

Maintaining public trust in parliaments without freedom of information — balancing the right to know with parliamentary privilege

Vicki Buchbach*

Introduction

In 2009, the NSW Ombudsman recommended that the state's Freedom of Information (FOI) scheme be extended to include the Legislative Assembly and Legislative Council. This proposal was not advanced in the subsequent reforming legislation and the Parliament remains outside the scope of the new *Government Information (Public Access) Act 2009* (GIPAA) regime which commenced on 1 July 2010. This paper examines the relationship between Freedom of Information legislation and a selection of parliaments around the world. It will discuss the potential conflict between the ideal of accountability to the public and parliament's traditional right to operate free of interference from executive government.

It then suggests a range of alternative institutional arrangements that can build and maintain public trust in the operation of parliaments in jurisdictions where parliaments are not included in FOI.¹

The Ombudsman's review

In 2008, the NSW Ombudsman commenced a wide-ranging review of the operation of the state's *Freedom of Information Act 1989* with the release of a discussion paper. This paper noted that other jurisdictions including South Africa, Ireland and the United Kingdom had brought parliament within the schemes governing access

* Vicki Buchbach is Committee Manager, New South Wales Legislative Assembly

¹ 'Freedom of Information Schemes' are called different things in various jurisdictions. Throughout this paper, 'FOI' is used as shorthand for general schemes but particular names are used where appropriate.

to government information.² The final report of the Ombudsman stated that few submissions commented on the issue and those that did recommended that parliament be included in an FOI scheme. The Ombudsman, therefore, recommended that the Legislative Council and the Legislative Assembly be included in the ambit of a revised Act.³

When asked to comment on the Ombudsman's recommendations, the Presiding Officers of the two Houses of Parliament expressed concern in three areas:

1. The need for parliament to maintain its privileges in order to perform its legislative and scrutiny functions without interference;
2. The need to preserve confidentiality of communications between members and their constituents; and
3. The risk to members' privacy from the potential disclosures of the use of entitlements.⁴

The government agreed to the majority of the recommendations of the review and, in May 2009, released an exposure draft of the Open Government Information Bill for a month-long public consultation period. The new legislation was designed to facilitate a culture of proactive release of information by establishing the principle that agencies should release information unless there was an overriding public interest against disclosure. Importantly, ministers would no longer have the power to issue certificates exempting information from release with limited rights of appeal. The draft bill included robust review mechanisms with independent oversight by an Information Commissioner and a parliamentary committee.⁵

This move in NSW can be seen as part of a broader trend to increase the release of information about the operations of government in Australia. For instance, in Queensland and Tasmania the new *Right to Information Acts* commenced on 1 July 2009 and 2010 respectively.⁶ At the federal level, ministers' ability to certify that particular material should not be released was removed in 2008 and, after lengthy consultation, new legislation was passed in May 2010 with most of the reformed

² NSW Ombudsman *Discussion Paper: Review of the Freedom of Information Act 1989*, September 2008, p.22

³ NSW Ombudsman *Review of the Freedom of Information Act 1989*, February 2009, p.45. The Ombudsman deferred the question of whether documents held by members should be included until the first periodic review of the new Act.

⁴ Correspondence to the Premier from the Hon Richard Torbay MP, Speaker of the Legislative Assembly and the Hon Peter Primrose MLC, President of the Legislative Council, 9 April 2009

⁵ NSW Department of Premier and Cabinet *Open Government Information: FOI Reform in New South Wales*, May 2009 pp. 3–9

⁶ Queensland Government website [<http://www.rti.qld.gov.au/>], Ombudsman Tasmania website [http://www.ombudsman.tas.gov.au/right_to_information2/rti_process]

FOI scheme to commence in November 2010.⁷ The ACT government was also considering a review of its scheme.⁸

Prior to adoption of a new FOI scheme in NSW, there were efforts to provide more government information in a more timely way. From 2008, all ministerial media releases needed to be published on agency websites. In May 2009, the then Premier issued an administrative directive that information about the purpose and costs of all overseas travel undertaken by ministers be published within 28 days of their return. The directive notes that such information is routinely sought and released under FOI requirements and full disclosure 'would help to dispel the public perception that overseas travel is undertaken for the private benefit of Ministers and their attendants at taxpayers' expense.'⁹

