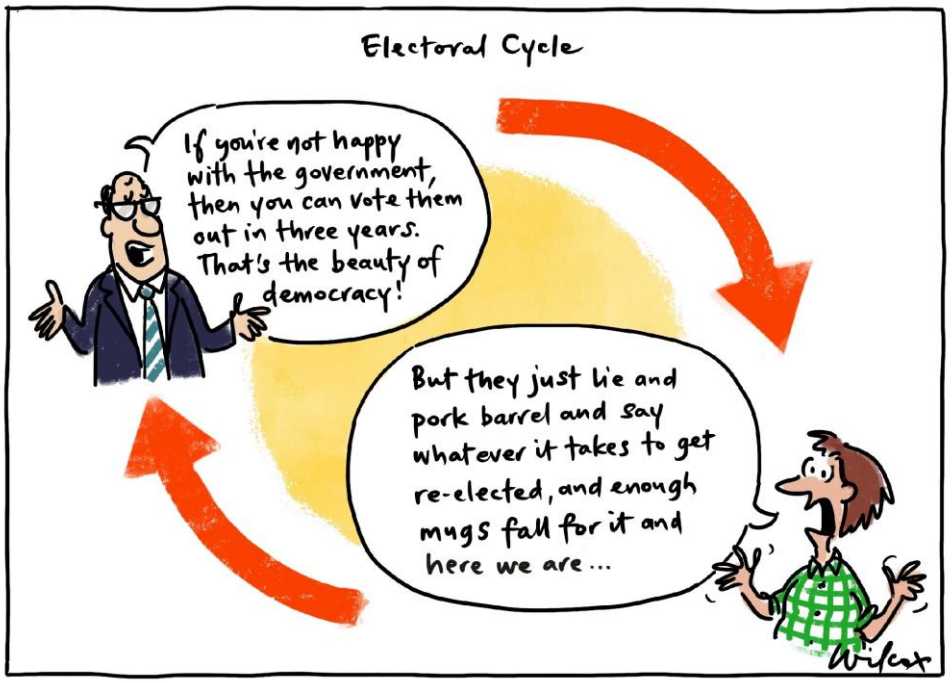
ACCOUNTABILITY ROUND TABLE

INTEGRITY NOW!

21 INTEGRITY REFORMS TO RESTORE THE RULE OF LAW, ACCOUNTABILITY AND PUBLIC TRUST

ART's REFORM PROPOSALS

DECEMBER 2021



** Cartoon used with the kind permission of Cathy Wilcox 10 Nov 2021.*

PREAMBLE

This Policy Paper is a dynamic document that aims to develop and enhance our understanding and practice of

- **The Rule of Law,**
- **Accountability and**
- **The Public Trust**

Including how they are shaped and reshaped by the multifaceted, social and physical systems of which we are all a part.

The Accountability Round Table (ART) is based in Australia and its members are committed to liberal, parliamentary democracy.

USING THIS TEXT

We invite comments and contributions from ART members and others who share our objective:

> *"The Accountability Round Table is dedicated to improving standards of accountability, transparency, ethical behaviour and democratic practice in Commonwealth and State Parliaments and Governments across Australia."*

The text of the document is intended to be "dynamic" because it will be revised and updated from time to time as members of ART and others contribute to its development.

Send comments and reflections expanding on the themes in this document and any logical additions to;

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RECOMMENDATIONS

Recommendations to protect and enhance the Rule of Law, Accountability and the Public Trust in Australia

Overall	ART recommends a set proposals involving strengthening of, and some judicious additions to, a range of independent integrity and accountability institutions. This will include a 'beyond best practice' Commonwealth Integrity Commission (CIC). We recognize that Parliament must be at the heart of any accountability or integrity system – supporting, and being supported by, the other integrity institutions. Parliament has an indispensable role in maintaining the Rule of Law.
1.	**Parliamentary Oversight and Scrutiny of Delegated Legislation:** All exemptions from disallowance and sun-setting of delegated legislation are to be in primary legislation; existing limitations on disallowance to be justified by Attorney-General and approved by Senate or removed from legislation. The Senate itself should not allow any exemptions from disallowance except in exceptional circumstances.
2.	**Parliamentary Oversight and Scrutiny of Treaties:** If a treaty proposed by the government is acceptable to the Treaties Committee, it should be ratified and enacted into domestic law. If it is unacceptable to the Treaties Committee, it should not be ratified. Australia should restore its acceptance of the compulsory jurisdiction of the International Court of Justice to its pre 2002 levels.
3.	**Parliamentary Oversight and Control of Appropriations:** Parliament should exercise its powers over money bills during consideration of the budget process. It should demand sufficient detail to understand the public benefit that justifies entrusting those funds to the relevant minister and require the government to propose a clarifying amendment or alternatively consider an amendment deleting the undisclosed item. Where the use of funds is relatively novel, separate legislation should be required.
4.	**Going to War:** Before entering a 'war of choice' truly independent legal and military advice is sought by, and presented to, a parliamentary committee made up of the cabinet security sub-committee and their shadows followed by a vote of both houses. Australia should ratify the Rome Statute amendments that allow prosecutions for the crime of aggression.
5.	**Question Time:** should be made more effective.
6.	**Parliamentary Committee Resources:** Committees should be funded to employ a greater staff to help them in their role. Committees should never be dominated by either major party and the UK practice of ear-marking some important committees chaired by Opposition nominees should be adopted.
7.	**Ministerial Staff Accountability:** The ministerial code (the 'Statement on Ministerial Standards') should proscribe any instructions preventing the appearance of staffers and public servants from appearing before committees and include a positive duty to provide all requested information to committees. Exceptional, sensitive security information could be provided to a committee made up of shadow ministers of those ministers who sit on the security sub-

