

## **Glossary and Response to the Terms of Reference**

\*\*\**and italicized text denotes response from John Williams*

### **Glossary**

**Accountability:** being obliged to answer for one's acts or omissions, and those of others, to an authority.

**Answerability:** being obliged to answer for one's acts or omissions, and those of others, to an authority.

\*\*\**The definition for Answerability is identical to Accountability which I presume is a typo. I see Accountability as being a combination of Answerability and Responsibility*

**Culpability:** being blameworthy.

**Responsibility:** the sphere or extent of the duty or charge which has been entrusted or assigned to someone.

**Government:** the executive group of the governing party (the Cabinet) and the public service that supports it.

**Minister:** a member of the executive

**Parliamentary Secretary:** a Member of Parliament appointed to assist a minister

Published by the **Australasian Study of Parliament Group**  
Melbourne. November 2006  
ISBN 0-9775989-1-9  
**RENEWING ACCOUNTABLE GOVERNMENT**

# Reform of governmental accountability in Victoria

## Underlying assumptions:

- Democracy is fundamental to the Australian way of life. We enjoy its benefits & wish to keep it.
- It is the responsibility of all Australians, and most particularly our Parliamentary representatives, to act in a way which protects and enhances our democracy.
- Accountable government, where the rule of law, reason and perceived procedural fairness flourishes, strengthens democracy.
- The power and exercise of Executive government at State, Territory and Federal levels has developed to a point where direct accountability to Parliament and to the broader public interest is significantly reduced, and reducing.
- A renewed commitment to accountability by governments and prospective governments will be beneficial to:

*\*\*\*\* As I pointed out in the paper, perhaps the failure of government to feel fully accountable to the legislature lies in the legislature not knowing its powers and exercising them appropriately. Governments by themselves will not voluntarily seek more accountability; it needs to be imposed upon them.*

- our democracy generally: the broad public interest,
- each government or prospective government itself,
- other nations for which we seek to be a positive model.

## Action Required:

- Legislate/ Codify Ministerial Responsibility
- Legislate/ codify the exercise of Cabinet confidentiality

\*\*\*\* *Codify if necessary, but do not legislate the relationship between Government and the Parliament. To legislate will bring the courts into the debate. The relationship between government and its parliament is political and not legal. To suggest that non-justiciable legislation could be passed is a non starter in my mind.*

*No court will accept the instruction that they cannot express an opinion (decide) on legislation. Legislation codifies a relationship between two or more parties as approved by parliament. Courts adjudicate on such matters.*

*The relationship between Government and Parliament is political and more properly codified in the Standing Orders of Parliament and addenda thereto which are beyond the reach of the government and their institutions (i.e. the courts). (See the discussion on the Bill of Rights (1689) (UK)*

- Establish ombudsman's role in mediating FOI disputes
- Establish Parliamentary Standards Commissioner
- Establish independent Parliamentary Presiding Officers
- Update, renew and adapt the Prime Minister's Guide for the Premier of Victoria and other State Premiers and Territory Chief Ministers

**Process:**

- Achieve genuine public commitment on these recommendations, from governments and potential governments

\*\*\*\* *As I said earlier, no government will abide by any such commitment, even if it can be obtained. The exercise and application of accountability rests with the superior institution, not the subordinate. I see the answer lying in education for parliamentarians in order for them to exercise their responsibilities and powers appropriately.*

- Achieve public interest and willingness to apply consequences for governments' failure to abide by the commitments so given.

*\*\*\*\* The responsibility for applying consequences to a government that fails to abide by its commitments rests solely and squarely on the shoulders of the parliament. They cannot shirk that responsibility and expect the public to apply censure instead. There is no such mechanism for the people to adjudicate on such matters other than replacing their government at an election.*

*Elections are fought on prospective agendas; vote for me and I will deliver campaign promises to you. The public will never become engaged in what they see as an arcane rancorous debate among politicians over rules they do not understand.*

*People may contemplate retrospectively and replace a government that is old and tired or involved in significant corruption or scandal, but they will never settle the score on who is abiding by the rules. Power accumulates to those who take it; never given to those who ask for it. That is why democratic oversight that is progressively more widely distributed (hour glass concept) to ensure that it cannot be grabbed and misused.*

#### RENEWING ACCOUNTABLE GOVERNMENT

2

### BACKGROUND

Australian citizens are increasingly denied effective democratic control over action taken on their behalf by governments of all political persuasions at Commonwealth, State and Territory levels. Governments hold office only through the democratic electoral process and the powers that governments exercise are delegated democratic authority. Yet it appears to many much as if they enjoy the discredited divine right of kings. Information is denied, processes are manipulated and accountability is deliberately frustrated.