However, despite the recommendations of the Ombudsman and this growing trend towards encouraging the release of government information, the NSW government chose to maintain the exemption of the Legislative Assembly and the Legislative Council. It is noteworthy that this was one of only two of the 88 recommendations of the Ombudsman's report that were rejected.¹⁰

Also of note is the fact that, despite the extensive media coverage of the ongoing British parliamentary expenses scandal during the consultation period on the draft bills, there was no visible public appetite to extend FOI to the Houses and members of the NSW parliament. Of the more than 50 public submissions on the draft legislation, none commented on the rejection of the Ombudsman's recommendation on this issue.

On 18 June 2009, two members of the Legislative Council asked questions about the exclusion of the Houses of Parliament from the new scheme and the matter was raised briefly in the debate on the bills but there were no efforts to amend them before they were passed.¹¹

The *Government Information (Public Access) Act 2009* exempts both houses of parliament and their committees from the definition of 'authority' for the purpose of the new regime.¹² It also exempts from the definition of 'public office' all offices of members and the office of a member of the Council or the Assembly or of a committee of either or both of those bodies, the office of President of the Legislative Council or Speaker of the Legislative Assembly or Chair of a committee

⁷ Department of Prime Minister and Cabinet *Freedom of Information Reform* page , [http://www.dpmc.gov.au/consultation/foi_reform/index.cfm] accessed 16 July 2010

⁸ D Solomon 2008 'Queensland's Freedom of Information Inquiry' pp 187–205
Australasian Parliamentary Review 23(2), p.197,

⁹ Premier's Memorandum M2009–10 *Release of Overseas Travel Information*, 19 May 2009

¹⁰ Department of Premier and Cabinet *FOI Reform in New South Wales Ombudsman's Recommendations And Public Submissions – Government Response* p.12, p.21

¹¹ NSW PD Legislative Council 18 June 2009, NSW PD Legislative Assembly 23 June 2009

¹² *Government Information (Public Access) Act 2009* Schedule 4 subclause 2(3)(b)

of either or both of those bodies.¹³ This is a slight rewording of the exemptions under the previous legislation and apparently will have the same effect.¹⁴

Other jurisdictions

The interaction of open information requirements, privacy, privilege and administrative arrangements are complex and it can be hard to generalise about the requirements of different regimes. This paper does not attempt an exhaustive analysis of practices in other jurisdictions but offers some examples to illustrate two contrasting approaches.

Australasia

A survey of Australasian jurisdictions showed that all of them have FOI schemes in place. In most cases, parliaments are not included however the Legislative Assemblies of the Australian Capital Territory and the Northern Territory are included with an exemption for releasing documents if they infringe the privileges of the Legislative Assembly or another parliament.¹⁵ In addition, in the Australian parliament, much of the administration of parliamentary support is managed by an external department, the Department of Finance and Deregulation which is included in the FOI regime.¹⁶

Other jurisdictions

While Canadian jurisdictions exempt their parliaments from FOI regimes, parliaments in the United Kingdom, Ireland, India, South Africa, the West Indies and Trinidad and Tobago are included.¹⁷

The application of these regimes varies. For instance the Scottish parliament publishes full details of members' allowances on-line so that the public can view claims and accompanying receipts. This has been described as the most comprehensive and transparent expenses system of any parliament in the world.¹⁸

¹³ *Ibid.* subclause 3 (2)(b) and (c)

¹⁴ *Freedom of Information Act 1989* s7(1)(a)(iii) and s8(3)(a) exempted the Legislative Assembly, Council and a committee of either or both of these bodies from the definition of public authority and the definition of 'holders of public office' excludes members of both houses of Parliament and the committees of either or both houses.

