

# May 2007 - Accountability of government

Text of keynote address by Prof. John McMillan at the AboveBoard Accountability Forum<sup>1</sup>, at the Australian National University, Canberra, 12 May 2007

Accountability is a necessary adjunct to the power that government exercises in our society. The topics that figured prominently in this week's Federal Budget are a reminder of the breadth of activities that are now subject to some form or other of government control or regulation - activities as diverse as job growth, climate control, child support, education, counter-terrorism, immigration movement, wealth accumulation, law and order, health services, land care, defence, family support, industrial relations, academic research, disease control, film production, heritage conservation, overseas aid, retirement savings, national security, and foreign trade.

The role of government in all those activities is manifested in laws that command and restrict, as well as laws that encourage and permit. In short, the power of government is pervasive, and accountability is an indispensable check on how that power is exercised.

That said, the concept of accountability is imprecise in meaning and scope. Definitions vary in emphasis and focus, especially among definitions drawn from law, political science, public administration, journalism or economics<sup>2</sup>. Points that loom large in the definitions of accountability drawn from those disciplines include:

- accountability describes the relationship between those entrusted with public power and the people who entrust that power to them
- a purpose of accountability is to uphold underlying and fundamental principles, such as public interest, public trust, rule of law and good governance
- accountability defines the expectations of the public concerning the responsible exercise of public power, on matters such as financial probity in government, the behavioural integrity of officials, and the protection of vulnerable members of the community
- an important dimension of accountability is the sanctions that can be applied and remedies to be granted when there is an accountability breach
- the essence of accountability is that those exercising public power must be answerable, responsive and transparent.

Notwithstanding the different emphasis in those definitional aspects of accountability, the point of common focus is upon the standards expected of those who exercise public power. That is apparent in the examples of accountability breaches that are provided in the brochure for this Forum. The perpetrators of those breaches were government agencies, police officers, judges, parliamentarians, defence force personnel, security intelligence agencies, and government supported companies.

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<sup>1</sup> The Forum was an initiative of students at the ANU College of Law; members of the Working Party were Matt Stevens (convenor), Jess Casben, Hannah Delaney, Stephanie Elliott, Charles Gascoigne, Matt Sherman and Mark Smyth.

<sup>2</sup> For examples, see R Creyke & J McMillan, *Control of Government Action: Text, Cases & Commentary* (2005, LexisNexis) Ch 1 'Accountability in an Administrative State'.

Another way to approach the topic of accountability is to focus on the laws, mechanisms and procedures that constitute an accountability system. This is a strong focus in today's Forum, especially upon administrative law mechanisms and procedures. Yet even to narrow the focus in that way is to select a topic of great complexity and challenge. I will emphasise that in the remainder of this talk by looking at four case studies of accountability issues that are contemporary and contentious.

## **1. Counter terrorism laws - balancing government power and civil rights**

The first case study is perhaps the most controversial current issue in the accountability debate. It concerns the balance to be struck in counter-terrorism laws between safeguarding the public from acts of terrorism, while respecting human rights and civil liberties.

This topic has recently challenged all parliaments in Australia, giving rise to a debate in which there are sharp divisions of opinion. I sat on a committee last year - the Security Legislation Review Committee - along with other statutory office holders and legal and judicial nominees<sup>3</sup>. In reviewing Australia's counter terrorism laws, the Committee found room for debate at every level - on the precise wording of counter-terrorism offences; how the offences should apply to those who come into contact with suspected terrorists, such as family members, journalists, and members of community and religious groups; and whether the final decision to proscribe a terrorist organisation should be made by a government minister, a judge or a parliamentary committee.

The difficulty of striking the right balance in counter-terrorism laws and protections is starkly illustrated in two published reports in the last month. One was a report of a speech by the Deputy Secretary General of Amnesty International. In referring to Australia's counter-terrorism laws, she accused Australia of being 'an ambassador for the violation of the Universal Declaration of Human Rights ... breaking its provisions, undermining its protections [and] betraying it with sophistry'<sup>4</sup>.

Sounding a counter note were a series of newspaper articles in Australian and Britain, following the conviction in May of five people known to have associated with the London suicide bombers who killed 52 people in July 2005. With titles like "How MI5 let bombers through net", the articles condemned British Government law enforcement authorities and the British public for being complacent and inactive<sup>5</sup>.