*\*\*\*\* Unfortunately I must reiterate my thesis that it is the role of parliamentarians, on behalf of their constituents, to hold the government accountable. Governments will always take power without accountability if allowed to do so.*

*We engage professionals to provide their expert skills in other aspects of our lives when we need them; we therefore also engage parliamentarians as the professionals when we want the government to be held accountable and responsive to our will. We should expect that parliamentarians would*

*perform as effectively as other professionals who have their standards to meet.*

Ministerial accountability fails as governments seize and hold political advantage, putting partisan interests ahead of the democratic rights of citizens and their entitlement to be treated with integrity, dignity and respect.

*\*\*\*\* Governments seize and hold political advantage only because they are allowed to do so by the parliament. I mentioned the power of political parties in the parliament in my paper. Again I can only offer education for parliamentarians and for them to understand their oversight roles. I also mentioned in my paper the need to educate citizens through civics classes in school. They need to better comprehend that they are the collective repository of ultimate democratic accountability and how important it is that they exercise that authority over their representatives. When the public demand accountability they will receive accountability, parliamentarians ignore the voters at their peril.*

*As the public become more interested and knowledgeable in the democratic process through education, and become cognizant of the fragility of their democracy, there is a greater probability that they will support parliament in the recovery of its powers that have slipped into the government's domain.*

*Parliamentarians on the governing side may be sympathetic to the government's agenda and the opposition (euphemistically speaking) less so, but that does not give parliamentarians the collective right to abdicate their oversight responsibilities. People without responsibility act irresponsibly, and this applies to too many parliamentarians on both side of the House.*

Some ministers claim that they cannot be held personally responsible for the acts and omissions of others who are involved in the administration of their portfolios because they did not know when they should have known and those directly answerable to them did know but did not tell them. They are not told because of a culture that allows information be withheld so that the minister can say "I did not know". Effectively, personal responsibility is denied. "Bad government is the inevitable result of a lack of accountability"<sup>1</sup> and fertile ground is prepared for corruption.

*\*\*\*\* We dealt with this exact issue during our sponsorship scandal in Canada, when the Minister said he only dealt with policy therefore could not*

*be held accountable. The 10<sup>th</sup> report of the Public Accounts Committee in the 38<sup>th</sup> Parliament (attachment 1) dealt specifically with this issue by calling for the Deputy Minister to be designated as an accounting officer, i.e. accountable before parliament for the exercise of his responsibilities. We also set out a transparent process for dealing with disputes between ministers and their deputies which would guarantee a public airing if a minister directed his deputy to proceed with an agenda over the deputy's better judgment. The report left no responsibility gap between the minister and his deputy, and what career deputy would take an unnecessary fall for his minister.*

*Unfortunately when the succeeding government passed legislation incorporating the report, the complaint mechanism for the deputy is to report the matter to the Treasury Board (a legislated committee of Cabinet). Should the deputy remain unsatisfied the Auditor General would be advised, but since a decision of the Treasury Board is a Cabinet confidence, the Auditor General would be severely constrained in advising parliament on the matter. (Government wins again!)*

*The Public Accounts Committee in the 39<sup>th</sup> parliament took up the issue again after the passage of the legislation and codified (with significant assistance from Prof. Ned Franks) their interpretation of the responsibilities of a deputy minister as an accounting officer, and his responsibility to parliament (attachment 3). The report has since been concurred in by parliament and will be published as an addendum to the Standing Orders.*

Freedom of information legislation is stretched to breaking point as many governments resort to delay, manipulation and court processes to defer or preferably prevent access to public information that they believe may affect voter support. This information belongs to the public. It is their votes which empower the executive to act and their taxes that provide the resources that are then used both to create information and to deny its availability in the public domain.

*\*\*\*Access to Information legislation imposes obligations on government with, I hope, administrative penalties for failure to fulfill their obligations. The parliament cannot let such abuse of power to go unheeded. It is the role of the Public Accounts Committee and other committees to demand public accountability from Ministers and to hold them publicly accountable for their failure to uphold the law. This is political accountability and if the*

*parliament decides that it is serious enough for them to make it a high priority issue in the parliament and with the public at large through the media, marked improvement can be achieved.*

Many ministers can evade answering parliamentary questions, and make a mockery of question time. They can use debating artifices to at best ignore the question and at worst to turn requests for information into abusive partisan attacks on political opponents.

*\*\*\*\* Welcome to the political world where the people are disillusioned with the behaviour of their politicians and have tuned out.*

*As I mentioned in the paper, a parliament (in the Westminster model) can only dismiss the entire government and not any particular minister, but given the political will, parliament has the power to call the minister to committee where he cannot duck the questions so easily. But again, if he is given political cover by his party at committee it proves my point, people without responsibility act irresponsibly. Only by engaging the public which can be extremely difficult given competing agendas of parties and parliamentarians, can progress be made. I do not have a remedy in the short term for such arrogant behaviour which is tolerated by parliamentarians from the governing party who have the ear of ministers and the capacity to effect change. But back bench M.P.'s are also vying for ways to climb the ladder, therefore must deal with competing and conflicting interests.*

The Victorian Legislative Council, which will be reformed with effect from the general elections on 25 November 2006, has the potential to be a major instrument of accountability.

