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**Maintaining public trust in Parliament without
freedom of information – balancing the right to
know with parliamentary privilege**

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MAINTAINING PUBLIC TRUST IN PARLIAMENTS WITHOUT FREEDOM OF INFORMATION – BALANCING THE RIGHT TO KNOW WITH PARLIAMENTARY PRIVILEGE

In 2009, the New South Wales 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 (GIPA) regime that 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 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 NSW Ombudsman's Review

In 2008, the New South Wales 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 to government information.²

The final report of the Ombudsman's Review 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

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.

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

These three issues will be discussed in more detail below.

Government Response

The Government agreed to the majority of the recommendations of the Ombudsman's 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

Broader trend to release government information

This move in New South Wales can be seen as part of a broader trend to increase the release of information about the operations of government in Australia. In Queensland, the new *Right to Information Act* commenced on 1 July 2009 to implement the findings of an independent review panel. At the Commonwealth 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 FOI scheme to commence in November this year.⁶ The ACT, Western Australia, Victoria and Tasmania are also reviewing their schemes.⁷

Prior to adoption of a new FOI scheme in New South Wales, 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 Freedom of Information 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."⁸

Continuation of Parliamentary Exemption

However, despite the recommendations of the Ombudsman and this growing trend towards encouraging the release of government information, the New South Wales Government chose to maintain the exemption of the Legislative Assembly and the Legislative Council and rejected the recommendation of the Ombudsman entirely. It

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

⁶ Department of Prime Minister and Cabinet Freedom of Information Reform page , [http://www.dpmmc.gov.au/consultation/foi_reform/index.cfm] accessed 16 July 2010

⁷ D Solomon 2008 "Queensland's Freedom of Information Inquiry" pp 187-205 *Australasian Parliamentary Review* Vol 23 No 2, p.197,

⁸ Premier's Memorandum M2009-10 *Release of Overseas Travel Information*, 19 May 2009

is noteworthy that this was one of only two of the 88 recommendations of the Ombudsman's report that were completely rejected.⁹

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 New South Wales 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.¹⁰

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.¹¹ It also exempts from the definition of "public office" all offices of members and the office of a member of the Legislative Council or the Legislative 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 of either or both of those bodies.¹² This is a slight rewording of the exemptions under the previous legislation and apparently will have the same effect.¹³

Other jurisdictions

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

Australasia

A survey of Australasian jurisdictions showed that there are Freedom of Information schemes in place but the legislation does not extend to cover parliaments with the possible exception of the administration of the Legislative Assembly of the Australian Capital Territory which has an exemption for releasing documents if they infringe the privileges of the Legislative Assembly, of the Commonwealth Parliament, or a State Parliament.¹⁴

⁹ Department of Premier and Cabinet *FOI Reform in New South Wales Ombudsman's Recommendations And Public Submissions – Government Response* p.12, p.21

¹⁰ NSW PD Legislative Council 18 June 2009, NSW PD Legislative Assembly 23 June 2009

¹¹ *Government Information (Public Access) Act 2009* Schedule 4 subclause 2(3)(b)

¹² *ibid* subclause 3 (2)(b) and (c)

¹³ *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.

¹⁴ Responses to e-cat question in May 2009 and WA and NT legislation

International jurisdictions

While Canadian jurisdictions exempt their parliaments from FOI regimes, parliaments in the United Kingdom, Ireland, India, South Africa, the West Indies, South Africa, and Trinidad and Tobago are included.¹⁵

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.¹⁶ 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.¹⁷

On the other hand, there were significant well-publicised efforts to limit the availability of such information about members of the United Kingdom's House of Commons and Lords. 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.¹⁸

What are Freedom of Information regimes for?

Fundamentally, Freedom of Information regimes are designed to increase the accountability of government by enabling interested people to find out information that is 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, the exemption of the New South Wales 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

¹⁵ 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

¹⁶ O. Gay *op. cit.* p.10

¹⁷ A. Kelso 2009 "MPs' expenses and the Crisis of Transparency" pp. 329-338 *The Political Quarterly* Vol 80 No 3 July-September 2009 p.334

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

wider public sector because the legislative emphasis has changed from holding the executive to account to promoting transparency in all public bodies.¹⁹

Therefore, the New South Wales system reflects a framing of the purpose of FOI regimes as a check on executive government. On the other hand, the Ombudsman's recommended reform characterises FOI as accountability mechanism for protecting the public interest in general.