¹⁵ Responses to e-cat question in May 2009 and *Information Act 2002* (NT)

¹⁶ Conversation with Dr Rosemary Laing, Clerk of the Senate, ASPG Conference 6 August 2010

¹⁷ Hon Margaret Wilson MP, 'Keynote Address to Information Law Conference marking 25 years of the Official Information Act, 15 May 2007, p.2, O. Gay, *The Freedom of Information (Amendment) Bill, Bill 62 of 2006–07, Research Paper 07/18* Parliament and Constitution Centre, House of Commons Library, February 2007, pp. 24–25

¹⁸ O. Gay *op. cit.*, p.10

This publication scheme was initiated in response to the resignation of a prominent member over concerns about a large number of claims for using taxis.¹⁹

On the other hand, there were significant well-publicised efforts to limit the availability of such information about members of the United Kingdom's Houses of Parliament. In January 2009, a Freedom of Information (Parliament) Order was issued to remove most expenditure information held by either House of Parliament from the scope of the Act. This was extremely unpopular and led to the resignations of the Speaker of the House of Commons and several other ministers and the eventual publication of exhaustive lists of information of the expense claims made by every member leading to more than a million pages of data on the parliamentary website.²⁰

What are FOI regimes for?

Fundamentally, FOI regimes are designed to increase the accountability of government by enabling interested people to access information not otherwise made available. The desired outcome of accountability processes is to improve the level of public confidence in governments.

Why would parliaments not be included?

As shown above, exemption of the NSW parliament from the FOI scheme is not unique. It is, however, more unusual that it has been retained after a large-scale substantial review of the scheme involving two public consultation processes and a parliamentary debate.

In a paper for the British House of Commons library research service, Oonah Gay suggests that the exclusion of most Westminster style parliaments from FOI regimes was a consequence of the era in which FOI was introduced in particular places. Initially, the focus of the concept was on central government rather than the wider public sector. She noted that newer FOI regimes include parliaments as part of a wider public sector because the legislative emphasis has changed from holding the executive to account to promoting transparency in all public bodies.²¹

Therefore, the NSW system reflects a framing of the purpose of FOI regimes as a check on executive government. On the other hand, the Ombudsman's

¹⁹ A. Kelso 2009 'MPs' Expenses and the Crisis of Transparency', pp. 329–38 *The Political Quarterly* 80(3) July–September 2009 p.334

²⁰ For published allowances see [<http://mpsallowances.parliament.uk/mpslordsandoffices/hocallowances/allowances-by-mp/>]. Also 'Treasury minister quits over tax dodge' Robert Winnett, Martin Beckford and Caroline Gammell *Sydney Morning Herald* 18 June 2009 [<http://www.smh.com.au/world/treasury-minister-quits-over-tax-dodge-20090618-ciok.html?page=-1>]

²¹ O. Gay *op. cit.* pp.24–25

recommended reform characterises FOI as an accountability mechanism for protecting the public interest in general.

It is clear that the NSW government has chosen to maintain the *status quo* rather than adopt the Ombudsman's re-framing of the purpose of the FOI regime. For instance, on 18 June 2009, the Attorney General told the Legislative Council that:

Historically and for good reason, freedom of information legislation in this State and throughout Australia is about keeping the Executive accountable. There are other means for keeping the Parliament accountable.²²

This is consistent with the views of the committee establishing the Queensland open government regime in 1990 which noted that the legislation was intended to apply to the executive not the legislature or the judiciary.²³ The situation is similar in New Zealand. Former Speaker of the New Zealand House of Representatives noted that the exemption of that parliament arose because at the time of establishing the regime:

[T]he emphasis was on constraining the exercise of executive power. Parliament was not considered to be part of the problem in this respect. In fact it is an essential part of the solution when it comes to executive accountability.²⁴

The reasons for preserving the distinction between executive and legislative functions of government are at the heart of the Westminster system of government.

Separation of powers and parliamentary privilege

Under the constitutional concept of 'separation of powers', the three arms of government (legislative, executive and judicial) operate independently. The rights of parliaments to conduct their affairs independently without outside interference and to have absolute freedom of speech are enshrined in the idea of 'parliamentary privilege', first given legislative force in article 9 of the Bill of Rights of 1688.

