



## ACCOUNTABILITY ROUND TABLE

### THE RULE OF LAW, ACCOUNTABILITY AND PUBLIC TRUST POSITION PAPER SUMMARY

#### WHAT IS THE PROBLEM?

**The Rule of Law** obliges public officials to exercise only those powers entrusted to them. To be accountable they must demonstrate that they use their powers only for the entrusted purposes. Community concern is growing because of increasing evidence of gaps in accountability and threats to the Rule of Law that weakens the institutions and culture underpinning these obligations. Public trust in the democratic system is thereby seriously eroded.

In response, the **Accountability Round Table** has prepared a position paper on the nature of, and relationship between, the Rule of Law, accountability and public trust. We emphasise serious shortfalls in all three areas and how they might be addressed to produce better governance for all citizens.

#### REFORM IS NOT ONLY ABSOLUTELY NECESSARY BUT ENTIRELY POSSIBLE

Unfortunately, accountability and integrity mechanisms tend to degrade for a number of reasons. In particular, politicians are tempted to compromise the integrity of the institutions they seek to lead and to which they should be accountable. However, if the electorate is sufficiently aware and sufficiently angry that (re)election is dependent on real action, reform can be rapid and comprehensive. Post Fitzgerald Queensland went from political pariah to global governance exemplar in five years.

#### THE KEY CONCEPTS UNPACKED

##### The Rule of Law

There is general agreement about five key elements of the Rule of Law:

1. **laws should be relatively stable, prospective, open, clear and 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**
5. **natural justice and procedural fairness must be followed.**

No-one is above the law and the law applies to all – including members of parliament, ministers, public servants and others exercising state-sanctioned power. They must exercise only those powers granted to them and only for the purposes for which they were granted. In a democracy, the power to elect governments belongs to the citizens who in turn entrust public officials to use powers granted for the benefit of citizens rather than for the benefit of themselves. This is the ‘Public Trust Principle’, and it applies crucially wherever discretionary powers are conferred.

However, there are key differences in the application of the Rule of Law to citizens and to officials exercising power. For citizens, whatever is not prohibited is permitted. For officials, whatever is not permitted is prohibited. Furthermore, the Rule of Law imposes duties on officials towards citizens in ways that citizens do not have duties to officials.

While our discussion is mostly about the ‘domestic’ Rule of Law, Australia also has increasingly important obligations to the International Rule of Law.

## **Accountability**

In a parliamentary democracy Parliament must be the centre of integrity and accountability. There is a beguilingly simple imagined democratic circle in which the voters choose their Members of parliament (MPs), the majority MPs choose their premier, the premier chooses the ministers, the ministers choose senior public servants and decide 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 – senior public servants are accountable to ministers, who are accountable to premiers, who are accountable to their MPs, who are accountable to the voters.

In this simplistic, over-neat model, anything that gets in the way of the virtuous democratic circle is undemocratic. The problem is that without protections, every element around the circle can be, and often is, corrupted. Policies and politicians can be bought, governments can use government resources and private donations to promote re-election and voter weighting and suppression can be practised.

In response to findings of actual corruption, various jurisdictions have developed new or reformed institutions and processes to form deeper and inter-connected integrity and accountability systems. In these systems, accountability is not necessarily hierarchical as in the simple model.

Notwithstanding the former Attorney-General, no politician has a right to their job because there is no proven criminal conduct. Ministers can lose office for many reasons short of misconduct – including should they fail to retain confidence of their leader. The Rule of Law is not mocked thereby.

## **PUBLIC TRUST AND INTEGRITY**

Powers are entrusted to officials; they do not belong to them. They must be exercised in prescribed ways, for permitted purposes and only to further the interests of citizens. A widespread definition of corruption is ‘the abuse of entrusted power for personal [including party political] gain’. Integrity has been succinctly defined as the obverse side of the corruption coin: ‘the use of entrusted power for publicly justified and officially endorsed purposes.’

Trust can link members of the public with a sense of collective identity, values and norms. The fundamental role trust plays in the wellbeing of the community is highlighted by community acceptance or otherwise of the stringent measures introduced in response to COVID-19.

To be meaningful, the trust needs to be based on reliable information and analyses. Trust can be misplaced if it is based on misleading or false information and may be greatly weakened where it later becomes known that this were the case.

## **ACCOUNTABILITY MECHANISMS – PROBLEMS AND OPPORTUNITIES FOR REFORM**

The [full Position Paper](#) comments on the strength and weaknesses of individual accountability agencies and processes and recommends specific reforms:

### **Parliament**

Reform is needed to deliver stronger and more effective:

- Parliamentary control of domestic legislation and international treaties
- Parliamentary influence over treaties
- Parliamentary control of money
- Accountability of the executive to the parliament, including imposing consequences for lying
- Accountability of ministerial staff to the parliament
- Parliamentary power over decisions to go to war
- Parliamentary assessment of corruption risks.

### **Institutions that assist parliament**

Reform of powers and accountability to Parliament of:

- Auditors-General
- Parliamentary commissioners/ombudsmen
- Integrity and Anti-Corruption commissions, including by the creation of a wide-ranging Commonwealth Integrity Commission
- Royal Commissions.

