowledgment that numbers matter, that the will of the people as expressed by voting is what should be the central concern of those charged with government. The reforms on offer are one way to deal with problems that flow from the fact that governments act contrary to the people's expectations and with the need to facilitate the majority of people's ability to bring about change when they do not like the way in which government conducted its business and/or the outcomes. The recommendations assume that a better informed electorate will rectify the situation, that there will be a more efficient means to hold elected legislators to account. An old slogan "information is power" is what guides the recommendations. Manifestly, one of the premises of the recommendations is that this will make citizens feel better about the parliamentary system. This perception will be enhanced if the proposals to make Ministers answer questions and take responsibility for their department's conduct of affairs are turned into reality.

But, this rationale for these kinds of proposals, laudatory as they are, is not all that sound because it ignores other, perhaps more significant, reasons for the citizenry's disaffection with electoral politics once it feels that its much-trumpeted expectations to be entitled to real participation have been thwarted. There is an unarticulated understanding that this form of government is only about notional democracy. That is, it is intuitively felt that "information is not power, but power is power". While this is not the occasion to elaborate, note that in the early debates about enlargement of the franchise, legislators were very concerned about the potential for the masses, by means of their numbers, to affect the interests of the wealthy who were few in number but, until then, had had little trouble exercising legitimated control over government. In relatively recent times, it has become conventional wisdom that the people writ large do/should exercise total control over government. But, this conventional wisdom is undermined every day by the publicly evident ability of the wealthy to exercise influence over the elected representatives of the people.

Examples should not be necessary. They range from the seemingly inevitable to the blatantly unacceptable. In polities, such as ours, where we rely heavily on private economic actors to generate our material welfare, those with wealth are listened-to in ways that others are not. Their needs and desires are all too easy for governments to see

as needs and desires to be privileged. Large concentrations of wealth gathered together inside corporate envelopes have made it easier for private actors to make their desiderata known and acted-upon. Corporate managers, appearing in public and at private gatherings, are able to ask for certain policies and advantages on the basis that they are scientifically representing objective economic realities. The explicit or implicit threats that the capital they control might be forced to move out of the government's jurisdiction is influential, without more. In an economy that is ideologically and politically committed to private markets, this disproportionate influence possibly does not upset the citizenry too much: it is to be expected. But, it may mean that, however instinctive the feeling may be, there is little belief that the formal democratic institutions that we do have actually can provide a sphere of true participation.

This lack of sanguinity is exacerbated, of course, by daily revelations of the undue influence of the unelected sectors. Ministers are more likely to appear at the meetings/conferences run by think-tanks set up to serve the interests of private wealth actors than they are at academic or community-based ones. They are more likely to credit information coming from such sources than from any other. To illustrate: recently, a federal government attack was launched on a study by a respected academic who found fault with the operation of the Work Choices legislation. It characterized the report as one coming from a person who had once worked with a union group and was, therefore, unreliable. Such characterizations are rarely used when a report comes from, say, a scholar or activist funded by the Chamber of Commerce. It is hard for the public to miss the significance governments of all stripes attach to certain actors and segments of the population and the same governments' tendency to marginalize the opinions of the many, indeed, even of the need to find out what these are. To be fair, this makes sense, given the weight that is accorded the wealth-generating sectors and given the fact that this is reflected in the mainstream large scale media, themselves members of the larger for-profit sectors. It must be hard for governments to believe that the views of the few they consult are not *ad idem* with the views of the majority. But, sensible or not, defensible or not, it is difficult for the governed to believe that, to our elected representatives, some people are not more important than others. This leads to disillusionment and always threatens to lead to the delegitimation of the parliamentary regime, especially when the influence of the few comes into view.

The business pages have gossip columns that chatter about which Minister/leading public servant was seen, at which up-market luncheon or dining place, or in which box at which sport venue or at which gala fine arts event, with which captain of industry or finance. The tight nexus between dominant private actors and those responsible to all the people is a matter-of-fact issue for anyone living in this society. More, the nexus has uglier (to electoral democracy enthusiasts) aspects. Consider here the number of leading politicians/public servants who finish-up with well-remunerated positions on major corporate boards and prestigious institutions once they leave their public duties and, conversely, the number of occasions on which well-connected private sector allies finish up with prestigious government appointments. It is difficult for the bulk of the people to believe that their votes count. Would any of this change if all the proposals put forward

were to be given legislative life? Did any of it change after the Prime Minister's guidelines were adopted?

In this context, mainstream supporters of the parliamentary electoral regime become agitated when these phenomena take on more obviously malodorous forms. This happens when clumsy lobbyists are caught out using undue influence or methods to get favours for their private clients. This is especially true whenever the lobbyist was connected to the party in government at an earlier stage of her/his career. This, in turn, points to the fact that Ministers surround themselves with their own advisers when in government. They prefer the advice from the committed friends and employees to that proffered by the more neutral permanent public service, established precisely because its goal is to serve the public weal rather than a political party momentarily in office. Worse: it is part and parcel of the political advisers' job to try to manipulate the public servants and the latter may often feel the need to ingratiate themselves with their political superior's allies. There are punishments for not doing this and there may be rewards for co-operation. The politicization of the public service is thus accelerated. When some or all of this becomes public knowledge, uproar may follow and there are calls for reforms. A few recent headlines tell the story. "MPs happy to take the money and run" (AFR, 8 May, 2007, p.5), referring to dinners held by the federal government's ministers for thousands of executives in Canberra who happily paid excessively for their dinners to enable them to lobby their favourite minister prior to the Budget. Or: "Bring political lobbyists out of corridors into the public eye" (The Age, 16 May, 2007, p.18), an angry, indignant editorial denunciation of undue influence peddling of former government insiders.