This discussion paper canvasses a range of reforms and revisions affecting the accountability of ministers and governments to Parliament and citizens. Government accountability would be cemented into law by a set of principles to be adopted through ordinary legislation in the first instance, but ultimately entrenched as part of the Constitution.

*\*\*\*\*I mentioned above, my serious concern in passing legislation that governs the relationship between government and parliament; it should be done by amendments to the Standing Orders, which are beyond the reach of the courts. I would become extremely concerned about the long term health of democracy if the courts found their way into the political arena. It would*

*only be a matter of time before government routinely used legislation to further emasculate the oversight powers of parliament.*

*The public at large have no choice but to rely on parliamentarians as professionals to protect their power of democratic oversight of government, and they should never be disappointed.*

Complementing that, a series of modest but significant updates are suggested to the code applying to Commonwealth ministerial responsibility, published as

<sup>1</sup> The Age (2006) Editorial, 13 April

#### RENEWING ACCOUNTABLE GOVERNMENT

3

“A Guide on Key Elements of Ministerial Responsibility” by Prime Minister John Howard in 1998 (referred to as the “Guide” in this paper). These build on the code and propose reforms to take account of:

experience of the Guide in action;

developments in the operation of Australian Government and Parliament since 1998; and

policies and practices in other jurisdictions.

The Guide is reproduced, with comments and suggested amendments intended to improve the operation and outcomes of ministerial responsibility.

*\*\*\*\* I mentioned in my paper that the best minds (perhaps with some partisan politics in the mix) produced the Guide on Ministerial Accountability in 1996, which needed revision in 1998 and is now considered to need further enhancements. In my humble opinion, there can never be a definitive guide that will ensure a satisfactory and peaceful relationship between government, the parliament and the people. It is completely unrealistic to think that everyone can or wants to be satisfied.*

*Politics is about the exercise of power and democratic constraint on the use of that power. By definition, there will always be tension, competition, the struggle to dominate and the counterweight of accountability. Politics are messy!!!*

*I talked in the paper about the see-saw concept and the push and pull of politics. Politics are always about the struggle between competing forces that draw on differing sources for their authority. If the competing forces are roughly in balance then there will be effective democratic governance.*



*The greatest concern is that the see-saw can tip too far in favour of the government, thereby weakening democratic oversight and threatening the viability of responsible and representative democratic government in the long term.*

Collectively, the proposals we put forward offer the most comprehensive, considered and effective reforms yet made to rescue the accountability of government to Australian citizens, supporting those politicians, public servants and advisers who seek to uphold Australia's democratic traditions with clear statements of the principles and practices required. We welcome debate and comment on them.

Hon Dr Ken Coghill  
Mr David Crawford  
Mr Ian Cunliffe  
Prof Bruce Grant  
Professor Graeme Hodge  
Professor Owen Hughes  
Hon Alan Hunt AM  
Ms Anne Mancini  
Hon Dr Race Mathews  
Hon Kevin Rozzoli  
Professor Spencer Zifcak

**1 November 2006**

Please send further comments to:  
[accountability@aapt.net.au](mailto:accountability@aapt.net.au)

OR

ASPG Accountability Working Party  
c/o Hon Dr Ken Coghill  
Department of Management, Monash University  
P.O. Box 197 Caulfield East 3145.

# Reforms to the Operation of the Executive

## 1. Legislating Ministerial Responsibility

The principles of ministerial responsibility are not stated in formal, authoritative statutory documents. Incorporation of the fundamental principles of ministerial answerability in legislation would have enormous symbolic weight. We propose that the principles be adopted in a declaratory, non-justiciable legislative instrument, stating that:

*\*\*\*\* I have mentioned above my opposition to entrenching ministerial responsibility in legislation and have given my rationale. I believe it is more appropriate to use the Standing Orders.*

- Ministers are answerable *\*\*\*\* to parliament\*\*\*\** for all acts and omissions of persons and organizations acting under prerogative, legislative or contractual authority assigned to them;
- Ministers are held personally culpable for: and for those of:

*\*\*\*\* On what basis? And what penalty is contemplated and how will it be applied when not every Parliamentarian will agree that either a wrong has been committed or that it is serious enough to warrant a sanction?*

their own acts and omissions;

the actions of their heads of department and their personal staff; and

*\*\*\*\*In Canada we have adopted the Accounting officer model rather than hold the minister accountable for issues where he was not involved or expected to be involved.*

the actions of others in which they have participated or of which they were aware or should have been aware.