As noted in the NSW parliament's Presiding Officers' comments on the Ombudsman's review of FOI, maintaining the independence of parliament enables members to perform their roles:

The primary role of the parliamentary departments is not the implementation of government policy as is the case with government departments, but the provision of support to the Houses of Parliament and their members to enable them to perform their constitutional and other public functions: the representation of the people, the passage of legislation and the scrutiny of the executive government. While there is no formal separation of executive and legislative power in the New South Wales

²² NSW PD Legislative Council, 18 June 2009

²³ EARC *Report on Freedom of Information* December 1990 cited in the Legal, Constitutional and Administrative Review Committee Parliament of Queensland Report 32 *Freedom of Information in Queensland* p.241 and p.244

²⁴ Hon Margaret Wilson MP *op. cit.* p.2

Constitution, the principle of independence of the Parliament from the other branches of government is recognised as fundamental to the ability of Parliament to perform these roles and essential to the system of responsible government in New South Wales.²⁵

This state of affairs has not been without challenge. Parliamentary privilege is a complex concept without a clear definition or clear boundaries and its interpretation varies between different jurisdictions. It is particularly problematic in NSW where there is no codification of privileges but rather a reliance on common law, certain statutory provisions relating to defamation and parliamentary evidence, and such powers and privileges as are implied ‘by reason of necessity’ to carrying out its legislative functions.²⁶

A distinguished scholar of parliamentary privilege, Dr Gerard Carney reminds us:

These privileges exist not for the benefit of members of parliament but for the protection of the public interest. Hence the freedom of speech exercised by members is in every sense a privilege which must be exercised in the public interest. There is clearly a need to regularly reassess the necessity for the continued enjoyment of these privileges. Their justification must be based on the needs of contemporary government, not the historical battles fought in earlier ages.²⁷

The extent of what is considered essential to the operation of parliament is a vexed question. A paper to the Australasian Study of Parliament Group conference in 2007 from Leslie Gönye Clerk Assistant (Committees) of the NSW Legislative Assembly noted that changes in technology and society’s expectations in recent decades have encroached on parliament’s ancient rights to conduct its own affairs in secret. Examples include the ability to table reports out of session and complying with liquor licensing and public sector employment legislation.²⁸

The Australian Law Reform Commission has long argued that Federal Parliament should be included in FOI legislation. Its report from 1995 on this issue noted that, of the parliamentary departments, the Department of the Senate behaved as if it were subject to FOI and released documents unless they were likely to be except on the grounds of privilege. The Commission considered:

The Review is not persuaded by these arguments. It remains convinced, particularly in light of the experience of the Department of the Senate, that there is no justification for the parliamentary departments to be excluded from the Act and that being subject to the Act will not cause any greater inconvenience for them than

²⁵ Correspondence to the Premier from the Hon Richard Torbay MP, Speaker of the Legislative Assembly and the Hon Peter Primrose MLC, President of the Legislative Council, 9 April 2009, p. 1

²⁶ R. Grove (ed.) *New South Wales Practice, Procedure and Privilege* 2007, pp.287–8

²⁷ G. Carney ‘The Power of Privilege’ pp. 28–30 in *About the House* June 2004, p.28

²⁸ Leslie Gönye 2008 ‘Finding a Balance Between Accountability and Exclusive Cognisance: Recent Developments in NSW’ pp.212–26 in *Australasian Parliamentary Review*, 23(1) Autumn 2008

is caused to other agencies subject to the Act. Accordingly, it recommends that the parliamentary departments be made subject to the FOI Act.²⁹

The recent federal government review of its FOI legislation was explicitly designed to implement the recommendations of that 1995 report and in response to draft bills, there was disappointment from three public submissions that this recommendation was excluded.³⁰

In 1999, the United Kingdom's Joint Committee on parliamentary privilege recommended the right of each house to administer its internal affairs should be confined to activities directly and closely related to proceedings in parliament and should no longer be free of acts relating to matters such as health and safety and data protection.³¹ Another committee - the House of Commons Public Administration Committee - considered that there are many administrative functions of parliament that do not need to be protected any more than those of police and excluding parliament may convey wrong impression to the general public.³²

The former Speaker of the New Zealand House of Representatives has noted that freedom of speech and operations are worthy principles but queries how far this concept should be extended beyond the chamber, committees, questions and other proceedings of parliament, such as to administration, finance, security and personnel.³³ She considered that in the area of administration parliaments should be accountable with suitable protections for the privacy of communications between members of parliament and their constituents and the agencies they petition on behalf of the public.³⁴

Discussion in the United Kingdom in 2007 when debating a bill attempting to remove the parliament from the FOI legislation reflected a widely-held view that it was a mistake for parliament to have been included in the first place.³⁵

There are sound reasons for exempting aspects of parliamentary operations from FOI regimes in order to preserve their independence and privileges and many jurisdictions include such an exemption in their legislation. It is harder to justify why areas outside the bounds of privilege such as administration of parliamentary departments should be exempt.