It is clear that the New South Wales 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.²⁰

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.²¹ 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.²²

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

¹⁹ O. Gay *op. cit.* pp.24-25

²⁰ NSW PD Legislative Council, 18 June 2009

²¹ 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

²² Hon Margaret Wilson MP *op. cit.* p.2

of the executive government. While there is no formal separation of executive and legislative power in the New South Wales 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.²³

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 New South Wales which does not have a codification of privileges but relies 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.²⁴

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.²⁵

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 New South Wales 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 employment legislation and liquor licensing legislation.²⁶

The Australian Law Reform Commission has long argued that Commonwealth Parliament should be included in Freedom of information 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 exempt. 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 is caused to other agencies subject to the Act. Accordingly, it recommends that the parliamentary departments be made subject to the FOI Act.²⁷

The recent Federal Government review of its FOI Act was explicitly designed to implement the recommendations of that 1995 report and in response to draft bills,

²³ 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

²⁴ R. Grove (ed.) *New South Wales Practice, Procedure and Privilege* 2007, pp.287-288

²⁵ G. Carney “The Power of Privilege” pp.28-30 in *About the House* June 2004, p.28

²⁶ Leslie Gönye 2008 “Finding a Balance Between Accountability and Exclusive Cognisance: Recent Developments in NSW” pp.212-226 in *Australasian Parliamentary Review* Autumn 2008 Vol 23(1)

²⁷ Australian Law Reform Commission *Open Government: a Review of the Federal Freedom of Information Act 1982* Report 77, 1995, 11.8

there was disappointment from three public submissions that this recommendation was excluded.²⁸

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.²⁹ 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.³⁰

Former Speaker Wilson of the New Zealand House of Representatives has noted that freedom of speech and operations are worthy principles but queries how far such a concept should be extended such as beyond the chamber, committees and questions and other proceedings of parliament or to administration, finance, security and personnel.³¹ 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.³²

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.³³

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 the areas outside the bounds of privilege such as administration of parliamentary departments that raise more complicated questions about whether they should be included in FOI regimes or not.

Information held by members

In his review of the operation of the New South Wales 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.³⁴

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.

²⁸ 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

²⁹ Cited in O. Gay *op. cit.* p. 6

³⁰ *ibid.* p. 5

³¹ Hon Margaret Wilson MP, *op. cit.* p.2

³² *ibid.* p.4

³³ O. Gay *op. cit.* p.16

³⁴ NSW Ombudsman *Review of the Freedom of Information Act 1989*, February 2009, p.45

In New South Wales 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.³⁵ 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.³⁶

The Presiding Officers of the Parliament of New South Wales 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.³⁷

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 is considered inappropriate with one member arguing that correspondence about individual constituents "should have the confidence of the confessional."³⁸

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 New South Wales, individual expenses are not disclosed although a range aggregated information about the total cost of allowances is published. General information

³⁵ R. Grove *op. cit.* pp.337-338

³⁶ Hon Margaret Wilson MP, *op. cit.* . p.5

³⁷ 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

³⁸ Nick Harvey MP, cited in O.Gay *op. cit.* . p.20, O. Gay *op. cit.* . pp.10-11

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.³⁹

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”.⁴⁰ 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.⁴¹

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.⁴²

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 the legislation that applies to agencies of the executive government.

It is suggested that 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 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.⁴³

³⁹ eg Appendix D NSW Legislative Assembly *Annual Report 2008/09*, pp 52-58

⁴⁰ Hon Margaret Wilson MP, *op. cit.* pp.4-5

⁴¹ Nick Harvey MP, cited in O.Gay *op. cit.* p.20

⁴² *ibid.* p.9

⁴³ 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

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:

1. Providing an explanation
2. Providing further information when required
3. Reviewing and if necessary revising the information
4. Granting redress or imposing sanctions.⁴⁴

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 New South Wales, 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, how they have voted and what questions they have asked.