\*\*\*\* *See immediately above.*

- In determining whether a minister is personally culpable, ignorance of a matter does not excuse the acts or omissions of a minister where the minister should have known or should have ensured the matter was drawn to the minister's personal attention. Without limiting the circumstances in which ministers should have known of any matter, they are deemed to have the knowledge of their heads of department and others who report directly to them and all members of their personal staff;
- Ministers are expected to have in place systems which will ensure that they are kept properly informed at all times by their departments and private offices.
- In discharging their responsibilities, ministers are obliged to respond to any questions or other matters raised in Parliament by:

\*\*\*\* *Unfortunately eliciting a response is not difficult but eliciting a response that satisfies everyone is a different matter.*

- redirecting the question to the relevant minister;

\*\*\*\* *In Canada, any minister can speak for the crown since the question is put to the government, not a specific minister. This is not too well known or understood. Ministers are accountable to the Prime Minister/Premier and it is the government as a whole that is accountable to parliament.*

- providing all relevant information;

\*\*\*\* *Parliament has the collective power, if so exercised, to obtain any document it so wishes. It is not constrained by Access to Information legislation or by Right to Privacy legislation.*

- providing full explanations;

\*\*\*\* *See above*

- taking any necessary remedial action;
- accepting personal culpability; or

\*\*\* *See discussions at earlier points*

- resignation<sup>\*</sup>  
as appropriate according to the circumstances of the case;

*The minister serves at the pleasure of the Prime Minister/Premier and can only be dismissed by him. Parliament can only hold the executive collectively accountable through expressing a lack of confidence.*

- Ministers shall provide answers to Parliamentary Questions which are direct and relevant;

\*\*\*\* *See previous comments on this issue.*

\* see Woodhouse, Diana (1994). *Ministers and Parliament: Accountability in Theory and Practice*. Oxford: Clarendon: pp.28-38. These levels of accountability are explained in detail in the proposals for updating the Guide to Key Elements of Ministerial Accountability

#### **RENEWING ACCOUNTABLE GOVERNMENT**

5

- Ministers shall do nothing to prevent or hinder personal or departmental staff from giving evidence to Parliamentary Committees when requested to do so

\*\*\*\* *Parliament has the collective power, if so exercised, to call any witness (except a sitting MP) to appear, and use the power of summons (subpoena) if ignored.*

- Freedom of information (FOI) requires that there be expeditious access to public records in all but specified exceptional circumstances where the

public interest requires non-disclosure (e.g. genuine risk to the administration of justice or to national security).

*\*\*\*\* Agreed, and if government is failing in this regard that should be required to account for itself before parliament.*

These principles should also be reflected in the Guide, which should be adopted in Victoria, with all necessary amendments, at the earliest possible opportunity. It is not necessary that updating of the Guide should await passage of the legislative instrument. However, a legislative instrument would add to the effectiveness of the Guide.

*\*\*\*\* Note my earlier comments on legislated solutions.*

The establishment of a Parliamentary Standards Commissioner as proposed in this Discussion Paper would also greatly strengthen the effectiveness of the Guide.

*\*\*\*\* I am skeptical. If the Commissioner is given real teeth to enforce the Guide, it wouldn't be too long before there is pressure from the government to water down the Guide or remove the power to sanction, at which time the Commissioner becomes a paper tiger.*

*This is a political arena where the game is played with real political power. An appointed official will never have sufficient political capacity to hold elected people accountable beyond their will. There is no substitute for an effective parliament where the members know their power and authority and are prepared to exercise it when necessary.*

# Reforms to the Operation of the Executive

## 2. Refining Freedom of Information

### Cabinet Confidentiality

Important documentation has been shielded from disclosure by inappropriate use of the exemption for Cabinet documents under freedom of information legislation (FOI). This misuse has been possible because the present exemption for Cabinet documents is cast too widely. We propose therefore that it be amended in accordance with the principles below.

A crucial component of the convention of collective ministerial responsibility is the 'confidentiality rule'. This provides that the deliberations and decisions of Cabinet must remain secret. Without such a rule, Cabinet unanimity would be impossible to uphold. Further, it is in the nature of collective deliberation that competing views will be put, issues argued, compromises struck, minds changed and individual ministerial submissions accepted or rejected. Were confidentiality not to attach to such discussion, the views expressed in Cabinet may not be as open as they should be. The quality of debate in Cabinet, therefore, would suffer and so could the decisions made by it.

For these reasons it is generally accepted that the deliberations of Cabinet should remain secret. Cabinet papers therefore are regarded as confidential. However, to say that Cabinet papers should remain private begs one important question. That is, which papers generated at the highest levels of Government are properly designated as Cabinet papers?

The short answer to this question is that only those papers whose release may undermine the unanimity of Cabinet or which may jeopardize fundamental matters of public interest such as the administration of justice and national security, must remain confidential. Documents recording Cabinet decisions should also be protected since the proper forum for the announcement of such decisions is the Parliament and the timing of their announcement is a matter for the government.