²⁹ Australian Law Reform Commission *Open Government: a Review of the Federal Freedom of Information Act 1982* Report 77, 1995, 11.8

³⁰ Submission to the Department of Prime Minister and Cabinet on exposure draft of FOI Reform Bill from Media Entertainment and Arts Alliance p. 4, from Australia's Right to Know p.7, from Peter Timmins pp. 6-7

³¹ Cited in O. Gay *op. cit.* p. 6

³² *ibid.* p. 5

³³ Hon Margaret Wilson MP, *op. cit.* p. 2

³⁴ *ibid.* p.4

³⁵ O. Gay *op. cit.* p. 16

Information held by members

In his review of the operation of the NSW FOI Act, the Ombudsman raised the issue of extending the regime to include documents held by members but deferred consideration of this question until the first periodic review of the amended scheme.³⁶

These documents would include such things as correspondence between members and constituents, between members and ministers and information prepared to assist them in the performance of their parliamentary duties. In NSW at least not all of these documents would be covered by parliamentary privilege and, should parliament be included in an FOI scheme, would not therefore be exempt from release on the basis that such a release would interfere with the operations of parliament. For instance, absolute privilege extends only to communication with ministers closely related to parliamentary business. Correspondence with ministers in order to conduct constituency business may attract the much more limited qualified privilege. Similarly, correspondence with constituents also arguably only attracts qualified privilege.³⁷ However the existing exemption of members' offices from the current FOI regime has the effect of preserving the confidentiality of this material.

When discussing whether this material should be subject to FOI regimes, former Speaker Wilson of the New Zealand House of Representatives argued that:

It is important not to restrict the freedom of the public to communicate with their Members of Parliament and for them to respond. Freedom of speech is a fundamental constitutional principle of our Parliamentary democracy. It needs to be vigilantly protected. Again however it would not seem impossible to work through a process where privacy was protected and the public interest was taken into account in any specific disclosure of information.³⁸

The Presiding Officers of the Parliament of NSW strenuously opposed suggestions that information held by members could be included in an FOI regime noting that:

Not all documents and communications are covered by parliamentary privilege. Nevertheless we believe that a strong case can be made for preserving the confidentiality of all members' documents and communications, together with research papers and other papers prepared for members. Members need to be able to prepare documents, communicate with constituents and other parties, and engage research while being assured that the information will not find its way into the public domain. Without this assurance the capacity of members to communicate with constituents and acquire information in fulfilling their parliamentary duties would be impaired.³⁹

³⁶ NSW Ombudsman *Review of the Freedom of Information Act 1989*, February 2009, p.45

³⁷ R. Grove *op. cit.* pp.337–338

³⁸ Hon Margaret Wilson MP, *op. cit.*, p.5

³⁹ Correspondence to Premier 9 April 2009 from the Hon Richard Torbay MP, Speaker of the Legislative Assembly and the Hon Peter Primrose MLC, President of the Legislative Council, p.2

Similar concerns were raised in the United Kingdom that constituency correspondence would be caught up when communicating to authorities on constituents' behalf as authorities may release material even if they did not originate it. For example a local authority may hold a letter from a member which it may decide to release in response to an FOI request. This was considered inappropriate with one member arguing that correspondence about individual constituents 'should have the confidence of the confessional.'⁴⁰

Members' privacy versus accountability

The final major area of concern about including parliaments in FOI regimes relates to releasing information about members' use of salaries and other allowances. In NSW, individual expenses are not disclosed although a range aggregated information about the total cost of allowances is published. General information about individual member salaries and applicable allowances is also published by the Parliamentary Remuneration Tribunal. Members are obliged to list their pecuniary interests in a register which is available for inspection and updated periodically and the parliamentary departments reports on travel by members, their staff and spouses or other approved relatives on an individual basis.⁴¹