	committee of cabinet. CIC legislation should not place any limits on the power of the CIC Commission to require the appearance of staffers and public servants.
8.	**Appointment of Commissioners and heads of integrity agencies:** Each Independent Officer of Parliament (Auditor General, Ombudsman, Information Commissioner, Commonwealth Integrity Commissioner, Human Rights Commissioner, Ethics Counsellor, Ethics Commissioner etc.) should be appointed by a legislated cross-party process that involves prior approval by the majority of a nominated parliamentary committee including at least one vote from a government and an opposition member.
9.	**Commonwealth Integrity Commission:** A 'beyond best practice' commission should be created as a major, essential feature of an effective integrity system and good governance. It must have the powers of a standing royal commission, subject to 'watch the watchdog' similar to those adopted in Queensland. All public officers (MPs, public servants, contractors to government, etc) are liable to CIC investigation of alleged unethical or illegal actions. These include the power to conduct public hearings into either specific allegations or general corruption issues, if it determines that that is in the public interest. It would be empowered to make findings of fact and recommendations in a public report. Matters involving potential criminal prosecutions could be referred to law enforcement authorities.
10.	**Assessment of Integrity Risks:** There should be parliamentary procedure for assessment of the risk that propose legislated powers may be abused and recommend the best means for avoiding or mitigating them (with inputs from the CIC).
11.	**Judicial Review of Administrative Actions:** The trend to strip the Federal Court of many review powers must be reversed with a return of full judicial review functions and all limits re-examined and justified before scrutiny of bills committees.
12.	**International Law and judicial review:** Legislation should clarify that treaties Australia has signed and international law in general are highly relevant considerations for the exercise of entrusted power and both elected and appointed officials should be subject to judicial review for a failure to do so.
13.	**Right to Know:** Information produced by the government for the purposes of making and recording decisions is the property of the people. One needs a good argument to deny access by the people to their property. There are some good arguments for such denial but they are overused and should be subject to veto by the Information Commissioner. Withholding information to prevent public discovery that a minister or senior public servant was wrong, foolish, unethical or, especially, lying is a serious abuse of power and therefore corrupt.
14.	**A Judicial Commission:** should be created to make recommendations and appointment by similar approach to heads of integrity agencies. A similar approach for appointment of Royal Commissioners and DPPs should be created.
15.	**Funding of Integrity Agencies**: The role of recommending the funding level to the Parliament should be assigned to a relevant parliamentary committee or an independent commission.
16.	**Codes of Conduct:** The code (or network of codes) needs to be more comprehensive in content (most notably workplace bullying and harassment (sexual or otherwise) and reach (covering all MPs, staffers and senior officials with any necessary modifications to reflect their roles). Breaches should be investigated by an "Ethics Commissioner" who should be chosen by the bi-

	partisan process for other key integrity agencies and their officials. The code should be drafted by a bi-partisan senate committee and be voted on by both houses of parliament. To help ministers, MPs and senior civil servants avoid breaches, an Ethics Counsellor should also be appointed who can offer ethics training and ongoing advice.
17.	**Truth in political advertising legislation:** It is an offence for to corporations in competitive markets to engage in misleading and deceptive conduct. ART argues that politicians, parties and supporters should have the same duty in the 'market of ideas'. More generally there needs to be negative consequences for lying and misleading.
18.	**Accountability of MPs and their parties via elections:** Public funds, resources and powers should not used to create advantages for candidates or parties, whether manipulating electoral boundaries, election timing, government advertising, pork-barrelling or secret agreements between coalition parties.
19.	**Money and Politics:** Cash and in kind Political donations be regulated with: disclosure in real time; limits on any single donor, retention of public funding for elections, anti-avoidance mechanisms, bans on some donors such as foreign governments and corporations (as in US) and industries that have too much to gain from governmental decisions.
20.	**The Media as an Accountability Mechanism:** To ensure that the media play their roles in holding governments to account, professional journalism should be supported and concentration of media ownership should be reduced by diverse ownership, 'Angel investors' and charities which do not have an agenda but want to support quality news, Trust ownership (e.g. The Guardian); supporting the ABC, financially and otherwise, as the quality standards-setter in Australian journalism; adoption and enforcement of ABC style standards for all news media. Professionalisation of journalists and editors with editorial charters to ensure their independence from the views of owners is essential.
21.	**Governance Reform Commission:** An enduring national Governance Reform Commission (following the model of the Queensland 'Electoral and Administrative Reform Commission') would review all aspects of governance and make recommendations to Parliament (which would be very hard to ignore) and develop an expertise in such reforms and a strong understanding of the need for new and reformed institutions to understand each other's roles and the ways they could be mutually supportive.

UNPACKING THE RULE OF LAW, ACCOUNTABILITY AND THE PUBLIC TRUST

WHAT IS THE PROBLEM?

The Rule of Law involves the requirements that officials must exercise only those powers that have been entrusted to them. To be accountable they are required to demonstrate that they have used their entrusted power in approved ways only for the purposes for which they were empowered. Over several years there has been increasing community concern that the institutions and culture that have underpinned these requirements and obligations have weakened and been subverted. As a result, the public's trust in our democracy and institutions has been seriously eroded. The Australia Talks National Survey conducted by Vox Pop Labs[1] provides grim reading in counting the views of Australians towards the political leaders who are supposed to account to them for the use of the people's power that has been entrusted to them. The general problem has been documented (and counted).

One of the more notable well-documented instances was the attitude of the former Attorney-General, Hon Christian Porter, towards the rule of law and accountability. In March 2021, accusations were made against him. The NSW police started an investigation but closed the case citing insufficient admissible evidence. Other forms of inquiry were suggested, including an investigation of Mr Porter's fitness for the office of Attorney-General. Mr Porter denied the allegation and claimed that standing down or resigning because of an allegation would be contrary to the rule of law. It would mean he said that, "any person in Australia can lose their career, their job, their life's work, based on nothing more than an accusation that appears in print." Many eminent lawyers took issue with these claims.[2] Even more seriously, his view of the rule of law contradicts the key tenet of our democracy. Ministers are accountable to parliament which has the right to make any enquiries it sees fit to determine whether it retains confidence in ministers. It is a central part of our democracy that a minister's career may come to an end merely because someone else is preferred by their electors, the Parliament, the Party or the Prime Minister (PM).

The increasing evidence of gaps in accountability and threats to the Rule of Law amount to a crisis. In response to this emerging crisis illustrated in this glaring example, the Accountability Round Table has produced this issues and discussion policy paper to emphasise the nature of, and relationship between,

the rule of law, accountability and public trust. We aim to emphasise the serious shortfalls in governments and attendant institutions in all three areas and how we, and all Australians, might address them to produce better governance for all citizens.

Reform is not only absolutely necessary but entirely possible

Much of this Policy Paper gives account of existing accountability institutions that operate collectively as a "National Integrity System" – which has been assessed twice as part of nationally funded research projects.[3] In this Paper we will highlight existing accountability mechanisms, their failures and how they can, and must be, improved. In many ways the present picture is grim. Public perceptions may be even grimmer; with Australia Talks[4] reporting on casual questioning that 56 per cent of the 60,000 responders agreeing that "Australian politicians are often corrupt".

Despite plumbing the rum-soaked depths of our first and only coup d'état in 1808, Australia has made major contributions to accountability mechanisms – especially in electoral reform. This started with voting rights: secret ballots and universal manhood suffrage in the 1850s and adult suffrage (including women) in the 1890s. It continued with preferential voting in the 1920s, different voting systems for Senators and Representatives in the 1940s and boundary drawing by independent electoral commissions in the 1980s. Recently electoral commissions have sought to make voting as easy as possible and Australians have turned civic responsibility into an election day social celebration. The Commonwealth's New Administrative Law, enacted in the 1970s, was probably the most far-reaching governance reform to occur without a prior scandal. The Fitzgerald reforms in Queensland took Queensland from the 'Deep North' to a Global Exemplar for governance reform within 5 years.[5]

Unfortunately, accountability and integrity mechanisms tend to degrade for a number of reasons. In particular, politicians are tempted to increase the chances of their re-election by compromising 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.

Public concern with Government decision-making can quickly change its political fortunes. This can create an environment where substantive reform to our integrity systems becomes a priority. Making clear that Government decisions are fair and transparent, contributes to the public's trust in government institutions and their actions. A level of trust is essential to effective government and the

functioning of society. Our recommendations for possible and necessary reforms are discussed in this Paper and are summarised in the above table.

