Ministerial Responsibility & Accountability

by

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Introduction
This paper concerns both the customary factors in accountability and the culture that prevails in a society, in its Parliament and in government as a crucial factor in effective accountability. A culture that suppresses accountability can cripple legal and institutional arrangements. A culture that favours and supports accountability can overcome legal and institutional weaknesses.

Good governance demands “a system that is transparent, accountable, just, fair, democratic, participatory and responsive to people’s needs” (World Conference on Governance, 1999). Each of these factors - transparency, accountability, justice, fairness, democracy, participation and responsiveness - is important and relevant to effective accountability in the use of public funds and the exercise of power.

The choice of these factors is a political choice. It assumes a commitment to governing on behalf of the people. This is the ultimate basis of democratic government. It accepts that any government derives its legitimacy and therefore its authority from the people. It accepts that government has a fiduciary duty to act in accordance with the interests of all the people. It accepts that government exercises a trust in which its members only proper interests are those in which they act on behalf of the people.

How then are the people’s interests to be determined? How can we be confident that any particular government is actually discharging its duty to act in the people’s interests, even when it says that it is (as most do)? Indeed, how can any government have confidence in its belief that it acts in the people’s interests?

There are many historical examples of governments that have fallen because the people felt that the government was not acting in the interests of the people. The lesson of history is surely that the stability of government relies on the people feeling that government is concerned and responsive to what they believe to be their interests. This belief or perception of what the people believe to be their interests is all-important. We may not agree with that perception, we may think it ill-informed, based on a false ideology or having the wrong priorities, but to the people, their perception is the reality. We may succeed in convincing the people to a different
point of view and to change their perception. Unless we succeed in doing so, how can we justify government actions which contradict the people’s perceptions of their interests rather than being responsive to the “felt interests” of the people? (Saward 1996).

**Responsiveness**
Here then we have the first of the good governance principles that guide the oversight of the exercise of political power and the utilisation of public resources; the system must be responsive to the people’s perception of their interests. How then can our system be responsive to the people?

**Democracy**
The short answer is to ensure democracy, the second principle. However, not all forms of democracy have been truly responsive to the people’s needs. We must look behind the word and consider what legal and institutional arrangements can best ensure oversight of the use of public resources and the exercise of power.

**Accountability**
Our aim is seeking democratic responsiveness is to ensure that there is accountability for the use of public resources and the exercise of power. In other words, we are looking for mechanisms through which those in control of and therefore responsible for the use of public resources and the exercise of power can be held to account for the discharge of that responsibility. This is the third principle.

**Justice**
These mechanisms for which we are looking must also operate justly. Under this principle, the mechanisms must operate so that there is a proper process, in which the people can be assured that use of public resources and the exercise of power is properly examined according to known and accepted procedures.

**Fairness**
The oversight of the utilisation of public resources and the exercise of power must also operate fairly. This principle is a slightly different concept to justice. The people will want to be satisfied that there is fair treatment of each person having responsibility for the use of public resources and the exercise of power i.e. that each person is treated equally before the law, without discrimination relating to political affiliation, ethnicity, gender or any other factor.

**Participation**
Whilst the opportunity for participation by the people in the oversight of the utilisation of public resources and the exercise of power may seem less important and relevant in some areas of public administration, it can actually be quite significant. The very fact that public officials have knowledge that the public may participate in oversight can be a significant factor in tempering incautious or improper actions.

However, participation by elected representatives of the people enables the principle of participation to become a highly effective and efficient mechanism for the oversight of the use of public resources and the exercise of power. The participation of elected representatives may be both direct and through appointed officials acting under their authority (e.g., Auditor General).
Transparency
Transparency - the jargon used to describe open disclosure of and access to information held by an organisation - is the fundamental principle underlying any effective accountability. Without relevant information, how can accountability be meaningful?

Having established those principles on which best practice must rely, how then can they be put into practice?

These issues have become more rather than less important with the trends and pressures for privatisation. This is because public sector activities are relatively simple to oversee compared with those in which the role of government is more indirect.

The diagram “The Complex Accountability Network – 1” represents the accountability relationships which operate where services or goods are provided by a public service department e.g. the Education Department.

The arrow points in the direction to which the entity is accountable in practice. Thicker lines indicate that accountability is stronger. Broken lines indicate that the strength of accountability is variable according to fuzzy logic i.e., according to the extent to which it is influenced by judgement, culture, negotiation and other factors.