Arguably there is a legitimate public interest in the appropriate use of taxpayer funds but this should be distinguished from curiosity about the private lives of public figures. As noted by a former Speaker of the New Zealand Parliament, if there were disclosures of the precise details of spending by members 'no doubt there will be a prurient interest in who takes taxis where and how much they cost'.⁴² Once brought into the FOI scheme, members of the British House of Commons expressed increasing unease about the huge volume of requests for information about their use of allowances which led to ill-fated efforts to limit the application of the legislation.⁴³ The issue of protecting members' privacy may be seen as grounds for not releasing information about their use of allowances. On the other hand, the very lack of scrutiny can lead to public perceptions of malfeasance or the possibility of it. In 2007 the United Kingdom's Information Tribunal did not consider this to be sufficient grounds for protecting this material from disclosure in an FOI scheme. Instead, it found that disclosure was in the public interest and would only result in limited invasion of members' privacy.⁴⁴

Secret parliamentary business or effective accountability?

Exemption from FOI does not mean that the parliaments necessarily conduct their business in secret: rather that there are limits to what can be asked of them under

⁴⁰ Nick Harvey MP, cited in O. Gay *op. cit.* p.20, O. Gay *op. cit.*, pp.10–11

⁴¹ eg Appendix D NSW Legislative Assembly *Annual Report 2008/09*, pp 52–58

⁴² Hon Margaret Wilson MP, *op. cit.* pp.4–5

⁴³ Nick Harvey MP, cited in O. Gay *op. cit.* p.20

⁴⁴ *ibid.* p.9

the legislation that applies to agencies of the executive government. These parliaments have a range of accountability tools available to them which they can use to varying degrees to build and maintain public trust. These tools include annual reporting, reports of parliamentary debates and committee activities and information about compliance of the administration with sound practices and demonstration of value for money. It is worthwhile, therefore, to examine why public trust is important and the role of accountability practices in building trust.

How to maintain trust

At its most basic level, a democratic government relies on public trust in order to exist. The public demonstrates its continued faith in its government through periodic elections. Three important ways that the literature identifies for institutions to build trust are by truth-telling, promise-keeping and the pursuit of fairness.⁴⁵ According to this model in the years in between elections, governments can maintain public trust by telling the public about their activities, doing what is promised and acting with integrity to rectify wrongdoing. FOI schemes can be seen as one aspect of this broader effort to improve public trust by enabling light to be shone on the workings of government as a way to verify that the right things are being done.

What is accountability for?

Like many concepts in common use, the precise meaning of ‘accountability’ is contested and the accountability of parliament is far less regularly discussed than accountability to parliament. A potentially useful model, based on a UK review of central government divides accountability into four aspects - providing an explanation, providing further information when required, reviewing and if necessary revising the information and granting redress or imposing sanctions.⁴⁶ This section examines the characteristics of a parliamentary administration that are relevant for promoting accountability and queries what aspects of parliamentary activities are of most relevance in building public trust.

Explaining: Parliaments are great disseminators of information about their activities. In NSW, parliamentary debates and some committees are filmed and broadcast on the internet. Parliamentary debates are recorded by hansard which is readily available, as are parliamentary papers. Public committee proceedings are recorded and transcripts and minutes are normally published online. Members of the public can search internet databases for the speeches of individual members,

⁴⁵ C. Offe ‘How can we trust our fellow citizens?’ in M.E. Warren ed., *Democracy and Trust* Cambridge University Press, Cambridge 1999, pp 73-75 cited in M. Groot *op. cit.* p.29

⁴⁶ Lord Sharman 2001 *Holding to Account: the review of audit and accountability for Central Government* para 3.5 cited in G. ‘Griffith Parliament and Accountability: the role of parliamentary Committees’ pp. 7-46 *Australasian Parliamentary Review* Autumn 2006 21 (1), p. 17

how they have voted and what questions they have asked. Like other Australian parliaments, NSW parliamentary departments generally provide annual reports in accordance with the relevant public sector requirements. These reports describe the administration in great detail, including the amount of money spent on travel supported by the parliament by individual members, their staff and approved spouse or relative.⁴⁷ General information about member salaries and applicable allowances is published by the Parliamentary Remuneration Tribunal. Members are obliged to list their pecuniary interests in a register which is available for inspection and updated periodically. Expenditure of public funds by individual members in the course of conducting their duties is less readily available. These funds are however subject to both internal and external controls.