The Rule of Law

The Rule of Law is a majestic phrase with many largely reinforcing and supportive meanings. It stands for a fundamental governance value (along with 'enlightenment'[6] values of liberty, equality, citizenship, democracy, human rights and respect for the environment). It stands for a fundamental governance value. It stands as an ethic for lawyers, officials and soldiers[7], the basic principle of constitutionalism, and a set of institutions that supports its attainment. While these multiple meanings and dimensions may occasionally serve to confuse, each of them are instrumental in advancing the others. The partial achievement of each supports the fuller achievement of all.

One of the simplest and most enduring versions of the idea of the Rule of Law centres on an evocative but impossible ideal: "the government of laws not the rule of men" (John Adams modifying Harrington[8] who had referred to an 'empire of laws not the rule of men').[9] Taken literally, this precept is nonsense[10] even with the necessary and much belated introduction of gender-neutral language. Sovereign authorities can only rule through human beings.[11] The Rule of Law cannot circumvent that. What it does stand for is a set of rules, institutions and processes to ensure as far as possible that laws are made and powers are exercised according to, and subject to, rules made in advance. No single rule or institution is sufficient, so most attempts to define the Rule of Law provide a set of salient points and demand further explanation.

The two most influential such attempts are those of the legal philosopher Professor Joseph Raz and the former Senior Law Lord, Lord Bingham who set out eight overlapping 'desiderata'/'rules'.[12] What they agree on can be distilled into five salient points:

1. **laws should be relatively stable, prospective, open, clear and generally applicable to all).** The adverb 'relatively' should be noted. These are not absolutes. For example retrospective legislation is justified in some cases (Fuller)[13] and objective differences can justify applying different laws to different persons (Bingham);
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**[14] .

This combination of rules emphasises a core element of the "Rule of Laws, not men" idea. No one is above the law in two senses. First, the law applies to all – including those who hold official power. (Some jurisdictions provide degrees of immunity to legislators and/or Presidents, but we, at ART do not entertain that pernicious foolishness.) Secondly, public officials (including ministers, other elected representatives, public servants and others exercising state-sanctioned power) only exercise powers that have been granted to them and for the purposes for which they have been granted that power. In a democracy, that power belongs to the citizens and must be used for the benefit of the citizens rather than the benefit of the officials.[15] It is for this reason that we say that power has been entrusted to them and grounded in the 'public trust' principle.

This is largely encapsulated by one of Bingham's rules[16] : -

> "*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.*"

However, we would emphasise that, beyond those conferred limits, an official has no power (the literal meaning of the legal term '*ultra vires*'). Any attempt by an official to act beyond the designated power has no legal effect on others as if the attempt had never been made[17] even though the attempt might constitute a violation of a code or even a criminal offence. This leads us to an important and structural exception to the generality applicability of, and equality before, the law. Two "objective differences" justify differentiation. The first is that citizens and officials face dichotomous 'closure rules' (the rules that apply when the law is silent). *For citizens and other residents, the closure rule is 'whatever is not prohibited is permitted.' For officials acting in their official capacity the closure rule is 'whatever is not permitted is prohibited.*' The second difference is that the Rule of Law is essentially directed at officials and their obligations. Some see the Rule of Law like 'law and order', emphasising that everyone must obey the law. Bingham's general statement of the Rule of Law reflects this. He states that, "all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws".[18] The Rule of Law is first, last and foremost about the duties of officials to citizens and their interests. Citizens do not have equivalent duties to officials. Officials have ethical duties towards the law that extend beyond those of ordinary citizens. Indeed, the system clearly contemplates citizen law breaking and provides room for civil disobedience. Civil disobedience by officials is far more fraught. (While whistleblowing may involve breaking laws that prevent disclosure this is merely as a safety valve where existing accountability measures prove inadequate.)

It should be emphasised that the fifth rule (natural justice and procedural fairness) is a variable standard. Those suspected or accused in the criminal process receive the strongest set of protections

owing to the personal consequences and public opprobrium of criminal conviction.[19] In other adjudicative procedures the requirements vary, generally depending on the degree to which individual interests are affected.

Domestic and International Rule of Law

Bingham emphasises that the ideal of the Rule of Law and its value does not stop at borders. He is in good company! At the 2005 United Nations World Summit, member states unanimously recognised the need for 'universal adherence to and implementation of the Rule of Law at both the national and international levels' and 'reaffirmed their commitment to "an international order based on the Rule of Law and international law."'[20]

Over 60 years ago, President Eisenhower said:

> *"The time has come for mankind to make the Rule of Law in international affairs as normal as it is now in domestic affairs. Of course the structure of such law must be patiently built, stone by stone. The cost will be a great deal of hard work, both in and out of government particularly in the universities of the world. Plainly one foundation stone of this structure is the International Court of Justice … [and] the obligatory jurisdiction of that Court. … One final thought on Rule of Law between nations: we will all have to remind ourselves that under this system of law one will sometimes lose as well as win. But … if an international controversy leads to armed conflict, everyone loses."*

More recently, there has been much talk of the necessity of a 'Rules Based International Order'. Just under 100 years ago, Australia signed the Kellogg-Briand 'Pact of Paris' to outlaw aggressive war and beefed that up with the signing of the UN Charter and the ANZUS Treaty[21], Article 1 of which commits the US and Australia to settle international disputes in which they may be involved in by peaceful means and to refrain from the threat or use of force.

The ratification of treaties represents the assumption of a legal obligation to comply with the terms of each such treaty. In this way, Australia subjects itself to the 'international rule of law'.

We recognise that some treaties are ratified in bad faith (possibly even 'utmost bad faith' – '*Uberrima mal fides*') and some countries would never have signed a given treaty if they thought that it might ever be enforced against them. One can hardly see that being pleaded in court! (This is relevant in judicial review, see below.)

So far the description of the Rule of Law is referred to as a 'thin theory' of the Rule of Law.[22] 'Thicker' theories incorporate other governance values within the Rule of Law – particularly democracy and human rights. Bingham goes part of the way towards the latter. Raz sees the Rule of Law as a virtue

relating to the way the law is administered. Democracy and human rights are different 'virtues' of law – relating to how they are made and their content. These virtues are mutually supportive and it is hard to have a full measure of any without a full measure of the other virtues.

Institutionally, the international Rule of Law is very much on the 'thin' side; Professor Simon Chesterman calls it 'anorexic'! This does not mean that we should not recognise and build on the Rule of Law as it exists – noting that the content is generally good to inspirational, especially in human rights and the laws of war. Building the international Rule of Law is one of the great challenges of our time – and especially for lawyers, soldiers and both elected and appointed officials.

ART is committed to democracy and human rights (through both 'thick' and 'thin' theories). Australian politicians not only claim to support democracy and human rights but have signed up to a wide range of human rights instruments that include and expand on **fundamental human rights**.