The recommendations on offer are responding to some of the misgivings we all share about the lack of accountability of Ministers who shroud themselves in plausible deniability garb and whose legislative performances lack a great deal of frankness and respect for the process of parliamentary democracy. But, it may well be that to address these shortcomings will do little to restore faith in that parliamentary schema because it does not address the underlying reasons that create the perception that empowerment of the electorate is inhibited by factors of a different kind. The problems addressed by the proposals are seen as being caused by all-too human frailties that cause all of us to seek ways to avoid responsibilities for the consequences of the exercise of discretion. The argument here is that there are structural causes for the malaise, distorting causes that will remain intact and lead to continued malfunctioning even if all the recommendations offered are implemented and implemented well. One illustration is proffered to make this point more salient.

One of the envisaged ways to ensure greater accountability and taking of responsibility is to force Ministers to establish systems which will ensure that they are properly informed at all times by their department and private office. In this context, there will be no way to avoid taking responsibility for events and decisions and it will be justified to hold a Minister culpable in appropriate circumstances. This remedy, then, is to set up a compliance scheme that mirrors the ones that are sought to be imposed on the private corporate sectors. To take but one example: it is analogous to a scheme adopted in the Crimes Act (Cth.) that provides for the fixing of corporate criminal responsibility if a

corporation fails to establish an acceptable corporate culture. While policy-makers have resorted to this kind of mechanism in the corporate setting because they have been seen to be—and have felt—impotent to make their regulations bite when applying the more traditional rubrics of criminal and regulatory responsibility, it ought to be noted that this tendency has done little by way of dulling the questions about corporate activities' legitimacy. While there is general acknowledgment of the corporate vehicle's contribution to overall wealth-creation, the status and legitimacy of corporations remain controversial, giving rise to endless expressions of hope that they may act in a socially responsible manner sooner rather than later. These doubts remain because the structural underpinnings of corporate behaviour are not addressed by the regulatory reforms. These underpinnings have a single-minded (materially useful) goal, namely the maximization of wealth by means of a vehicle that is anti-democratic by design, that often conflict with values, such as altruism, compassion, sharing, accountability to one's neighbours and respect for democracy, values that are dear to people's ordinary lives.

Skepticism about government may persist if all that changes is the enactment of the reforms on offer in respect of governmental behaviour. The cultural changes aimed-for, while admirable, do little about the corrupting influences of the unelected private sector on the electoral democratic scheme. In the context of the nature of the argument made above, it ought to be of some interest to note that the remedies chosen resemble those sought to be used to make the anti-democratic private sector somewhat more accountable, to urge them to think a little about the people affected by this sector's decisions. These remedies are designed to make the undemocratic—albeit efficient—corporation more palatable to a population that aspires to more, rather than less, democratic participation. What is remarkable, then, is that, instead of infusing the private sector with public accountability measures, the public sector is being asked to live up to the undemocratic private sector's slightly mediated standards of responsibility and accountability, standards not so much intended to give outsiders to the corporations real power as they are aimed at leavening the adverse ideological impact of having an undemocratic institution make so many important decisions. But, government is meant to be democratic, not efficient in bottom line terms. Efficiency in government should be equated with enriched empowerment of the people.

In sum: the steps proposed thus far are good ones. They do not go far enough. Attention should be paid to remove, as much as it is possible, the seductions and influences of (rightly undemocratic) private wealth from the democratic institutions and their functionaries. This would require attention to be paid to the establishment of different political fund-raising rules, eg., the abolition of contributions by non-human individuals and by capping the donations of any individual (reducing the incursion of the one dollar/one vote sphere into the one person/one vote one); consideration might be given to abolishing Ministers from bringing their own staff; serious efforts ought to be made to close the incentives furnished by the revolving doors that do little to separate the public and private sectors; difficult as it might be, some thought could be given to forbidding Ministers from meeting with any persons seeking to inform/persuade them, unless notice was given of any such meeting to those most likely to be affected by such a meeting's subject-matter...

The liberal democrat editor of Harper's Magazine, Lewis Lapham, writing about the situation in the U.S. in August, 1996, argued that there are now two governments in the United States, the permanent and the provisional. The permanent is constituted by the corporations on the Fortune 500 list, plus the attendant lobbyists, media and entertaining syndicates, research institutions and universities, law firms, etc. What characterizes the permanent government, Lapham went on to say, is that it is "obedient to the rule of men, not laws". The provisional government is based on the notion that it is based on the rule of law and not of men. Consequently, Lapham wrote, "it must live within the cage of high-minded principle" while controlling very little of substance.

My purpose has not been to offer solutions as much as it has been to draw attention to the danger of limiting the reform debate. A great deal of effort may be put into creating a cage of high-minded principle.

I trust this is of some use. I wish the Committee well in its deliberations.

Yours sincerely,



Harry Glasbeek,
Professor Emeritus and Senior Scholar,
Osgoode Hall Law School, York University,
Toronto

and

Visiting Professorial Fellow,
Law School, Victoria University,
Melbourne.