The accountability relationships applying in the case of a state-owned body such as a statutory authority (e.g., a water board) is shown in “The Complex Accountability Network – 2”.

Citizens of a democracy

Head of State

Parliament

Inquiries

Parliamentary Departmental committees

Opposition

Party Organisation

Executive

Auditor General

Public service provider

Customers/ Clients/ etc

The Complex Accountability Network - 1
Citizens of a democracy

Parliament
- Opposition
- Parliamentary Departmental committees
- Party Organisation

Executive
- Head of State
- Administrative law
- Auditor General
- Inquiries

Public sector agency (regulator)
- Customers/Clients/etc
- State-owned provider

The Complex Accountability Network - 2
Privatisation

Privatisation raises special problems of accountability. By “privatisation”, I use the widest of definitions, so that it may range from the outright sale of publicly-owned assets to the contracting-out of activities previously undertaken by the public sector. It can include:

- Contracting out
- Services
- The management of publicly owned services
- Franchising
- Sale of state-owned assets
- Without a tender process
- Through a trade sale tender process, or
- Via a share float

In my home State of Victoria, Australia during the period of the Kennett Government (1992-1999), we have seen some of the most extensive privatisation seen anywhere in the world. Very few policy areas have not been subjected to privatisation in one or other of its forms, with the one major exception of the water industry.

Issues affecting the manner in which privatisation is conducted include:

- Probity, and
- ‘Commercial in Confidence’ issues.

Questions that arise in the accountability aspects of privatisation are:

- Why privatise?
- The effect on
  - accountability,
  - democracy
  - competition

Hodge (1999) has critically reviewed the claims of financial savings from privatisation. He points to the claimed average level of savings and examines and distinguishes between those actually found for the provision of physical services and of human services. Whilst significant savings have been demonstrated for the provision of physical services such as road making or rubbish collection, the results for most human services is at best equivocal. There are no savings, only minor savings or even increased costs.

Hodge has noted major implications of privatisation for the quality of service, and difficulties in building-in incentives for public interest objectives (as compared with profit) e.g., social welfare, equity and quality of service.

This then raises major issues for the accountability for all aspects of privatisation, at every stage. Again, disclosure (transparency) is fundamental. This disclosure must commence with the very reasons for privatising.

- What independent analysis has been made of the advantages and disadvantages of privatising a particular part of the public sector?
  - Are the analysts truly independent?
What are the assumptions on which their analysis and recommendations rest?

Have they assumed a level of savings which is actually unproven, or even discredited?

Who would be the beneficiaries of the particular privatisation?

Have the social and environmental implications been considered?

Which sections of the community may be disadvantaged by privatisation?

What would be the costs of contract supervision?

Might the claimed savings for the public sector actually be at the expense of greater aggregate costs to the national, state or regional economy? (i.e., cost shifting rather than savings)

What might the effect be on the national balance of payments if privatisation leads to foreign control?

What might be the effect on the nation’s democratic capacity to act in that policy area if it falls under the control of foreign owners or policy-makers?

These are all extremely serious questions that can arise in any privatisation. For example, in Victoria’s road making sector, the sale of all plant and equipment to one private sector operator was without a proper process to ensure that it was sold at its true market value. There is reason to suspect that these publicly owned assets were sold for much less than their true market value. However, there was no effective accountability for the use of these public funds. One of the reasons was the claim that such transactions should be treated as “commercial in confidence”. The Commercial in Confidence report by the Victorian Parliamentary Public Accounts and Estimates Committee has totally discredited that claim (Victoria 2000).

In Australia, the Commonwealth Auditor General has reported extremely adversely on the failure of the Howard Government’s IT privatisation program to achieve its performance targets.

Furthermore, if this were an area with only one or very few private operators, the government’s lack of any reserve capacity to act in the policy area could become a huge problem. It could leave the people hostage to incompetent or unscrupulous operators. Governments have found that in some areas it is essential to maintain a reserve capacity, for two reasons. Firstly, it gives the government a capacity to step in should a private operator fail financially or fail to provide goods or services. Secondly, it gives the government an independent source of information on the costs and other aspects of operating in that sector.

Effective accountability will identify this issue.