Like other Australian parliaments, New South Wales parliamentary departments generally provide annual reports in accordance with the relevance 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.⁴⁵

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.

⁴⁴ 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 Vol 21 (1), p. 17

⁴⁵ eg Appendix D Legislative Assembly Annual Report 2008/09 pp. 52-58

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 New South Wales 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.⁴⁶ Politicians in some jurisdictions such as New South Wales 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.

Decline in reputation of politicians

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".⁴⁷ Although the extent of this decline in trust is disputed and hard to measure empirically, it is 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.⁴⁸

In particular, there has been a decline in the level of trust in parliamentarians. Although as Fox reports British research finds that politicians have rarely been held in high regard,⁴⁹ 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 2000.⁵⁰

⁴⁶ P. M Hall *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedure*, Lawbook Co Sydney 2000, p. 145

⁴⁷ M. Grattan cited in M Groot 2002 "Distrustful, disenchanting 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.

⁴⁸ *ibid.* p.19, p.50

⁴⁹ R Fox "Engagement and Participation 2009 "What the Public Want and How our Politicians Need to Respond" pp.673-685 *Parliamentary Affairs* Vol 62, No 4 2009 p.675

⁵⁰ Cited in K. Coghill *et al* "Developing MPs' Ethical Standards" 2008 pp101-20 *Australasian Parliamentary Review* 23 (1) p.102

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.”⁵¹ 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.⁵²

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.⁵³ Thus, there is a high level of interest in the use of public resources by parliamentarians and their ethical conduct.

Doing the right thing and being seen to do the right thing

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 robust 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.⁵⁴

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.⁵⁵ 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 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 robust. For instance, the review mechanisms of member allowances system in New South Wales 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.⁵⁶

Another issue may be a lack of clarity about expectations of parliamentary conduct and robust codes of conduct are recommended by some commentators.⁵⁷ Coghill et al recommends stronger parliamentary codes of conduct to be adopted in all parliaments which address broader issues of accountability and transparency. There

⁵¹ A. Kelso *op. cit.* p. 330

⁵² R Fox *op. cit.* p. 674

⁵³ R Fox Engagement and Participation 2009 “What the Public Want and How our Politicians Need to Respond” pp.673-685 *Parliamentary Affairs* Vol 62, No 4 2009 p. 675

⁵⁴ A. Kelso, *op. cit.* p. 332

⁵⁵ Uhr, J. 1998 *Deliberative Democracy in Australia: the Changing Place of Parliament*, Cambridge University Press, Cambridge, p.163

⁵⁶ 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

⁵⁷ Coghill et al 2008 *op. cit.* p.106

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 US states and the United Kingdom. This could be complemented with access to ongoing advice from a parliamentary ethics adviser.⁵⁸ 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.⁵⁹

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

Telling the good news

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.⁶⁰

There is merit in the suggestion that explaining what is done with resources can increase accountability and build public trust.

Conclusion

The reform of the freedom of information regime in New South Wales should lead to a more transparent executive government. It does not include the Parliament but this is consistent with the historic framing of the purpose of the regime as a way of making executive government accountable rather than the public sector in general.

There are strong arguments that some aspects of parliament should be accorded protection from FOI regimes but in areas beyond the immediate operations of parliament, such as the management of administrative support and members' use of public funding the case is less clear.

However in jurisdictions where parliaments are exempt from FOI there are many tools of accountability in operation. These include administrative schemes, internal and external controls on the use of resources, ethics training and parliamentary codes of conduct. These can work together to build public trust and confidence in the operations of parliament.

⁵⁸ *ibid.* pp108-110, pp.114-115

⁵⁹ Ken Coghill *et al* "Why Accountability Must be Renewed" 2006 *Australasian Parliamentary Review* Spring 2006 Vol 21 (2) 10-48, pp.15-16

⁶⁰ A. Kelso *op. cit.* pp.334-335