In fact, Australia is a party to nine separate United Nations international human rights treaties. The most important of these treaties are the International Convention on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights signed and ratified over 30 years ago. Despite these legal commitments to these treaties, in practice Australia's compliance has been consistently defective. United Nations human rights treaty bodies have identified hundreds of ways in which Australia's actions do not accord with international human rights standards and obligations. This is deeply regrettable. It demonstrates a careless and/or cursory attitude to international human rights rules and norms. The three key areas of international criticism have related to our nation's shocking treatment of refugees and asylum seekers, discrimination and continuing impoverishment of Australia's indigenous peoples, and the fact that Australia is the only Western Democracy in the world not to have enacted a statutory or constitutional Charter of Rights. This could be extended to a fourth area: that of response to climate change. If Australia is genuinely to be regarded as a nation governed in accordance with the international rule of law, these deficits must urgently be remedied.

Accountability

If the Rule of Law involves the requirement that officials must exercise only those powers that have been entrusted to them for the purposes for which they are entrusted with those powers, accountability is easily defined. Officials are accountable only to the extent to which they are required to demonstrate that they have used their entrusted power in officially approved ways and for the purposes that they were empowered. This is particularly true where discretionary powers have been conferred on officials.

For any government and its officials there is a range of accountability measures. At the centre of these is the Parliament which must be the centre of integrity and accountability institutions and the national

and state 'integrity systems'. However, it cannot be the only accountability institution. 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, anything that gets in the way of the virtuous democratic circle is undemocratic and to be resisted. The problem was that every single element along the circle could be, and often has been, corrupted. Policies and politicians could be bought, governments could use government resources to promote re-election and electorates be gerrymandered and voter suppression practised. The post-Fitzgerald reforms in Queensland sought to create new and reformed laws, norms and institutions to improve integrity and accountability. Collectively these were called an ethics regime**23**, an ethics infrastructure (OECD)[24], an integrity system[25] by Transparency International (TI) or, in Queensland's 20th anniversary reforms an 'integrity and accountability system'[26]

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 – e.g. audit offices and ombudsmen should pass on accounts or complaints about suspicious behaviour to the proposed Commonwealth Integrity Commission (CIC)[27] and the CIC should pass on cases of maladministration to ombudsmen and referral of misuse of resources to Auditors General. Some will assist parliament and its committees to do their work e.g. ombudsmen, and Auditors-General. They may also be mutually or horizontally accountable e.g. CIC actions should be subject to judicial review but judges can be investigated by a CIC (preferably involving a judicial commission).

Accountability and Rule of Law Requirements for Procedural Fairness

When calls were made for an independent inquiry into various allegations relating to a Member of Parliament's alleged questionably illegal behaviour, (the former Attorney-General, Hon. Christian Porter claimed that if this happened there would be no Rule of Law left to defend.[28] In concentrating on criminal procedures he was making a fundamental mistake, proclaiming it as if all law were criminal law.[29]

The protections for an accused person are very substantial because of the formal opprobrium associated with criminal conviction along with potential loss of liberty, employment, status and property. This does not mean that every such loss must be preceded by a full criminal trial with the protections that go with it. An individual may lose property in a civil case (including defamation) on the

balance of probabilities. They may lose their job because of an internal investigation into a breach of their duties under an employment contract. They may not be retained when an existing contract ends. They may lose their professional accreditation for bringing the profession into disrepute. In all of these cases, the individual enjoys safeguards to provide procedural fairness. The nature and extent of those safeguards vary, generally in proportion to the potential damage to relevant individuals. This is far from perfect and needs to be considered – as courts and legislators occasionally do. This is all right and good. There have been improvements to prevent discrimination and unfair dismissals that have been opposed by quite a few Attorneys General.

Procedural fairness provides the foundation for the protection of individuals whose rights or interests may be affected adversely by decisions taken by ministers or governmental officials. Procedural Fairness includes the two fundamental rules of natural justice: the hearing rule and the bias rule. The hearing rule requires that any person whose rights or interests may be adversely affected as a consequence of a governmental decision has the right to be heard with respect to that decision and must be given the opportunity to make their case. The bias rule is straightforward. It means that the decision maker should come to the decision with an open mind as to how their powers should be exercised. The test is whether a fair-minded and informed observer might apprehend that the decision-maker might not be impartial or have an actual or perceived conflict of interest. If either of these rules is transgressed, the Rule of Law is undermined.

However, political accountability sets up a different test. No politician has a right to his or her job even if they are doing it well. Before the crystallisation of responsible government following directly from the loss of 13 of its American colonies, UK Parliament could remove a minister by impeachment when they did not like the King's choice for that ministry. The USA retained impeachment, the UK largely discarded it. While there were some 'safeguards' to protect the rights of the accused under impeachment procedures, responsible government meant that ministers lost office if they (or their PM) failed to retain confidence of the parliament. Whether or not they were doing a good job, the only question was whether another were preferred. When responsible government was introduced to the Australian colonies, ministers were referred to as 'Officers liable to retire from Office on political grounds'. As long as a PM has the confidence of the parliament, they can dismiss other ministers. There is no presumption of innocence but the presumption of convenience. If the PM does not have the confidence of parliament, the PM and all's other ministers are 'liable to retire on political grounds.' Again, there is no presumption of innocence but a presumption of preference. 'Innocence' is irrelevant because no breach of law is alleged and no breach has to be proven. If a minister loses the confidence of the House or PM, no guilt has been found – merely a preferred replacement.

Public Trust

With the implementation of Rule of Law and Accountability, Public Trust falls into place. Under thin or thick theories of the Rule of Law, the powers of officials do not belong to them but are entrusted to them. Those trustees must use only the powers they have been given. They must be exercised in prescribed ways, for permitted purposes and only to further the interests of the citizenry. The link between trust, integrity and corruption is emphasised by an analysis of the latter terms.

A widespread definition of corruption, used by Transparency International and many others is 'the abuse of entrusted power for personal [including party political[30]] 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.'

We note that the analogy to trustees and beneficiaries throws up some differences. In normal trust law, the beneficiaries do not have a say in the trustee and how the trust property is used. In a democracy, the beneficiaries have the ultimate say. To some extent, public trust reflects pre-democratic paternalism that has been transcended by constitutionalism, the separation of powers and integrity systems. However, it is a very effective way of reminding citizens and officials that the power belongs to the former to be used for their benefit.

Separation of Powers

The Separation of Powers is a vital support for both the Rule of Law and Accountability. The ideal arose from Montesquieu's[31] famous misunderstanding of the 18th century British constitution as involving a three-way separation of legislative, executive and judicial powers with no person or institution having more than one of those powers. This distribution of power means nobody has total power and that each form of power depends on the others. The legislature can pass a law but it needs the executive to put it into effect and it needs the judiciary ultimately to enforce it. A judge can enforce the law but can only enforce the laws in force at the time. The executive can only implement the laws made by the legislature and is likewise dependent on the judiciary for enforcement of its actions and whether its actions were within its power.

