SUBMISSION BY THE ACCOUNTABILITY ROUND TABLE TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE INQUIRY INTO THE PERFORMANCE AND INTEGRITY OF AUSTRALIA'S ADMINISTRATIVE REVIEW SYSTEM

Summary of Recommendations

Appointments

Appointments to all non-judicial administrative review bodies should be overseen by an independent non-partisan body responsible for key integrity agency appointments.

Funding

Funding should be guaranteed and legislated for all integrity and accountability institutions for at least 7 years with an appropriate indexation factor (AWE being more relevant than CPI)

An Administrative Review Council

The Administrative Review Council should be reinstated to advise on the overall shape and health of the administrative review system.

Introduction

The Senate has referred the following matter to the Senate Legal and Constitutional Affairs References Committee for inquiry and report by 31 March 2021:

The performance and integrity of Australia's administrative review system, with particular reference to:

(a) the Administrative Appeals Tribunal, including the selection process for members;

(b) the importance of transparency and parliamentary accountability in the context of Australia's administrative review system;

(c) whether the Administrative Review Council, which was discontinued in 2015, ought to be re-established; and

(d) any related matter.

The Accountability Round Table's submission focusses on the importance of a well-performing administrative review system to the overall integrity of Australia's national system of government.

The Accountability Round Table is a non-partisan group of citizens with diverse backgrounds (journalists, lawyers, senior academics, retired judges and public servants and former politicians from both sides and the middle) and extensive experience in parliament, government, and the courts. ART is dedicated to improving standards of accountability, transparency, ethical behaviour, and democratic practice in Commonwealth and State parliaments and governments across Australia.

It is concerned that, in recent years, honesty, integrity and trust in government has been eroded while maladministration and misconduct in public office have noticeably increased. It is committed to making constructive recommendations for the restoration of integrity in the practices and processes of government and in the conduct of parliamentary and public officials. It does this through op-eds, submissions, position papers] and parliamentary integrity awards.

The Accountability Round Table is animated by the idea that government is a trust. All government officials are entrusted with public power and must use that power for the benefit

of the public whose power those officials exercise – and must be held accountable for the exercise of that power

ART's fundamental aim is to ensure integrity in the practices and processes of government and in the conduct of parliamentary and public officials.

Relevant principles: the rule of Law, Public Trust, Accountability, and Integrity

The Rule of Law requires that:

1. laws should be relatively stable, prospective, open, clear, and generally applicable to all
2. law making should be guided by open, stable, clear and general rules;
3. judges must be independent and there should be ready access to their courts;
4. discretion must not be abused and must be subject to judicial review; and
5. the law must be based on natural justice and procedural fairness.

All are relevant to an effective administrative law system – especially the last three. Lord Bingham emphasizes one of the corollaries:

"*Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers. This sub-rule reflects the well-established and familiar grounds of judicial review.*"

This aligns with **public trust**:

The powers exercised by officials belong to us and not them. They are entrusted with them by us, to be exercised for us.

It links directly to **accountability**:

Officials are accountable to the extent that they are required to demonstrate that they have used their entrusted powers in officially approved ways and for the purposes they were empowered.

It also links to **corruption and integrity:**

A standard definition of corruption is the abuse of entrusted power for personal or party-political benefit. Integrity is directly related: the use of entrusted power for publicly justified and officially endorsed purposes.

Accountability through Parliament alone?

The Parliament is and must be the core accountability institution and at the heart of the integrity system. Its members are elected by citizens and entrusted with powers to make laws and to choose those among their number who are to be entrusted with executive powers – holding the latter to account and themselves being accountable at election time. While we emphasize the key roles played by independent agencies such as review bodies in promoting integrity and accountability. this is not to diminish the role of Parliament but to provide vital supports and necessary institutional additions to Parliament's role.

There is a beguilingly simple democratic circle in which the voters choose their Members of Parliament (MPs), the MPs choose their premier, the premier chooses the ministers, the ministers choose senior public servants and the policies they implement for the benefit of the voters and the voters decide whether to re-elect the MPs. Accountability goes in the opposite direction of the circle – civil servants are accountable to ministers, who are accountable to premiers, who are accountable to their MPs who are accountable to the voters.

In this circular model, it can be argued that anything that gets in the way of the virtuous democratic circle is undemocratic and to be resisted. The trouble however is that every single element along the circle can be, and often has been, corrupted. Policies and politicians can

be bought, governments can use government resources to promote re-election and voter suppression practised.

It should be noted that, in these systems, accountability is not necessarily vertical or hierarchical as in the simple model. Integrity institutions will generally be expected to be mutually supportive. They may also be mutually or horizontally accountable e.g. an Integrity Commission's actions should be subject to judicial review but judges and merits reviewers can be investigated by an Integrity Commission.