Once privatisation has occurred, there is then an even greater difficulty in ensuring oversight of the use of public resources. These may be direct payments to contractors, or they may be expenditure on the regulation of private operators. In the latter case, the regulation may not be the much-criticised prescriptive regulation with which we have been familiar, but the more sophisticated “reflexive” regulation (Teubner1983) - regulation of self-regulation.

Recent Californian experience with deregulated electricity supply utilities, in which demand has leapt ahead of supply and prices have sky-rocketed, has demonstrated the
severe difficulties of accountability and the profound risks which can arise with reliance on market mechanisms.

The more complex accountability relationships which exist with privatised services and entities is illustrated by “The Complex Accountability Network – 3”. Each arrow points in the direction to which the entity is accountable in practice. Thicker lines indicate that accountability is stronger. Broken lines indicate that the strength of accountability is variable according to fuzzy logic i.e., according to the extent to which it is influenced by judgement, culture, negotiation and other factors.
The regulation of privatised services and entities is often fundamentally different from the prescriptive regulatory regimes adopted for much of the 20th century. However, neither deregulation nor re-regulation (taken literally) properly describe new regimes which we now see.

The removal of some former prescriptive regulations has been accompanied (or sometimes followed by) the introduction of new forms of regulation designed to more effectively achieve social, environmental and economic objectives expressed through political processes. These new forms of regulation rely not so much on self-regulation as on what Teubner has called "reflexive" regulation - the regulation of self-regulation (Teubner 1983). Teubner's insight was to recognise the ultimate futility of attempting to control ever more aspects of human behaviour by prescriptive regulation. The complexity of such regulation may lead to crippling transaction costs.

The regulation of self-regulation refers to the role of government in ensuring the deregulated industries actually regulate themselves in an acceptable manner. Thus, a deregulated electricity industry must not be permitted to operate as a rapacious oligopoly, in which operators collude to charge outrageous prices in order to maximise profit, or fail to invest in the renovation or expansion of supply capacity.

**Regulation of Self-regulation**

By the regulation of self-regulation we mean sets of rules through which participants are empowered to govern their affairs and interactions. To give an example, instead of regulation dictating that a polluting industry must take certain specific actions to control a particular pollutant, the new reflexive regulation establishes licences through which an industry may undertake to meet a standard in its discharges to the environment. In some areas of regulation, the standards are established not by government but by professional or industry associations.

The new forms of regulation applied to privatised sectors such as electricity including, for example National Competition Policy, through interactive state and national legislation, are intended to create self-organising markets subject to certain rules specified in the design of the regulatory regimes.

These new regulatory regimes require a quite different and more sophisticated approach to accountability. Accountability must now be concerned with the design and performance of the regulation of self-regulation, in addition to the efficiency and effectiveness of the end products of those regimes - the provision of goods and services. Best practice must monitor the operation of self-regulation.

The accountability for public funds paid to contractors providing outsourced services requires sophisticated review of the performance standards in contracts, and the monitoring of actual performance against those standards. It also requires that there are effective sanctions available, including the termination of the contract, should it be found that the contractor has failed to perform.

Underlying this must be a recognition that the objectives of the operators may be quite different to those of the people on whose behalf the goods or services are provided. The
people, and their government, may be concerned with the quality of their relationship with a service (e.g. a hospital), whereas the owners may be more concerned with profitability.

What legal and institutional arrangements can we then put in place to meet these concerns?

**Legislature**

In many parliamentary democracies, the constitutional system gives the Parliament the central role in accountability. At its most basic, this requires the Parliament to authorise the collection of public funds (taxes and charges) and the expenditure of public funds, after due debate and consideration. Best practice must include detailed consideration through a committee process.

The Parliament requires government agencies to formally report annually on their activities and their use of public funds. Details to be included are specified by the Act. These reports to the Parliament are public documents. The very fact that they are required is an incentive to the responsible use of public funds and the exercise of power. However, best practice requires annual reports that provide full and frank disclosure, rather than glossy publications designed for public relations.

The office of Auditor General (or equivalent) is established by Parliament to act on its behalf, with extensive powers to audit the proper, legal use of public funds and the performance of agencies in using the funds to undertake their responsibilities. These powers include unlimited access to information held by agencies, but allows sensitive information to be withheld by the Auditor General from further disclosure. The Auditor General maintains liaison through a Parliamentary Committee (e.g., the Public Accounts and Estimates Committee) and makes formal reports to the Parliament. The reports typically include comprehensive annual reports covering all agencies and special reports covering particular issues.