It follows that not every document that goes to Cabinet is deserving of protection from disclosure. It cannot be sufficient to exempt a document that it is merely passed across the Cabinet table. Rather, a document must be such as to disclose either the deliberations of the Cabinet or its decisions to qualify for exclusion. So, for example, an attachment to a Cabinet document providing factual or statistical information to assist in Cabinet decision-making should not be exempt. This is because such raw material cannot, by definition, disclose

Cabinet's deliberations.

RENEWING ACCOUNTABLE GOVERNMENT

7

We propose, therefore, that only the following classes of document should be capable of exemption under freedom of information legislation:

- A document that is an official record of any deliberation of the Cabinet.

\*\*\*\* *Agreed*

- A document that has been prepared by a Minister, or his or her staff, for the specific purpose of submission for consideration by Cabinet.

\*\*\*\* *Agreed*

- A document the disclosure of which would involve the disclosure of any deliberation of the Cabinet.

\*\*\*\* *Agreed*

- A document the disclosure of which would involve unacceptable risk to the public interest on a specified ground (e.g. the administration of justice, national security)

\*\*\*\* *Agreed*

It follows that a document will not be an exempt document if:

- The document contains factual, statistical, technical or scientific, including social scientific, material prepared for the purpose of consideration by Cabinet in making its decisions, after the decision to which that material relates has been made.

\*\*\*\* *A word of caution here. This document would appear to be prepared by drawing on public information but not necessarily so. Even if it is drawn from public information, its style of presentation and conclusions drawn could very well point to the thinking of Cabinet and therefore used against*

*them in a public forum. It therefore needs confidential protection. The converse would be even more problematic. If Cabinet rejected the advice in the report, which turned out in due course to be the correct advice, a political nightmare would ensue. It would not be long before the government (cabinet) would be using their political weight in parliament to either ignore the rule or have it changed.*

*There also the issue of Cabinet building on its confidential knowledge. A report could quite easily draw from previous confidential reports therefore a simple statement of requiring the release of: “ material prepared for the purpose of consideration by Cabinet in making its decisions, after the decision to which that material relates has been made”; should require more careful thought.*

- The document is a document considered by the Cabinet but has not been prepared specifically for that purpose.

*\*\*\*\* I suggest caution and a more considered statement. The government is the repository of vast amounts of information that is protected by Privacy legislation which should not be in the public domain and I would think there are other examples of protected information that find their way into Cabinet submissions.*

*It would be an irony for information, not otherwise available to the public, was required to be released by virtue of being used by Cabinet.*

- The document has entered the public domain.

*\*\*\*\* Agreed*

### **FOI Administration**

It has been remarked frequently that Government departments seek to avoid their obligation to disclose documents under freedom of information legislation on the grounds that a request for documents is voluminous either in relation to the resources required to fulfill the request or the quantity of documents sought. Further, applicants may frequently be discouraged from applying for documents because the charges for access are too great. Sometimes applicants are further deterred by the excessive delay involved in the processing of requests.

Conversely, the spirit of freedom of information laws has also been abused by oppositions seeking to make political mileage by a range of tactics including:



- “fishing”- i.e. simply inserting a request for “everything said, written or done by a particular person over a particular period” or “ every document on a particular issue”, where the request is not targeted at a specific investigation, but is a generalized search for anything which can be used for political gain.
  - blanket volume requests- where the objective is in itself to overwhelm a department’s capacity to respond on time, so the charge of non-adherence to FOI laws can be trumpeted at a government, again for political gain. Adhering to such requests can be a costly exercise for the public purse, with limited public interest benefit.
- In order to deal with these matters we propose that the Ombudsman be given jurisdiction to review disputes in each of these areas.

\*\*\*\* *Agreed, see comments below.*

**RENEWING ACCOUNTABLE GOVERNMENT**  
8

The Ombudsman should be authorized to mediate, investigate and report in disputes

- over the processing of voluminous requests at the request of either an applicant or an agency.
- over the level of charges imposed for processing FOI requests.
- where an applicant complains that there has been an excessive delay in the processing of a request or where a request has not been processed within a designated statutory time limit.

\*\*\*\* *If there is such a disconnect between the requirements of the legislation and government performance perhaps it is time to hold parliamentary committee hearings on the subject to hear from the government and the public with a view to recommending changes to the law.*

*I agree with the recommendation of an Ombudsman to mediate on disputes. At the Federal level in Canada we have an Access to Information Commissioner to protect the public’s right to know and a Privacy Commissioner to protect the release of privileged information.*

## Reforms to Parliament

The operations of Parliament, especially each House in which the government has majority support, are severely biased in favour of the executive. The public interest and the right to know what is being done by government acting with the citizens' democratic authority should prevail. Accordingly, we propose:

1. Conventions that Presiding Officers abandon participation in parliamentary party affairs and receive greater respect for the independence of their functions;