## **Judicial Review and Administrative Law**

The need to reverse the gradual erosion of the reforms of the 1970s is pressing.

## **Freedom of Information and the Right to Know**

Government-held information is produced and collected with entrusted power and resources. There needs to be a compelling reason to withhold it from the public. There are some good reasons, but they do not include preventing public discovery that a minister or senior public servant was wrong, foolish, or unethical. Withholding information that would prove a minister misled parliament or the electorate, or failed to correct a false statement is a clear and serious abuse of power and to do so for personal or party-political gain is corrupt.

**Criminal Justice and key integrity institutions should be independent of political control** through appointments, staffing and funding. This is not always the case.

**Codes of Conduct** should be strengthened, and supported by ethics counsellors.

There should be more effective controls over the **scope for governments to maximise electoral advantage** through election timing, pork barrelling, advertising and campaign donations and expenditure.

**The Media**, like parliaments, are key to accountability. They can investigate, question, broadcast and expose lies and corruption. However, the power of the media is now highly concentrated in the hands of a few increasingly partisan players who can, and do, influence policy and the outcome of elections, sometimes for corrupt reasons, and some reforms are suggested in the Position Paper.

## **WHAT SHOULD WE DO?**

### **Deploy the insights of many disciplines**

There is no shortage of solutions, but too many are based on the perspective of one discipline – each of which has a different view of the nature of institutions, their problems and to the solution. When **lawyers** look at institutions they see formal rules and problems arising from poorly drafted rules: their answer lies in more and better rules. **Ethicists** look to informal norms and values. If there is a problem, it is that those values have not been clearly articulated, applied to those at the coalface and their answer lies in properly doing so. **Economists** see institutions in terms of incentives and disincentives. Problems arise from perverse incentives and their answers lie in aligning incentives with the behaviour required. **Political scientists** see institutions in terms of power and institutional problems arising from those who exercise it and or how they exercise it.

No single discipline can solve institutional problems alone, but in combination they go a long way towards such solutions. The suggestions we make draw on all of them. This should provide the basis for considering the ethical standards officials should follow and the legal regulation and economic incentives to make it likely that those standards will be followed. The overall aim should be to make it:

- clearly articulate the right thing to do (through clear norms and opportunities for ethical advice)
- easy to do the right thing (through the formal processes including human and electronic elements)
- hard to do the wrong thing (as above) and
- easy to find out those who do wrong (through record keeping and investigatory bodies).

### **Having a full Integrity system and an enduring Governance Reform Commission**

Rule of Law problems cannot be solved by a single institution. Particularly, a strong integrity commission is needed. However, reform of other complementary institutions is required also – as set out in the full Position Paper. We need action public agencies (courts, parliament, police, prosecutors), watchdog agencies (ombudsman, auditor-general), NGOs, laws, norms and incentives mechanisms. This combination is primarily directed at promoting the positive goal of good governance rather than the negative goal of limiting corruption. The reforms suggested will go a long way to addressing the inadequacies in Australia's national integrity system.

In the medium term we recommend establishing an enduring Governance Reform Commission to recommend integrity system reforms to federal Parliament and promote the need for new and reformed institutions to understand each other's roles and the ways they could be mutually supportive.

### **Culture and Behaviour**

Some see institutional nature, problems and solutions in terms of culture. But 'culture' is a particularly ambiguous term can appear to be a 'black box' that sits between attempts to reform an institution and improvements in institutional outcomes. If the attempted reforms do not produce the desired outcomes, 'culture' can be an excuse that includes all that is resistant to change, a prediction that change will take a long time and an explanation of a failure to change after that 'long time' has expired. In such cases putting a box around various elements of an organisation and calling them 'culture' may amount to a mere distraction.

It is very hard to change culture directly. A more effective way to achieve reform is to change behaviour. The way to change behaviour is through changes to ethical standard setting, legal regulation, economic incentives and institutional design. This brings us back to the concrete steps included in this Paper. These concrete steps can be introduced quickly and can be effective.

### **Ethical Leadership**

When institutions falter and fail us, when cultures turn toxic, we naturally blame leaders and demand new ones. But changing leaders will not of itself fix institutional problems. Ethical leaders are needed at all levels – as individuals and institutional reformers. Individual Ethics involves individuals asking hard questions about their own values: giving honest and public answers and living by them. Institutional ethics involves asking hard questions about the values the institution stands for, giving honest and public answers and living by them. Living by those values involves personal qualities such as determination, sensitivity, courage, and strategic thought. For an institution it needs a combination of ethical standard setting, 'political' structures, economic incentives, and good institutional design. The ethical leader should be an exemplar of individual ethics and a leader in the process of identifying and embedding values in an institution.

## **CONCLUSION**

The **Accountability Round Table** sees it as essential that there is a broadly-based response to reverse the decline in the public's trust and engagement in our democracy. The response must draw on the insights of many disciplines, enhance our integrity system and institutions, and embrace strong culture and leadership. Sustained change based on this approach will build on a shared understanding on the importance of the Rule of Law, transparency, and accountability, and thereby improve the quality of government decisions and the wellbeing of all Australians.