Providing further information: In some jurisdictions, representatives of the parliamentary administration appear in front of estimates committees. The media can query particular matters but there are limits to opportunities to seek further information.

Correcting the record: There are also limited opportunities to correcting the record although in recent years, many jurisdictions including NSW have started to provide for a citizen's right of reply. Under this provision individuals who are named adversely in parliamentary debate can seek a right of reply which may be published in hansard.

Granting redress or imposing sanctions: Members of parliament generally can be subject to public opprobrium and the wrath of the ballot box. Other means identified by Hall as ways of holding them to account include the courts, media, parliamentary processes, parliamentary debates, privileges committees, and sanctions by parliament.⁴⁸ Politicians in some jurisdictions such as NSW are also subject to investigation by external bodies such as the Independent Commission against Corruption. The relative strength of these mechanisms in demonstrating accountability is important when considering where there is the greatest need for building trust.

It has become a truism that there has been a decline in public trust in institutions such as government agencies and parliament over recent years with commentators pointing to a disengagement from political parties and policies, including 'a growing distrust of and disillusionment with governments and governance'.⁴⁹ Although the extent of this trend is disputed and hard to measure empirically, it is

⁴⁷ E.g., Appendix D Legislative Assembly *Annual Report 2008/09* Parliament of NSW, pp. 52–58

⁴⁸ P. M Hall *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry — Powers and Procedure*, Lawbook Co Sydney 2000, p.145

⁴⁹ M. Grattan cited in M Groot 2002 'Distrustful, disenchanted and disengaged? Polled opinion on politics, politicians and the parties: an historical perspective' pp.17–57 in *Parliament and Public Opinion Lectures in the Senate Occasional Lecture Series 2001-2001*, Papers on Parliament Number 38, p.18. Groot's paper critiques the increase of disengagement over time for which he does not find empirical support within Australia.

attributed variously to massive structural changes in the economy, globalisation, the convergence of the policies of mainstream political parties, increased individualism and reduced participation in community activities.⁵⁰ In particular, there has been a measurable reduction in the level of trust in parliamentarians. Although as Fox reports British research finds that politicians have rarely been held in high regard,⁵¹ Australian polling by Morgan Gallup has identified a significant decline in the reputation of parliamentarians compared to other professions over three decades. In 1976, 20 per cent of respondents believed politicians act with honesty and integrity but this proportion had fallen to 8 per cent by 2000.⁵²

Doubts about the personal integrity of parliamentarians was the major issue in the British parliamentary expenses scandal which commentators asserted had ‘caused a collapse in public trust in politicians so comprehensive that the entire basis of parliamentary democracy might well be in jeopardy’.⁵³ In response, there have been calls in the United Kingdom for greater accountability of parliamentarians through a range of mechanisms to build and maintain public trust.⁵⁴ Fox cites research about political engagement in the United States of America that showed the public was for the most part very disengaged in political processes except in the few areas in which they were extremely interested, the principal of which was the opportunity of politicians to profit from office.⁵⁵ Thus, there is a high level of interest in the use of public resources by parliamentarians and their ethical conduct.

Discussions of how to improve the accountability of parliaments emphasise the potential for problems arising from the fact that it is able to regulate its own affairs. Without external scrutiny, there can be limited incentive to develop and maintain stringent controls. For instance, Kelso notes that the House of Commons Additional Costs Allowance operated for many years without verification of the validity of claims for expense and without any publication of the level of expenses.⁵⁶

A way to improve public confidence would be to establish a sound administrative scheme. John Uhr suggests that effective accountability should avoid a ‘gotcha approach’ and should include processes for providing information as well as mechanisms for imposing sanctions.⁵⁷ Clear guidelines about such matters as appointing and managing staff and the use of allowances combined with robust internal review and external auditing can provide some confidence to the public that

⁵⁰ *ibid.* p.19, p.50

⁵¹ R Fox ‘Engagement and Participation 2009 ‘What the Public Want and How our Politicians Need to Respond’ pp.673–685 *Parliamentary Affairs*, 62(4) 2009 p. 675

⁵² Cited in K. Coghill *et al.*, ‘Developing MPs’ Ethical Standards’ 2008, pp101–20 *Australasian Parliamentary Review* 23 (1) p.102

⁵³ A. Kelso *op. cit.* p.330

⁵⁴ R Fox *op. cit.* p.674

⁵⁵ *ibid.* p.675

⁵⁶ A. Kelso, *op. cit.* p.332

⁵⁷ Uhr, J. 1998 *Deliberative Democracy in Australia: the Changing Place of Parliament*, Cambridge University Press, Cambridge, p.163

their elected members are acting accordance with sound administrative practices even without publishing minute details of the operation of their affairs.