The separation is not, and cannot be, complete. Each institution needs incidental powers of the kind they do not theoretically enjoy. Courts legislate rules for the conduct of court proceedings and administer their courts;[32] legislatures have powers of contempt and generally administer their buildings; and the executive makes subordinate legislation. However, the separation of judicial and other forms of power is absolutely central to the Rule of Law.

The separation between executive and legislature is different. They are formally quite separate in both US and Australian constitutions. However, the Australian constitution follows long time British practice of having strong links between the legislature and the executive through the requirement that ministers are members of the legislature and subject to scrutiny and instant dismissal should they lose a motion of confidence in the House or Representatives. This creates a risk of an over-mighty combination of powers but it also provides our core accountability mechanism lacking in US-style presidential systems. In such systems, the separation of powers is seen as giving the president a great deal of autonomous power which courts and legislatures are called on to respect.

The separation of powers is complicated by the necessary rise of integrity agencies such as ombudsmen, Auditors general, Information commissioners and integrity commissions. Some see them as part of the executive and subject to executive control. Others see them as independent officers of the Parliament (most explicitly under the Victorian Constitution). Others see them a 'fourth arm' of government. In most modern democratic constitutions they are given separate recognition. However they are characterized, they are an essential part of an effective National Integrity System.

Two fundamental drivers of increased trust are perceptions about performance and fairness. Performance is important where it matters to the individual and where it has improved or exceeded expectations. Fairness relates to matters of process and includes access to services, transparency, integrity and compliance.

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

Parliament – General

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 in promoting integrity and accountability. However, this is not to diminish the role of Parliament but to provide vital supports and necessary institutional additions to Parliament's role.

Parliamentary control of legislation

Legislation is the core business of Parliament and is the source of its other powers. MPs propose, oppose, amend and vote on 'Bills'. If passed by a majority in both houses the Bill is presented to the Governor General for signature and it becomes an Act of Parliament.

However, much of the detailed consideration of legislation is by Parliamentary committees who have time and relevant expertise. They scrutinise legislation using a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, the Rule of Law and on parliamentary scrutiny"[33] and compliance with international human rights norms.[34]

In many cases the laws passed are relatively general and authorise the executive to fill out details and update laws on the basis of experience through 'subordinate' or 'delegated' legislation' (this legislation is variously called regulations rules, orders, ordinances, declarations, certificates and, collectively, 'legislative instruments'. This can free up Parliament to be the 'forum of principle'. However it is essential that parliament retains control and can decide that it does not want the legislative instrument to become part of the law. Legislative instruments must be tabled before each House of the Parliament within 6 sitting days of that House after the instrument is made. Either House then has the opportunity to reject (i.e. 'disallow') the legislative instrument within 15 sitting days. [35]

To properly consider the volume of subordinate legislation, it is scrutinised by a relevant committee,[36] which can recommend that the regulations be 'disallowed' in whole or part. Either House of Parliament can take up the recommendation and the disallowed portions have no effect. This reflects the fact that if the content of the regulation had actually been included in the authorising Act, it would have had to have passed both houses of Parliament before becoming law.

Attempts to limit this power attack the very heart of our democracy. Unfortunately, a growing number of Acts of Parliament have exempted the regulations made under those Acts from scrutiny. Indeed, in 2020, 17.4 per cent of delegated legislation was exempted from disallowance.[37] Some of these disallowances relate to emergency regulations (for example, the 2014 Biosecurity Bill). However, other Acts have exempted regulations increasing the Federal government debt ceiling to $1.2 trillion; and changing Australian content obligations that apply to commercial television broadcasters. Neither of these are emergencies and regulations have the potential to impact our economy and polity. In the

latter case, changes may materially affect the profitability of media corporations which could be exchanged for favourable coverage.

Following a Report of the Scrutiny of the delegated legislation committee, the Senate has emphasised the importance of the disallowance mechanism and required the Attorney-General to justify current exemptions from disallowance.

The Report recommended: that all future exemptions from disallowance and sun-setting be in primary legislation; that existing exceptions for disallowance be removed from legislation; that if exemptions from disallowance are proposed, they require explanatory statements to be included with the relevant legislation. That report also recommended that the Senate itself should not allow any exemptions from disallowance unless there are "exceptional circumstances"

ART agrees with all of the Senate Scrutiny of Delegated Legislation Committee's recommendations. ART again, would go a little further: first in requiring the Attorney-General to justify all current exemptions from disallowance; secondly in requiring the chair and deputy chair of the Senate Committee be notified at the start of the drafting process for any authorised emergency regulation. If the committee agrees to the regulation, then it can take effect (though generally with a sunset clause).

Recommendation 1

Parliamentary Oversight and Scrutiny of Delegated Legislation: All exemptions from disallowance and sun-setting of delegated legislation are to be in primary legislation; existing limitations on disallowance to be justified by Attorney-General and approved by Senate or removed from legislation. Senate itself should not allow any exemptions from disallowance except in exceptional circumstances.

Parliamentary control of treaties

International law is largely made by governments through treaties. The US Senate votes on treaties. If they pass, they become law. If not, the US is no longer party to the treaty. Our Parliament has a Joint Standing committee on Treaties that can provide feedback to the government, which the latter can ignore. Domestic implementation has to wait on legislation that may never come or may look very different from the Treaty.

Given the increasing importance of international law, a greater role for Parliament is overdue. First, if a treaty is unacceptable to the Treaties Committee, the Committee should recommend that it should not be ratified. Both Houses of Parliament should, within six months, be required to consider and determine

whether the recommendation should be accepted. A convention should be established that governments should not formally ratify treaties without parliamentary approval. This parallels the approach to subordinate legislation.

If the Treaties Committee recommends ratification, then it ought to be incorporated into our law by legislation. If the government does not introduce such legislation within twelve months, the Government should justify why it is not legislating what we have internationally agreed to. Any MP who wants to promote legislation to include a treaty into domestic law should be guaranteed time to move a private member's bill and assistance by the Parliamentary Draftsman to draft it.

This should be a firm policy going forward and a special commission should be set up to go through past treaties to identify those that have not been fully enacted into Australian law and make recommendations to the Parliament on whether the treaty should be enacted or not.

There are many treaties that Australia has ratified that we have not honoured domestically (especially the International Refugee Convention over our treatment of refugees and the United Nations Charter over our participation in the 2003 Iraq War). There are many other examples, from the contempt of the International Court of Justice to the failure to establish an integrity commission type body under the Convention Against Corruption.[38]

One of our oldest commitments is to abjure aggressive war through the Kellogg-Briand 'Pact of Paris' from 1928. In 2002, Australia signed up to the Rome Statute. That treaty set out four crimes, including three for crimes committed during a war and one for starting a war.[39] However, the International Criminal Court was not able prosecute that crime until the signatories met to agree the definition of the crime and the conditions for the exercise of jurisdiction in the Kampala Review Conference of the Rome Statute States Parties in 2010. Forty states have signed up to the amendment and it became binding on them in 2018 (the 90th anniversary of the Pact of Paris). Australia has not ratified the amendment and has not introduced legislation to give it effect. It is truly shocking that we have ratified the sections that apply to our soldiers fighting wars but not to those sections that apply to political leaders who start them – without which there would be no opportunities for war crimes.