*\*\*\*\* Agreed*

2. Establishing the independence of Presiding Officers (e.g. as proposed by Hon Kevin Rozzoli, former NSW Speaker<sup>2</sup>) with a view to enabling them to:

o better ensure adherence to already existing rulings regarding appropriate responses to Questions without Notice;

*\*\*\*\* Agreed, but I expect this will give you difficulty in short order. These types of disputes are better settled by a House Procedures Committee, but given a government majority, how much progress will actually be made. This issue will not be resolved until there is an improved decorum in the House which can only come from 'education' of the members.*

o have some responsibility and authority to investigate actions of

Ministerial staff;

*\*\*\*\*Disagree. Partisan politics dictate that this kind of issue should be dealt with by a partisan committee of the House, such as a House Procedures Committee. The Speaker's reputation of independence will never survive any investigation by him that has political overtones, no matter how well done.*

- extend opportunities for public engagement in scrutiny of legislation & enquiries;

*\*\*\*\* This recommendation suggests there is perhaps a need to examine House committee rules to ensure the effectiveness of committees in engaging the public, and an examination of committee resources which may need improvement.*

*Partisanship can never be eliminated, but committees in general should be less so than the House. In Canada, some committees reach across party lines and deliver very substantial unanimous reports that are a major contribution to the public debate.*

- establish a multi-party presidium (similar to that common in Europe) to control the business program (bills, motions, etc).

*\*\*\*\* In Canada this work is done by the House Leaders of the parties.*

3. Parliaments insist on their right as sovereign institutions to examine and investigate the actions of ministers' personal staff and departmental officials;

*\*\*\*\*Agreed, and I am sure you already have these powers.*

4. Ministers and their staff be required to appear before Parliamentary Committees on request.

*\*\*\*\*Agreed and I am sure you already have these powers.*

5. Ministers be required to be directly responsive, relevant, succinct and limited to the subject matter of the question in answering Questions Without Notice. This requires reforms to Standing Orders (Rules of Procedure) and rulings by Presiding Officers;

*\*\*\*\* During Question Period in the House of Commons of Canada, questions and answers are limited to 35 seconds each and the rule is policed*

*by the Speaker. We have the good fortune of having a House so large that one cannot be heard without using the microphone system that feeds into an earpiece for each member. The Speaker has control of the microphones therefore has control of the House and the time.*

*On the other issues such as relevance etc, let me know when you have a rule that works.*

6. Parliaments extend opportunities for public engagement in the scrutiny of parliamentary legislation and inquiries.

*\*\*\*I am not sure what you mean by ‘parliamentary’ legislation but all hearings should be in public and engage the public to the fullest extent. See my comments on committees above.*

<sup>2</sup> Rozzoli (*Gavel to Gavel*, 2006) proposes the election of each Presiding Officer (Speaker of the Lower House; President of the Upper House) for a term not exceeding eight years, with the election taking place between general elections. The Presiding Officer would serve in Parliament as a member-at-large representing a notional electorate and be ineligible to continue as, or become, a member of any registered political party. The vacancy on the floor of the House would be filled within twenty-eight days by a member from the same party. Any member nominated for office would be required to have completed at least three full terms in the parliament and have during such period served at least two years as either Chairman of Committees or Temporary Chairman of Committees. The Presiding Officer could be removed from office only by a two-thirds majority of all Members voting to that effect.

RENEWING ACCOUNTABLE GOVERNMENT

10

## **Parliamentary Standards Commissioner**

A Parliamentary Standards Commissioner should be appointed as an independent officer of the Parliament (similarly to the Victorian Auditor General and Ombudsman).<sup>3</sup> The Commissioner's main responsibilities would be:

- Overseeing the maintenance and monitoring the operation of the registers of members' interests;

*\*\*\*Agreed*

- Providing advice to each House about the provisions of the Guide to the Key Elements of Ministerial Accountability (Guide) and any code of conduct adopted by either House (code), whether existing or

recommended to be introduced;

\*\*\**Agreed*

- Monitoring the operation of the Guide and each code and, where appropriate, proposing possible modifications to the Parliament.

\*\*\**Agreed*

- Providing advice on a confidential basis to individual ministers and members and to each House about the interpretation of the Guide and any code;

\*\*\**Agreed*

- Preparing guidance and providing training for ministers, and members on matters of conduct, propriety and ethics;

\*\*\**Agreed*

- Receiving and investigating complaints about ministers, and members who are allegedly in breach of the Guide and code;

*\*\*\*Now you are giving the Commissioner power to be judge, jury and executioner. The Commissioner cannot have authority to give confidential advice on rules and also be the adjudicator when rules appear to have been broken. This is a serious conflict that will destroy the Commissioner, the office or both. We did it to our Commissioner in Canada.*

- Investigating evidence of possible breaches of the Guide or code by ministers and members, on the Commissioner's own motion;

\*\*\* *See above.*

- Reporting to the Parliament, and thereby the public, upon:

1. compliance with the principles and spirit of the Guide and each code;

\*\*\**Agreed*

2. any failure (whether wholly, partly or in spirit) to comply with the provisions of the Guide and code;

\*\*\**Agreed*

3. the extent and seriousness of any failure to comply;

\*\*\**Agreed*

4. the responsibility of any person for such failure;

\*\*\**Is this not a reiteration of #1 to #3 above?*

5. whether any matter should be referred to the Privileges Committee of the House of which the minister is a member, or was at the time of the event(s) in question.