Such systems need to be subject to continuous improvement to ensure they are still effective. For instance, the review mechanisms of member allowances system in NSW was recently subject to criticism by a report of the Independent Commission Against Corruption for not including a corruption prevention strategy in addition to its current compliance audit and verification actions.⁵⁸

Another issue may be a lack of clarity about what is expected of parliamentarians. A potential solution would be to establish codes of parliamentary conduct.⁵⁹ Coghill *et al* recommend stronger parliamentary codes of conduct be adopted in all parliaments and these should address broader issues of accountability and transparency. There also may be benefit in encouraging members to undergo professional development in reflective ethics so members are equipped to understand ethical dilemmas as is provided in some states in the US and in the United Kingdom. This could be complemented with access to ongoing advice from a parliamentary ethics adviser.⁶⁰ A further suggestion is that parliaments appoint standards commissioners to oversee pecuniary interest registers and investigate instances where members might have breached accepted standards of behaviour with powers to report to parliament or a privileges committee.⁶¹

In short, a sound administrative system can be described as one which provides guidance up front, access to advice on an ongoing basis and has processes of verification at the end with some mechanism for complaints to be made to appropriate investigatory bodies.

It is commonplace for public enterprises to use performance indicators to highlight good performance and to explain what is achieved by the deployment of resources. In discussing the expenses scandal in the United Kingdom, Kelso suggests that as well as assurance that parliamentarians are using resources appropriately there should be a demonstration of the value generated by public funds to support members' offices. He suggests that those using fewer resources are not necessarily the best parliamentarians and there is an opportunity to paint a more complex picture than the simple black and white media equation of high spenders as bad and low spenders as good.⁶² There is merit in the suggestion that explaining what is done with resources can increase accountability and build public trust.

⁵⁸ Independent Commission Against Corruption *Investigation into the submission of false claims for sitting day relief payments by a NSW MP and members of her electorate staff*, July 2010, p.22

⁵⁹ Coghill *et al.* 2008 *op. cit.* p.106

⁶⁰ *ibid.* pp108–110, pp.114–115

⁶¹ Ken Coghill *et al* 'Why Accountability Must be Renewed', 2006 *Australasian Parliamentary Review* Spring 2006, 21(2) 10–48, pp.15–16

⁶² A. Kelso *op. cit.* pp.334–335

Conclusion

If implemented effectively and maintained adequately, the new GIPAA regime in NSW could lead to a more transparent executive government. That the new scheme does not include the parliament, despite the recommendations of the Ombudsman, is consistent with the historic framing of the purpose of FOI schemes in NSW and other jurisdictions as a tool for making executive governments accountable rather than the public sector in general.

There is a strong case that some aspects of parliamentary operations, particularly those closely associated with any parliamentary proceeding, should be accorded protection from FOI regimes on the grounds of preserving parliamentary privilege. In areas beyond absolute privilege but still associated with parliamentary proceedings, such as communications between members and constituents, privilege alone is not sufficient reason but privacy concerns may add enough weight to tip in the balance to exclusion. In contrast, in areas beyond the immediate operations of parliament, such as the management of administrative support and members' use of public funding, there is far less justification for exemption. This is particularly so given the diminishing role of exclusive cognisance in managing the parliamentary departments. In NSW, the continuing exclusion of these aspects of parliament is apparently the result of lack of political and public pressure for change.

However in jurisdictions where parliaments are exempt from FOI there are many other tools of accountability in operation. These include annual reports, administrative schemes, internal and external controls on the use of resources, ethics training and parliamentary codes of conduct. If these are perceived to be working effectively, they can build public trust and confidence in the operations of parliament. In such circumstances, there is less likelihood of public and political pressure to extend the coverage of FOI to include the operations of parliament. ▲