## **2. Automated decision-making - protecting rights in a technological age**

The second case study concerns another recent publication that arose from a joint project between four Australian Government agencies - the Commonwealth Ombudsman, the Privacy Commissioner, the Australian National Audit Office and the Australian Government

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<sup>3</sup> *Report of the Security Legislation Review Committee* (June 2006), available on the Attorney-General's Department website at [www.ag.gov.au](http://www.ag.gov.au).

<sup>4</sup> 'Human Rights in Tough Terrain', *Melbourne University Magazine* (April 2007), p 4.

<sup>5</sup> 'How MI5 let bombers through net', *The Australian*, 2 May 2007, p 10.

Information Management Office. Those offices together devised a Better Practice Guide on Automated Assistance in Administrative Decision-Making<sup>6</sup>.

Why did those agencies join together in that project? They did so in response to the growing proportion of government services that are delivered, and decisions that are made, by computers. Automated systems do things as varied as calculate a person's taxation rate or penalty, decide eligibility for welfare and pension benefits, evaluate commercial tenders, decide whether to inspect imported goods, decide liability to pay workers' compensation, analyse scientific data in applications for regulatory approval, assemble prosecution evidence and give advice to the public about their rights and obligations.

Properly programmed, operated and maintained, computers never make mistakes. But therein lies the rub! Each year government agencies and the Commonwealth Ombudsman receive a steady flow of complaints because an automated system has miscalculated a person's benefit, sent a letter to the wrong address, issued the wrong advice, merged unrelated information from two sources, or incorrectly recorded a person's personal details.

Those computer-related errors always cause annoyance to the public, even anger. Sometimes the outcome is far worse. An information technology error can mean that a person is wrongly stripped of their government welfare benefit, is landed with a debt to a government agency, or is not recognised as a citizen or visa holder and then placed in immigration detention.

In short, the accountability of government in upholding the law and respecting rights can depend not just on how laws are drafted, or the effectiveness of courts and tribunals in reviewing government decisions. It can depend also on how computers are programmed and managed. That was the reason for the Better Practice Guide on Automated Decision-Making. It spelt out the public law values that underpin our system of government, and gave guidance on how those values should be anchored in automated systems.

### **3. Official corruption - an enduring threat to government**

The third case study concerns another threat to government accountability and good governance - official corruption in government and policing.

Corruption can degrade every element of a system of government: it can undermine the operation of the democratic system, distort government policy priorities, bleed the efficiency of business, breed crime, result in unsafe buildings and products, skew the delivery of government services, and generally lessen the standard of living of the community. Once rooted in a system, corruption is immensely difficult to remove.

Fraud and corruption are a continuing problem for every government around the globe. Though Australia is ranked as the ninth least corrupt country in the latest Transparency International Corruption Perception Index, Australia has not been free of government corruption. Witness the reports of the Fitzgerald Inquiry in Queensland, the WA Inc Royal Commission in Western Australia, the HIH Royal Commission, the Bundaberg Hospital Inquiry, the Oil-for-Food Inquiry, and the prosecution each month of public officials around

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<sup>6</sup> The Guide, published in February 2007, is available on the Ombudsman website at [www.ombudsman.gov.au](http://www.ombudsman.gov.au). A speech by this author describing the Guide is also available on the website: '*Automated Assistance in Administrative Decision-Making - Launch of the Better Practice Guide*'

Australia on the recommendations of the Independent Commission Against Corruption in NSW, the Crime and Misconduct Commission in Queensland, the Crime and Corruption Commission in Western Australia, and the Office of Police Integrity in Victoria.

How do you curb official corruption? The difficulty of doing so is well illustrated by a report in February 2007 of the Office of Police Integrity in Victoria, *Past Patterns - Future Directions*. The report looked at 19 royal commissions and official inquiries into police misconduct and corruption in Victoria over a period of 150 years. Why was there an official inquiry on average every eight years? Because the problem of corruption re-surfaced no sooner than the recommendations of the last inquiry were digested. As the report observed, 'the history of the Victorian Police over its 150 or so years, unhappily, is interwoven with recurring strands of misconduct and corruption'<sup>7</sup>.

Building a corruption resistant culture is therefore a large challenge. The central theme of the Victorian report is that an ad hoc approach to the problem of curbing corruption will achieve little. Two essential reforms are a values-driven culture embedded in the police force, and a permanent, independent and well-resourced body (like the Office of Police Integrity itself) with strong and coercive powers to investigate corruption and misconduct.