This office is always uncomfortable for government, if the office-holder is working effectively on behalf of the people. No matter how good a government, a diligent official can always find something that could be improved! A measure of best practice is the extent to which the facts and findings reported by the Auditor General reveal the potential for improved performance by privatised services and entities and their regulatory regimes.

There may appear to be tensions involved between the relationships that the individual politician has as a member of a legislature and as a representative of the people.

In democracies like Australia's, a politician elected from a particular area is firstly responsible for the good government of the entire state or nation that is served. This principle is well recognised in Australian law, but it may introduce a tension between the felt interests of a particular electorate and its Member of Parliament and/ or the government.

Members of Parliament naturally have a certain loyalty to their party (as I did as a Member of the Victorian Parliament), which makes it more difficult for them to comment critically on actions of their party’s government. However, it is possible to foster a culture within a political party and a government that allows and facilitates the rigorous review the policies and actions pursued through government agencies. It requires confidence and leadership, but it can and has been done. New Zealand has been a good example of government party members routinely and successfully recommending significant changes to government actions. Best practice requires it be practiced by all Member of Parliament.
Parliamentary Committees

A comprehensive system of committees adds enormously to the effectiveness with which accountability operates. A system in which there is a committee with responsibility for each area of policy (often called departmental committees – each may cover a number of related government agencies), enables the legislature to develop groups of members and staff with specialist knowledge on the activities of agencies. They can monitor the use of public funds, the exercise of power and how well each agency serves the people.

These committees allow the people to participate through written submissions and to appear before public hearings (by invitation) to canvass issues of concern. The committees will report to the legislature on the use of public funds and other matters. They can have a major influence on revealing inefficiency or misuse of funds and in recommending improvements to policy, legislation and administration.

A more general right to participation can be written into law, as in some of the most recent constitutions, The Constitution of the Kingdom of Thailand, enacted in 1997 (B.E. 2540), which states:

Section 60. A person shall have the right to participate in the decision-making process of State officials in the performance of administrative functions which affect or may affect his or her rights and liberties, as provided by law. (Thailand 1997)

Participation can be valuable in another, indirect manner. The exercise of the rights of citizenship requires an understanding of the system of government and of the matters to be resolved by democratic processes. Formal education is not necessarily sufficient in itself, whereas involvement in civil and democratic processes itself engenders understanding and commitment. That can, in turn, add to effective oversight of the use of public funds and the exercise of power.

Freedom of Information Legislation

Legislation to guarantee and enable the right of people to access to information held on their behalf by government agencies is crucial to the effective accountability for the use of public funds and the exercise of power. It ensures that anyone can obtain information to satisfy themselves about the use of public funds and the exercise of power in any particular instance.

A good example of a constitutional guarantee to information held by government agencies is in The Constitution of the Kingdom of Thailand. It states:

Section 58. A person shall have the right to get access to public information in possession of a State agency, State enterprise or local government organisation, unless the disclosure of such information shall affect the security of the State, public safety or interests of other persons which shall be protected as provided by law.

Section 59. A person shall have the right to receive information, explanation and reason from a State agency, State enterprise or local government organisation before permission is given for the operation of any project or activity which may affect the quality of the environment, health and sanitary conditions, the quality of life or any other material interest concerning him or her or a local community and shall have the right to express his or her opinions on such matters in accordance with the public hearing procedure, as provided by law. (Thailand 1997)
These provisions, like those in an increasing number of jurisdictions, make no exceptions for “commercial in confidence” agreements between government agencies and private organisations. The recent Commercial in Confidence report (Victoria 2000) makes it clear that there are almost no legitimate grounds for withholding any information affecting any arrangements between government agencies and private organisations, particularly when there is prior knowledge that any such information is liable to disclosure. Indeed, it has emerged that it was the former Kennett Government (1992-99) which tried to prevent the release of information even though its contractual partners did not object. There can be no justification for withholding information on purely political grounds.

Information Held by Contractors

Contractors providing services may gather and hold information that is crucial to understanding the manner and effectiveness with which they are using payments from public funds. These contractors may be private sector businesses or non-government-organisations (NGOs). The information gathered and held by contractors must be sufficient for the qualitative aspects of the contracted service to be effectively assessed. This must be made clear in tender and contract documents and in the Government’s administration and supervision of contracts.