At the same time, Australia should restore its full acceptance of the 'compulsory jurisdiction' of the International Court of Justice (ICJ). From 1975 to 2002, Australia agreed to accept suits from any other country that likewise accepted the ICJ's compulsory jurisdiction. In 2002, it amended its acceptance of compulsory jurisdiction with respect to seabed disputes and only accepted suits from countries that had accepted the compulsory jurisdiction for at least 12 months. The first blocked suits from East Timor on the major issue between our two countries. The second blocked suits from Iraq in the war that

commenced a year later. Whether or not the latter was accidental, Australia should either reverse those decisions or recant its rhetoric about an 'international rules based order.'

These matters should be considered urgently by the Treaties Committee.

Recommendation 2

Parliamentary Oversight and Scrutiny of Treaties: If a treaty proposed by the government is acceptable to the Treaties Committee, it should be ratified and enacted into domestic law. If it is unacceptable to the Treaties Committee, it should not be ratified. Australia should restore its acceptance of the compulsory jurisdiction of the International Court of Justice to its pre 2002 levels.

Parliamentary control of money – the reason we are a democracy

Parliament has the sole power to raise money and to authorise its expenditure for the good of citizens. Because no government could subsist without money, the British Parliament secured two further powers that allowed it to hold governments to account. The first is a power to make and break governments by requiring that governments secure the confidence of the lower house in order to govern. The second, is a power to scrutinise government expenditure of money and hold ministers accountable for the expenditure of the people's money for the purposes that justified its appropriation. These powers were built into parliamentary systems around the world – including Australia's.

This fundamental principle is being eroded by a number of high profile cases. Under the recent Sports Rorts, money was spent without authority. Under Robodebt, money was demanded from welfare recipients without legal authority. Many of the appropriations are put in very general terms, the Treasurer is allocated huge discretionary funds and there is a growing figure of 'decisions made and not announced.'[40]

The secretive appropriation of funds in this covert manner is increasingly used by each major party in government, leading to the perception of an unholy conspiracy between them to the ultimate harm to good government and merit-based allocations of resources.

Recommendation 3

Parliamentary Oversight and Control of Appropriations: Parliament should exercise its powers over money bills during consideration of the budget process. It should demand sufficient detail to understand the public benefit that justifies entrusting those funds to the relevant minister and require the government to propose a clarifying amendment or alternatively consider an amendment deleting the undisclosed item. Where the use of funds is relatively novel, separate legislation should be required.

Parliamentary majority determines government

The need to retain confidence of the House makes that House a kind of standing electoral college for individual ministers and the government as a whole. Ministers are accountable to the house for their actions and they can lose office for no greater reason than that another prime minister is preferred. Ministers are, as the constitutions of the Australian colonies from 1855 stated 'Officers liable to retire from Office on political grounds.' This is much lower bar than impeachment (which the US retained).[41] Where one party or coalition has a majority, change either occurs at elections or because the PM's colleagues fear the next election result will be negative. During 'hung' parliaments governments are much more responsive to MPs and parliamentary committees (see below).

Going to war

Going to war is the most important decision any government takes. It has long been listed as the first and most important prerogative power of the Crown. The US Constitution requires congressional approval and the UK now has a convention that parliamentary approval should be sought. Under the Australian Constitution and Defence Act Australia has two ways to go to war: first by the Governor General under s61 (by convention following the advice of the Prime Minister) and the second is by the Defence Minister under s8 of the Defence Act following, according to political practice, a meeting of the Cabinet or its Security sub-Committee. Despite very strong doubts as to whether s8 was ever intended for this purpose when introduced in 1975[42] it has been used since then to legally authorise commitment of troops in both Iraq wars and Afghanistan. This means that, if Australia goes to war with China, 'the hand that signs the paper' will be that of the Defence Minister!

For nearly two decades there have been calls for a prior resolution of parliament before going to war and this has become convention in Canada and UK. Australia should be careful of expecting too much of such requirements by themselves. Such votes are highly political with legislatures fed misleading information and accusation of disloyalty to the troops levelled at any dissent. In the US, this constitutional provision is a limited deterrent to wars of aggression. Indeed, the mischief that the proposed parliamentary vote is proposed to address is one that only arises if the US Congress approves a war.

More is needed. We suggest, as a minimum, that truly independent legal[43] and military advice is sought by, and presented to, a parliamentary committee made up of the cabinet security sub-committee and

Recommendation 4

Going to War: Before entering a 'war of choice' truly independent legal and military advice is sought by, and presented to, a parliamentary committee made up of the cabinet security sub-committee and their shadows followed by a vote of both houses. Australia should ratify the Rome Statute amendments that allow prosecutions for the crime of aggression.

their shadows – all of whom either have, or would have in government, security clearance. Those giving legal advice would have to hold practising certificates and Australia should recommit fully to the compulsory jurisdiction of the International Court of Justice as well as signing the amendments to the Rome Statute to ensure the government would be accountable for any illegal wars in which it engaged.[44] Accepting this accountability would show respect for the international Rule of Law and the rules based order.[45] It would also be in accord with Article 1 of the ANZUS Treaty which commits Australia to "settle any international disputes in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations."

Accountability via Parliament

While elections are the means by which governments are held accountable through losing their majorities, Parliament is intended to hold them accountable on a day-to-day (or, at least, sitting day by sitting day) basis. Traditionally this was through MP's asking questions. However, question time is limited and largely wasted through 'Dorothy Dixers' and 'answer avoidance'.

Question Time's failure as an accountability mechanism arises from the flaws in its original design. The Speaker's Ruling (1901) left Ministers with discretion as to if and how they answered a question.[46] The recent Committee recommendations[47] were disappointingly inconsequential. The fundamental flaw should be corrected by:

1. The Speaker's making a Ruling redressing the 1901 Ruling and making other reforms requiring ministers to provide answers to questions and similarly setting requirements for questions;
2. After a trial period of the operation of the above Ruling, Standing Orders being amended to make similar provision, with any amendment found to be desirable;
3. The Prime Minister issuing revised guidelines for ministers supportive of and complementary to the above Ruling.[48]

Recommendation 5

Question Time should be made more effective

Parliamentary Committees have more time to debate and greater subject matter expertise through committee staff and some members. They have a right to demand production of any document or to summon any witness. Ministers will normally instruct staffers and may instruct public servants not to appear. But Parliament is the final arbiter of what information and witnesses it can demand. Committees are reluctant to move from an invitation to a demand for two reasons – retaliation when governments change and the concern that they might have to jail the summoned witness for contempt. The first is not worthy of any MP who claims to support accountability and the Rule of Law. The second is easily dealt with. It is not necessary to jail the staffer/ or public servant in question. The House (the Senate) acting on the recommendation of a Committee, can go to Court seeking a declaration that the government instruction is ultra vires and that the Parliament has a right to hold the Minister in contempt.[49] Once the Declaration is issued, there is legally no instruction and the staffer/public servant has no reason not to appear.