Restoring Administrative Law

The administrative Law reforms in the late 1970s included:

1. A requirement that citizens could demand statements of reasons for actions that adversely affected them.
2. Freedom of information legislation to underpin transparency of decision-making and reveal documents that might throw doubt on the reasons given.
3. Strengthening and simplification of judicial review with an extension of standing, simplification of procedure, standardisation of remedies and a reversal of the then 30-year attempt by governments and legislatures to reduce the opportunity for judicial review. Judicial review has long allowed challenges to governmental decisions based on breaches of procedural fairness and faulty reasoning (such as taking into account irrelevant considerations or improper purposes, failing to take into account relevant considerations and certain kinds of 'unreasonableness'). This was made much easier by the required disclosure of reasons and access to documents under FOI.
4. Separate 'merits review' that allowed independent members of the Administrative Appeals Tribunal (AAT) (or other specialist tribunals) to put themselves in the position of the decision maker and make a new decision.
5. A Commonwealth Ombudsman to review instances and systemic problems of maladministration (the misuse of entrusted power).
6. The creation of an Administrative Review Council to keep a watching brief on the operation of the new system and provide independent advice on adjustments and improvement.

The reforms constituted one of the best governance and accountability reforms to that time and since that were not the consequence of a prior scandal.

The then new Federal Court provided a lot more judges who could perform that judicial review. Judicial review strengthened the Rule of Law by ensuring that officials only used the powers entrusted to them for the purposes they were entrusted. If they failed to take into account relevant considerations, took notice of irrelevant considerations, or pursued improper purposes, the court could find that their actions were void.

Unfortunately, much of this has gone backwards with the Federal Court being stripped of many of its review powers so that in many areas, the only recourse is to the High Court, the removal of several specialist Tribunals, an increasing load on an under-resourced and arguably under-skilled AAT, and the abolition of the Administrative Review Council.

But restoration of previous mechanisms, resources and capabilities is not enough. Given the threat of climate change, judicial review of key ministerial decisions that affect greenhouse emissions should be extended with international climate agreements being recognized as particularly "relevant considerations". Given the concern about abuse of power through grants programs for largely party-political purposes, ministerial decisions should be subject to judicial review under two Acts:

(a) section 71 of the Public Governance, Performance and Accountability Act 2013 which bars a Minister from approving proposed expenditures unless the Minister is satisfied, after making reasonable inquiries, that the expenditure would be a proper use; and
(b) more comprehensively under the Administrative Decisions (Judicial Review) Act where irrelevant considerations and improper purposes can lead to a voiding of the minister's decision.

The relevance of international law

Australia has generally been a good international citizen, signing up to most of the major international treaties and conventions negotiated since the Treaty of Versailles and committing itself to the International Rules Based order and the Rule of Law in international affairs. Treaties signed and ratified by the executive government do not become a part of domestic law until legislated by the parliament. However, the commitments that Australia makes through the executive should not stand for nothing in the absence of such legislation. When the executive government has made a commitment by signing and ratifying a treaty officials of that government should take that commitment seriously. It should be a highly relevant consideration for the exercise of entrusted power and both elected and appointed officials should be subject to judicial review for a failure to do so. Indeed, in *Teoh's case*, the High Court held that signing a treaty could give rise to a legitimate expectation that the treaty would be honoured. Governments have sought to pare back the effect of Teoh. Instead we suggest it be embraced. Elected and appointed officials of the Australian executive government should assume that all Australia's treaty commitments have been made in good faith and act accordingly.

The Administrative Appeals Tribunal

Given that the Tribunal may overrule decisions taken within government and substitute its own, it is critical that it should operate independently, free from improper political influence.

The independence of the AAT may be regarded as having three interrelated components. The first is **institutional** independence. Institutional independence is about ensuring proper appointments to the Tribunal. It is concerned with ensuring that the executive power to appoint and remunerate members does not influence the outcome of tribunal decisions.

Next, there is **administrative** independence, which involves ensuring that an administrative tribunal has a proper measure of control over its budget, finance, staffing and accommodation, to underpin independent and effective decision-making.

Then there is **adjudicative** independence. This involves making sure that tribunal members have the capacity to make impartial decisions free from external influence or improper interference from any source, including from executive government.

In recent years there has been many appointments to the AAT of people who have been criticised for their previous political affiliations and their apparent lack of relevant skills. In response to one round of appointments in 2018, the then President of the Law Council Arthur Moses SC remarked that:

The independence and integrity of the AAT depends upon an apolitical, open and merit-based appointment system. The Federal Government's announcement of thirty-four new appointments to the AAT made without community consultation is concerning…In the context of the upcoming federal election, this may give rise to a reasonable apprehension that

decisions are affected by political considerations and therefore compromises the reputation of the tribunal.