Effective oversight requires that every contract with a government agency makes it clear that, as a condition of the contract, all relevant information is to be made freely available. It should be available to the agency and through it to the Auditor General and to others (such as the Parliament and its committees) who may be undertaking the oversight of the use of the public funds involved and the exercise of powers and administrative discretion. The public should similarly have access to all information that is relevant under the terms of contracts and legislation affecting any privatised service or entity. This need not include other information held by the contractor which is unrelated to the discharge of its obligations to the government.

In addition, an overriding provision in the Freedom of Information Act that such information is to be available in all cases (with appropriate exemptions for any matters subject to criminal investigation or prosecution) would further ensure that there were no unnecessary restrictions.

Resources

There are, of course, resource implications for some of these matters, which cannot be ignored.

However, the most important legal and institutional arrangements do not require significant expenditure. Creating a requirement to disclose information and a legal right to access information involves little, if any, cost beyond the existing operations of government. It costs no more for Members of Parliament to act diligently.

Furthermore, there may be very real savings in efficiency through ensuring that accountability is effective.

Publication

Conventional publication of reports etc is costly, and consumes large quantities of paper. Internet publication now offers new options which can be of lower cost (but not cost-free). It can vastly expand access to information and thereby greatly enhance accountability.

Media

Although generally not a formal institution, the media may actually be one of the most important contributors to accountability. A free media can report on the use of public funds
and the exercise of power. Its sources may include the activities of others such as Members of Parliament and its committees, reports to the Parliament, or its own reporters’ investigations. Media reports are very often the people’s quickest and easiest source of information and are therefore absolutely central to meeting the objectives of good governance.

Like the Auditor General, the media often makes life uncomfortable for a government: editors (and perhaps readers) often prefer critical, sensationalist reports to “good news”. However, we must ask: is the potential for the inefficient or improper use of public funds and the exercise of power to be prominently reported an effective constraint and a contribution to accountability?

Here again, the culture that prevails is crucial. My research has found instances where the media failed to investigate and report information critical of the misuse of public funds and powers by government and thus helped allow that to occur (e.g., WA Inc). In other instances, the media played an important public role in exposing corrupt conduct (e.g., Queensland under the former Bjelke-Petersen Government).

Culture
This paper conclude with the theme with which it began. The culture in a society and in government is also crucial to effective accountability. A culture that suppresses accountability can cripple legal and institutional arrangements. A culture that favours and supports accountability can overcome legal and institutional weaknesses.

No culture is static. If the culture in a society or a particular government today restricts the accountability for the use of public resources and the exercise of power, that is not immutable, as the former Kennett Government found. It was defeated at the 1999 elections partly as a result of public reaction to its restrictions on accountability. The culture must not be used as a justification for restrictions that relate more closely to maintaining personal (or party) power than reflecting the interests felt by the people. Culture can and does change if the people want it to change. We have seen it change in many societies, including Victoria.

Best practices are integrated into a culture supportive of effective accountability.

Conclusion
The effective oversight of the use of public resources and the exercise of power is a key element of good governance, and must embrace the essential features of good governance i.e., transparency, accountability, justice, fairness, democracy, participation and responsiveness.

Best practice requirements to achieve this include:

- A Parliament with
  - Effective ultimate control over the collection and expenditure of public funds by the Executive Government
  - Members of Parliament able to and committed to putting the interests of their state or nation first, ahead of personal or party concerns
  - Adequate opportunities, such as question times, for scrutiny of the Executive, with full and frank responses by Ministers
  - Adequate opportunities for debate of matters of public importance
  - A powerful, incorruptible and diligent Auditor General
  - Full and frank reporting by agencies
  - Parliamentary departmental committees which monitor and review the performance of agencies
- Opportunities for the people to participate
- Open and freely accessible disclosure of information held by agencies, guaranteed by law
- Open disclosure of privatisation proposals and arrangements
- Contractual arrangements between agencies and contractors which require the collection and dissemination of information required to assess performance quantitatively and qualitatively
- Open disclosure of contractual arrangements between agencies and contractors (private businesses or NGOs)
- Open disclosure of relevant information held by contractors
- A diligent free media
- A culture within government and society conducive to effective accountability.

When incorporating a culture of accountability, these various legal and institutional arrangements ensure substantial accountability.
References


World Conference on Governance (1999) "1999 Manila Declaration on Governance" Commonwealth Innovations Vol. 5 No. 3 1999: pp. 8, 9