\*\*\**Agreed, but should not be restricted to Ministerial behaviour only.*

In exercising the functions of the office, the Commissioner shall have the privilege of the Parliament i.e. investigations will enjoy the authority of the House of which the minister is a member and reports shall have parliamentary privilege.

\*\*\**Agreed, but should not be restricted to Ministerial behaviour only.*

The Commissioner would be appointed on the recommendation of an all-party Parliamentary Committee

\*\*\**Agreed*

## Proposals for updating of the Guide to Key Elements of Ministerial Responsibility

### *Preface*

In 1976, the Royal Commission on Australian Government Administration (the Coombs Commission) commented on the principles of Ministerial responsibility. It noted that

It is through ministers that the whole of the administration—departments, statutory bodies, and agencies of one kind and another—is responsible to the Parliament and thus, ultimately, to the people. Ministerial responsibility to the Parliament is a matter of constitutional convention rather than law. It is not tied to any authoritative text, or amenable to judicial interpretation or resolution. Because of its conventional character, the principles and values on which it rests may undergo change, and their very status as conventions be placed in doubt.<sup>4</sup> The Commission went on to state that the traditional conceptions of ministerial responsibility had been called into question in recent times and that

...there is little evidence that a minister's responsibility is now seen as requiring him to bear the blame for all the faults and shortcomings of his public service subordinates, regardless of his own involvement, or to tender his resignation in every case where fault is found.<sup>5</sup> It commented that

The evidence tends to suggest rather that while ministers continue to be held accountable to Parliament in the sense of being obliged to answer to it when Parliament so demands, and to indicate corrective action if that is called for, they themselves are not held culpable—and in consequence bound to resign or suffer dismissal—unless the action which stands condemned was theirs, or taken on their direction, or was action with which they ought obviously to have been concerned.<sup>6</sup>

<sup>4</sup> Paragraph 4.2.1, page 59

<sup>5</sup> *ibid*

<sup>6</sup> Paragraph 4.2.1, page 60

The Coombs Commission recognized the realities of the increased range and complexity of government which...make it unreal to expect a minister of state to take an active part in the detailed administration of the affairs of his department.<sup>7</sup> It expressed no opinions as to the appropriateness of the convention as described by it.

The Commission referred to the role of the personal staff of ministers and their relationship with departmental staff and other issues. It stated that "...it is essential that the minister have full control over and responsibility for all members of his staff."<sup>8</sup>

*\*\*\*\* While I have stated that no one including the Minister's staff are outside the reach of parliament, therefore can be called as a witness, a staff person for the Minister would likely refrain from answering questions regarding conversations, advice and direction given between the two. It would be appropriate for the staff person to decline to answer and direct the committee to the Minister for an answer.*

*It is for the Minister to decide how the question is to be answered and for the committee to decide if it is satisfied with the answer.*

Given the conventional nature of ministerial responsibility, it is important to have an authoritative, comprehensive and clear statement of its content, obligations and consequences.

In 1996 the Prime Minister published the Guide to Key Elements of Ministerial Responsibility. It was revised in 1998. It is a wide ranging statement of elements of ministerial responsibility and is the principal statement in Australia.

Recent events have brought into question the adequacy of the Guide.

Concerns have been expressed about whether and to what extent a doctrine of ministerial responsibility still exists and, if so, what is its content.<sup>9</sup> In particular, it appears that the Coombs' proposition, that the convention imposes culpability for actions with which the Minister ought obviously to have been concerned, is denied. Further, oral statements reported earlier this year as made by the Head of the Department of Prime Minister and Cabinet, Dr Shergold, and the Prime Minister point to a government view that the personal culpability of ministers should be significantly limited.