There are problems too, with administrative independence. The AAT recently had a backlog of some 40,000 cases. This situation is critical. The existing tribunal membership clearly cannot cope. The backlog increases every year. The government's year upon year decreases in the AAT's funding has in large part caused the problem.

There are also problems with adjudicative independence. It used to be the case that tribunal members were chosen on merit. Positions were advertised, candidates were short-listed, an independent panel was chosen to interview all applicants, and the panel made final recommendations to the Minister as to who should be chosen. In almost all cases the Minister accepted the recommendations. This independent selection process has been dispensed with. Under-qualified applicants are selected, personal connections appear to predominate in selection, the tribunal membership is politicised, and the quality of decision-making declines correspondingly.

Further, in recent years, Tribunal decisions have been subject to relentless political attack arguably with the intention of pressuring the membership to conform to governmental practices. Tribunal members with independence of mind are not reappointed.

The former Chief Justice of the High Court, Sir Gerard Brennan has written that:

A tribunal of independence and competence…provides a manifest benefit to the community by giving an assurance of integrity and legality in administrative justice…when the chips are down, it is not the Parliament that secures our freedom and our rights, it is certainly not the executive government that does so; it is the law in the hands of a fearless and independent judiciary and, nowadays, in the hands also of a peak administrative tribunal.

We trade away independence and impartiality at our peril.

Freedom of Information and the Right to Know

There has been an important conceptual shift from 'Freedom of Information' (FOI) to the more assertive 'Right to Information' (RTI) or "Right to Know" (RTK). However, we would add a strong property argument to the rights argument.

1. Information produced by the government for the purposes of making and recording decisions is the property of the people.
2. One needs a good argument to deny access by the people to their property.

In addition:

3. There are some good arguments to deny access (especially to the confidential information about other individuals). But it is important that they are applicable and applied by an independent authority.
4. Some arguments are over-used: commercial in confidence, cabinet confidentiality, professional privilege and national security.
5. There are some very bad arguments for withholding information such as preventing public discovery that a minister or senior public servant was wrong, foolish, or unethical. The worst case of all is where information is withheld because it would prove that a minister misled parliament, electorate (deliberately or otherwise), or failed to correct a statement.

6. To use a power to withhold information for that purpose seems to be a very clear abuse of power for personal or party-political ends and seems to fall within Transparency International's definition of corruption.
7. ART suggests that we move towards a system of publishing government gathered information on public websites as a rule and withholding as an exception (the reverse of the traditional approach).

In all cases Integrity agencies should have access to any information they require to exercise their powers (e.g. the Ombudsman investigating potential maladministration, a Commonwealth Integrity Commission investigating potential, courts for judicial review, the AAT for merits review and parliamentary committees for oversight).

Recommendations

Appointments

Appointments to all non-judicial administrative review bodies should be overseen by an independent non-partisan body responsible for key integrity agency appointments. We envisage that such a body would also supervise key appointments to other integrity-related agencies such as a Commonwealth Integrity Commission, the Auditor-General, the Ombudsman, the Commonwealth DPP, FOI commissioner, and the Privacy Commissioner. Nominations for judicial office should also be made through a non-partisan process.

Funding

Integrity institutions need funding and funding should be guaranteed and legislated for all integrity and accountability institutions for at least 7 years with an appropriate indexation factor. Reducing funding of an independent body after it has challenged government decisions or made adverse findings or just started asking awkward questions should be totally unacceptable. Not only is there a clear conflict of interest, it is corrupt according to standard definitions of corruption (an abuse of entrusted power for personal or party political ends). The fact that this and other actions that fall within that definition are not illegal is not an exoneration of politicians who practise it, is but a further indictment that they have neither criminalised it nor made it subject to independent review.

The executive should not control the quantum or timing of access to the funding of integrity agencies, including those in the administrative review system. There should be transparency around how the funding level is set and explicit criteria on how the adequacy of funding is assessed. The role of recommending the funding level to the Parliament should be assigned to the parliamentary committee with the closest involvement in reviewing the work of the integrity agency, or it could be assigned to a single committee or an independent commission.

An Administrative Review Council – and beyond

The Administrative Review Council was an attempt to fill a very important role. It provided independent advice on the performance of elements of the reformed administrative law system. Even more importantly, in doing so, it could consider the interaction between its elements and the extent to which they were mutually supportive. That function is essential. It could form the core of a broader 'Governance Reform Commission' with a wider remit – oversight of all the institutions of a national integrity system, as such a system is set up with the creation of an effective National Integrity Commission. But the reforms recommended to the administrative law system should not be delayed until that is achieved.

Conclusion

ART considers the performance and integrity of Australia's administrative review system is under threat, and it is due for reform. We have made several suggestions for that reform in the context of wider integrity issues. We are happy to provide further including oral evidence.