## **4. Rwanda - designing a new system of government**

The fourth case study takes us well away from Australia. Recently I had the rewarding experience of visiting Rwanda. It is a country we all know, because of the terrible genocide that occurred there in 1994. In the space of 100 days an estimated one million people were killed in a State organised genocide. The State apparatus, the militia and ordinary citizens, urged on by the national radio station, undertook the gruesome and frenzied mutilation and killing of men, women and children, huddled in churches and schools.

In a short time the country was decimated. It was left with no state machinery - no bureaucracy, no agencies, no staff, and no communications network. Everything was damaged - the electricity and water supply, buildings, computers, even office tables and chairs. There was a legacy of death that touched every family, 80% of the population of eight million were displaced or became refugees, two-thirds of the population lived below the poverty line, and there was a pervading climate of fear, suspicion and anger.

What was a country to do after that? The answer chosen in Rwanda has been to build a new nation. A foremost principle that has guided that nation-building task has been the concept of good governance, alongside other principles of unity, reconciliation, economic reconstruction, power sharing, and decentralisation of government. Those principles are reflected in the titles of new government ministries and agencies.

Rwanda fits the hypothetical that is often studied in legal and political theory classes: if you have to build a new society from the green fields, what will it look like?

Many of the answers are contained in the new Rwandan Constitution that was adopted in 2003. There are many features, but three are notable. First, there is the creation of a parliamentary system modelled on a principle of power sharing that is achieved in part by limiting the percentage of government positions that any one political party can hold.

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<sup>7</sup> Office of Police Integrity, *Past Patterns - Future Directions* (February 2007), 'Letter of Transmittal'.

Secondly, great faith has been placed in the creation of an independent judiciary, illustrated by the recent appointment of 300 new judges. Thirdly, the Constitution establishes and protects a range of independent oversight agencies, such as the Ombudsman, Human Rights Commission, Auditor-General, National Tender Board and National Examination Board.

There are large challenges ahead, but an equally impressive record to date. Rwanda is now described by many as the safest country in Africa, with the lowest level of corruption in the sub-region, and having a targeted program to lift five percent of the population above the poverty line each year.

## **Accountability - some lessons**

What lessons can we draw from those four case studies?

The first is that it is a complex challenge to build an effective accountability system in government. There will be sharply differing views on where the balance should be struck, not just on the design of counter-terrorism laws, but also on the competing roles of different accountability institutions. That was illustrated this week, when the heads of eight leading media organisations in Australia joined forces to launch a campaign to safeguard freedom of speech in Australian democracy. A chief target in their campaign is court suppression orders. There are reported to be over 1000 such orders in place at any time (compared to 100 a decade earlier)<sup>8</sup>.

The second lesson is that an accountability system will be a mixture of many different elements. The WA Inc Royal Commission concluded that 'there is no single path to be followed to achieve a satisfactory level of public accountability'<sup>9</sup>. Accountability describes a range of different relationships, accountability mechanisms, rules and standards, and remedies and sanctions. Inevitably this poses questions: Who is accountable? To whom? For what? And what are the accountability standards?

Thirdly, the purpose of accountability is to facilitate government: not to impede the exercise of public power, but to ensure that it is exercised responsibly. Civilisation can be damaged by bad government, but it cannot progress without good government.

Fourthly, the principles of accountability must apply to all areas of government. It is a permanent condition attached to public power, to public service. That too raises difficult questions about what we mean by 'government' and 'public power'. This again prompts those basic questions: who is accountable, to whom, and for what?

Fifthly, values as well as legal safeguards must drive an accountability culture. Administrative law is in part an error or fault driven culture. It makes officials accountable by asking whether they have done something wrong, such as made the wrong decision, acted unlawfully, or misused their authority. Yet good governance must also be a values driven

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<sup>8</sup> See M Moore, 'Media rally to defend free speech', *Sydney Morning Herald*, 11 May 2007. The eight media organisations are ABC, AAP, Commercial Radio Australia, Fairfax Media, Free TV Australia, News Ltd, SBS, and Sky News.

<sup>9</sup> *Report of the Royal Commission into Commercial Activities of Government and Other Matters*, 1992, Part II, Ch 3, p 3:4.

culture. Direction must be given on how public power should be exercised in a responsible fashion.