Following an address to the National Press Club, Dr Shergold, in a question and answer session, was asked when a minister should resign. He was reported as identifying two situations where a minister would be clearly responsible for failures within a department. One was where the minister was involved in a



breach of the law. The other was where the minister had his or her attention drawn to matters and took no action.<sup>10</sup>

A few weeks later, the Prime Minister was reported as saying, concepts of ministerial accountability mean that if you're directly responsible for a wrongdoing, or if there has been a total systemic failure in your administration, then you have to accept responsibility for that.<sup>11</sup>

*\*\*\*\* In the preceding paragraphs attributed to Dr. Shergold and the Prime Minister we have pronouncements by the government on their view (not interpretation) of ministerial accountability. What they are really saying is; they acknowledge that certain behaviour of ministers will not be accepted by the general public and will have an adverse effect on the people's perception of the government. The government is therefore acknowledging that there are limits to the public's tolerance for misbehaviour or incompetence of ministers and that the government will take action accordingly.*

*Note the comments in my paper about government now reaching over parliament and drawing its confidence and authority to govern directly from the people.*

*Parliament is right to be concerned about the erosion of parliamentary power of oversight. Governments are happy with the relaxation of democratic constraints. The public does not mind since government is still responsive to their needs and desires. But democracy is ultimately about the constraint of strong leaders in whom the full powers to govern are vested. Parliament is the people's insurance policy that must be kept nimble and capable, even when democracy is not under serious threat, in order that it can rise to the occasion when necessary. A strong leader can come along who has ambitions and grand schemes for himself through the abuse of the power of government granted to him.*

*History is littered with democratic failures which have their roots in innocuous situations where parliaments have failed to exercise their prerogative of oversight and accountability. Little by little, the power of oversight slips away to the point when government is able to ignore parliament with impunity. As I said in the paper, the Orwellian world may arrive some day, under the guise of progress and development!!!*

<sup>7</sup> Paragraph 4.2.2, page 60

<sup>8</sup> Paragraph 4.6, page 106

<sup>9</sup> For example The Age, editorial of 13 April 2006; The Australian, editorial 9 February 2006

<sup>10</sup> John Quiggin, ARC Federation Fellow, University of Queensland, Australian Financial Review, 2 March 2006

**RENEWING ACCOUNTABLE GOVERNMENT**

13

On one interpretation, the Prime Minister was limiting both the circumstances in which ministers would be required to account for their failings, or those of their departments, and the circumstances in which ministers would be held personally culpable.

These recent statements, if accepted, would significantly limit the principles of ministerial responsibility as they have been understood and as discussed by the Coombs Commission. It cannot be said, however, that such statements conflict with the 1998 Guide because the Guide says little about the obligation to account for departmental failings and fails to address the issue of the personal culpability of a Minister.

Another important matter is the practice that Australian parliaments do not generally use their powers to compel the attendance of ministerial advisors as witnesses. In Australia it has come to be known as the 'McMullan principle', named after the Labor minister who ordered his personal staff not to appear or answer questions. His justification was that "ministerial staff are accountable to the minister and the minister is accountable to the parliament and, ultimately, to the electors".

Accepting that in our political system it is the minister who will be held to account by the parliament not his or her personal staff, it does not follow that their staff should not be questioned by the parliament. To the contrary, it is critical to holding ministers to account that their personal staff be able to be questioned by the parliament.

*\*\*\*Note my comments above about ministerial staff being called as witnesses but deferring questions to be more properly answered by the minister.*

It is our view that the 1998 Guide does not adequately address the definition of ministerial responsibility and the means by which ministers are to be made answerable for the discharge of that responsibility. It does not specifically address the circumstances in which ministers are to be held personally culpable for their acts and omissions and those of others in matters relevant to the ministers' portfolio. These deficiencies leave considerable uncertainty which is undesirable from the community's point of view and unsatisfactory for Ministers and the Parliament. The Guide does address the issue of the minister's responsibility for the acts and omissions of personal staff;

but identifying that responsibility will have no effect as long as the convention exists that personal staff are not required to appear before parliamentary committees to answer questions. That weakness needs to be addressed. Other provisions need to be added and existing provisions strengthened to make governments accountable to parliament and the people.

What is needed is a restatement of the Guide. Such an important document should be the subject of public comment and debate.

*\*\*\*\* I can only reiterate my point that rules will not fix a political problem. It basically comes down to the fact that government realizes that it can stare down parliament and get away with it. The question is how long will it be before parliament reasserts its authority and restores the political equilibrium?*

The 1998 Guide seriously understates the nature and extent of ministerial responsibility. It reads:

*Under the Australian system of representative government, ministers are responsible to Parliament. This does not involve ministers individual liability for every action of public servants or even personal staff. It does however imply that ministers accept two major responsibilities: first for the overall administration of their portfolios, both in terms of policy and management; and secondly for carriage in the Parliament of their accountability obligations to that institution.*

#### RENEWING ACCOUNTABLE GOVERNMENT

14

We have set out a modified version of the Guide on the following pages, which takes into account comments received on the discussion paper ***Why Accountability Must be Renewed***. It addresses the deficiencies outlined above. It is proposed that it be adopted in Victoria subject to any further amendments of detail or form required to reflect Victorian legislation and institutions.

Please send further comments to:

accountability@aapt.net.au

or

ASPG Accountability Working Party

c/o Hon Dr Ken Coghill

Department of Management,

Monash University

P.O. Box 197

Caulfield East Vic 3145