Recommendation 6

Parliamentary Committee Resources: Committees should be funded to employ further staff to help them in their role Committees should never be dominated by either major party and the UK practice of ear-marking some important committees chaired by Opposition nominees should be adopted.

In the absence of amendments to the ministerial code as proposed, then at a minimum any legislation for an Integrity Commission should not place any limits on the power of the commission to require the appearance of staffers and public servants.

Parliamentary committees should be able to employ further staff to help them in their role (a bit like counsel assisting) and should be funded for it. Membership should never be dominated by either major party and the UK practice of ear-marking some important committees chaired by Opposition nominees should be encouraged.

All departments and statutory authorities (corporate Commonwealth entities and non-corporate Commonwealth entities) are required to report to Parliament[50] rather than merely to the relevant minister. Ministers should notify the relevant parliamentary committee of any exercises of their shares in government owned corporations (or golden share in part privatised corporations).

Ministerial staff members (sometimes referred to as advisers) have an important role to play. Ministerial standards formally make ministers accountable for the actions of their staffers. But ministers are rarely required to accept any formal responsibility for staff actions, even if they admit them. Staff actions are by their nature often hidden, and easily deniable whether or not they were taken with the

Minister's implied or explicit consent. Neither the minister nor the staff members are held to account for staff actions in any forum of parliament.

It is important to know what actions a staffer has taken before the relevant minister can be held accountable for it. Accordingly, ministerial staff should be liable to be called as witnesses to parliamentary committees to provide information and explain their role in any policy developments, but not comment on policy, on a similar basis to the appearance of public servants.

Breaches of the staffer's code should be investigated independently by the commissioner who would need to determine if the staffer breached the code and whether the minister had ordered or encouraged the staffer then the commissioner may find against the minister.

Recommendation 7

Ministerial Staff Accountability: The ministerial code (the 'Statement on Ministerial Standards') should proscribe any instructions preventing the appearance of staffers and public servants from appearing before committees and include a positive duty to provide all requested information to committees. Exceptional, sensitive security information could be provided to a committee made up of shadow ministers of those ministers who sit on the security sub-committee of cabinet. CIC legislation should not place any limits on the power of the CIC Commission to require the appearance of staffers and public servants.

Institutions that assist parliament

Parliament has a pivotal role in making those entrusted with public power accountable for the exercise of that power. However, they need the contribution of other integrity agencies in support of that role. MPs have taken complaints of constituents to ministers and their departments with the 'threat' of a question in the house if the matter is not resolved. The Ombudsman extended this kind of work with its specialist trained staff who can go into much greater detail when examining alleged errors and maladministration, make recommendations and report them to Parliament. (For this reason, the office was originally called the 'Parliamentary Commissioner'.)

The Auditor-General has a critical role in Parliamentary control of finance and the interaction of parliamentary accounts committees. When Auditors General comment and media are on the look out for a story, they make one of the most potent institutional combinations for promoting integrity and accountability. The Australian National Audit Office's (ANAO) examination of the purposes for which expenditure was made, the processes for approval and the exercise of discretion, are major

contributions to accountability for the use of entrusted power. Hence, ensuring, respecting and actively protecting the independence of the Auditor General and the Department is a continuous responsibility.

While criminal justice institutions (integrity commissions, Police, DPPs) may receive information about potential corruption from the institutions cited above (e.g. if the Ombudsman suspects that alleged maladministration may be corruption), their deliberations on whom to investigate and prosecute are largely independent of Parliament. Errors are a matter for the courts, not parliaments (though it is good practice to have an independent commissioner to investigate complaints against integrity commissions and report to a Parliamentary Committee). However, well-constructed integrity commissions have a research function – examining the risk and extent of corruption and other forms of organised crime as well as the ways that they may be addressed. Institutions for the investigation and prosecution of criminal offences must be independent of Parliament and government ensuring that Parliament Criminal prosecutions are not the responsibility of parliament.

Parliamentary Committees can investigate major problems but sometimes the task becomes so large that a Royal Commission is needed. Royal Commissioners' recommendations for reform naturally go to the government that appointed them. They should also go to relevant parliamentary committees for their comment and, in most cases, pressure the government to accept recommendations the committee endorses. Parliamentary committees may halt their enquiries during cognate Royal Commissions, but should not be required to do so on the insistence of the government.

In Queensland, the Fitzgerald Inquiry recommended an 'Electoral and Administrative Reform Commission' that examined every element of the governance of Queensland and recommended improvements on them, recognising the interactions between them. Its recommendations were submitted to a Parliamentary Committee which would then report to Parliament. Fitzgerald intended that this would be an 'enduring body' which could review each of those elements on a regular basis. This 'lesson not learned' is recommended for all jurisdictions.[51]

Parliamentary scrutiny committees should consider reports from the UN and other international bodies in their deliberations on legislative and executive action – though they are bound to come to their own conclusions.

All integrity agencies should be formally constituted as "Independent Officers of Parliament" who, following Victorian practice, are "entities established by statute, which are independent of the executive government and which assist parliament in carrying out its responsibilities to scrutinise the actions of the government."[52] Each Independent Officer of Parliament (Auditor General, Ombudsman, Information Commissioner, Commonwealth Integrity Commissioner, Human Rights Commissioner, Ethics Counsellor, Ethics Commissioner etc.) should be appointed by a cross-party process determined

by the Parliament backed by legislation. The best such mechanism was introduced by Queensland following the Fitzgerald Inquiry and actually proposed (and, it should be noted,) enacted by the outgoing National Party Government. Appointments require prior approval by a majority of the relevant parliamentary committee, with that majority including a member of both the government and opposition. This prevents either party seeking a 'fellow traveller'. While it is not possible to give every independent and minor party a similar say, their roles might be enhanced by giving them rights to make representations to the relevant committee

Recommendation 8

Appointment of Commissioners and heads of integrity agencies: Each Independent Officer of Parliament Auditor General, Ombudsman, Information Commissioner, Commonwealth Integrity Commissioner, Human Rights Commissioner, Ethics Counsellor, Ethics Commissioner etc.) should be appointed by a legislated cross-party process that involves prior approval by the majority of a nominated parliamentary committee including at least one vote from a government and an opposition member.

Commonwealth Integrity Commission (CIC)

A CIC is a major, essential feature of an effective integrity system and good governance. A CIC must have the powers of a standing royal commission, subject to checks and balances to prevent it abusing its powers.

All public officers (MPs, public servants, contractors to government, etc.) would be liable to investigation of alleged unethical or illegal actions. These include the power to conduct public hearings into either specific allegations or general corruption issues, if the CIC it determines that that is in the public interest. It would balance the seriousness of allegations with any unfair prejudice to an accused's reputation or unfair invasion of her/his privacy. Public trust would be enhanced through public hearings, subject to legitimate concerns about damage to an accused's reputation.

It would be empowered to make findings of fact (including that a complaint was baseless or not established) and recommendations in a public report. Matters involving criminality could be referred to law enforcement authorities. Standing royal commissions (like the usual single issues royal commission) are structured to give priority to finding the facts about big issues of public importance. This is why witnesses can be compelled to give evidence but the evidence they give cannot be used against them. This may reduce the chances of ultimately getting convictions but the point is to understand the problem and recommend solutions.

The Integrity Commissioner would be a statutory officer of the Parliament, appointed by a bi-partisan processes independent of government (e.g. similar to the Queensland equivalent). One or more assistant commissioners would allow for internal checks and balances.

The integrity commission would be responsible for whistleblower protection and provide greater protection for whistleblowers and those who want to participate in political discourse but are afraid of repercussions. Australia should consider compensation for whistleblowers, as in certain circumstances in France, Ireland, Japan, UK and USA.

"Watch the watchdog" functions would operate via parliament and the courts. A parliamentary joint committee would ensure the CIC's compliance with statutory provisions, due process and other standards. CIC's decisions could be challenged in the courts.

Given the considerable powers to be assigned to the CIC there should be an Independent Inspector giving oversight to the use of these powers similar to the positions in a number of States. The CIC would be responsible for a corruption prevention program across the public sector. This pro-active integrity function would monitor major corruption risks across all sectors. These functions would be supported by a research capability, through which the Commission could learn from investigations, prosecutions and the Scrutiny of Bills Committee. The function would enable the CIC to advise on corruption risks and measures to reduce it through legislative and other provisions. It could be charged with providing the necessary feedback to close the feedback loop on the operation of, and effectiveness of legislation that has passed through the hands of the Scrutiny of Acts and Regulations Committee, (or any other pre existing regulation and legislation that has been found by a CIC or ICAC to be wanting) and add any other relevant research, such as how such matters are managed in other jurisdictions.

Some of that feedback should include existing anti-corruption legislation. It is common for anti-corruption laws to be restated and strengthened in advance of the establishment of an anti-corruption commission. In Australia's case these should include the common law offence of misconduct in public office (including conspiring to commit misconduct). Prosecutions under strengthened laws are only possible for future conduct; past conduct can be prosecuted under pre-existing laws. Furthermore, CIC's experiences with each are relevant inputs to Parliamentary decisions for ongoing improvement of legislation

Note that although an effective CIC and adequate anti-corruption laws are important parts of the integrity system, they are not sufficient by themselves. National Integrity Systems require a range of other laws, norms and institutions complementing and mutually supporting each other. These are set out in the rest of this Policy Paper but should be considered along with a standing Governance Reform Commission to recommend and oversee reforms.

Recommendation 9

Commonwealth Integrity Commission: A 'beyond best practice' commission should be created as a major, essential feature of an effective integrity system and good governance. It must have the powers of a standing royal commission, subject to 'watch the watchdog' similar to those adopted in Queensland.

All public officers (MPs, public servants, contractors to government, etc.) should be liable to CIC investigation of alleged unethical or illegal actions. These include the power to conduct public hearings into either specific allegations or general corruption issues, if it determines that that is in the public interest. It would be empowered to make findings of fact and recommendations in a public report. Matters involving potential criminal prosecutions could be referred to law enforcement authorities.

Parliamentary assessment of corruption risks

Whenever new powers are created or existing powers extended, it will inevitably attract those who would misuse or abuse that power for their own benefit. The various risks should be identified, mitigated and managed. While a National Integrity System provides sophisticated and multi-layered forms of risk management, it is useful to consider the particular risks that are generated by various powers at the point of their creation. Those who draft and scrutinize proposed laws should take what Oliver Wendell Holmes called the 'bad man's' view[53] of that law and consider how 'bad men' might abuse the powers created by those laws to their benefit (or to the benefit of an organisation of which they are a member or have a public or political interest). There are well known risks of the abuse where legislation gives ministers or senior officials broad discretion in financial grants, the awarding of contracts, the granting of licenses and permits. There are also long standing concerns about discretion and political influence in law enforcement decisions (from raids to prosecutions). However, we should recognize that the corrupt can be innovative too.

Parliament should scrutinise draft bills carefully to determine whether a bill contains any provisions (especially those that grant powers) that might provide an avenue or opportunity for corrupt activity or other abuses of power. This function could be undertaken by the Senate Standing Committee for the Scrutiny of Bills (or a new committee overseeing the CIC). New terms of reference could be added to the relevant Committee and that Committee should seek input from integrity agencies such as the ANAO and the CIC (especially the CIC has, a research function – as we believe it should.)

Recommendation 10

Assessment of Integrity Risks: There should be parliamentary procedure for assessment of the risk that propose legislated powers may be abused and recommend the best means for avoiding or mitigating them (with inputs from the CIC).

Judicial Review and Administrative Law

The Administrative Law reforms of the 1970s constituted one of the best governance and accountability reforms that were not the consequence of a prior scandal. They involved (1) the requirement that citizens could demand statements of reasons for actions that adversely affected them; (2) Freedom of Information (FOI), and (3) a separate 'Merits Review' that allowed an independent member of the Administrative Appeals Tribunal (AAT) to put themselves in the position of the decision maker and make new decision. At the same time, judicial review was strengthened and simplified 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 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. The 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. The AAT would put itself in the place of the decision maker and naturally take into account relevant considerations and proper purposes.

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. This trend must be reversed with a return of full judicial review functions to the Federal Court. All limits must be re-examined and justified before scrutiny of bills committees in both houses.

Given the concern about pork barrelling, ministerial decisions should be subject to judicial review under 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.

Recommendation 11

Judicial Review of Administrative Actions: The trend to strip the Federal Court of many review powers must be reversed with a return of full judicial review functions and all limits re-examined and justified before scrutiny of bills committees.

Administrative Law needs to recognize the growing importance of international law and the Rule of Law in international affairs. 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 would be deeply ironic if a promise made by the Australian government to the world was construed not to apply to those within our borders. 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 went further. They held that signing a treaty could give rise to a legitimate expectation that the treaty would be honoured by the relevant government minister. Governments have sought to nullify Teoh and the High Court has walked back from it. We suggest a reversal in direction. 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. Even if the Australian government that signed the treaty had not intended to honour it, this is not something that they would readily plead in court.[54] And it is not something any court should entertain.

We recommend that legislation should make it very clear that treaties Australia has signed and international law in general, are highly relevant considerations for the exercise of entrusted power and both elected and appointed officials should be subject to judicial review for a failure to do so. Officials and courts should also consider the deliberations of international bodies, especially international courts.

Given the threat of climate change, judicial review of key ministerial decisions that affect greenhouse

Recommendation 12

International Law and judicial review: Legislation should clarify that treaties Australia has signed and international law in general are highly relevant considerations for the exercise of entrusted power and both elected and appointed officials should be subject to judicial review for a failure to do so.

emissions should be extended with international climate agreements being recognized as particularly "relevant considerations."

Freedom of Information, The Right to Know and the Australia Information Commissioner

There has been an important conceptual shift from 'Freedom of Information' to the more assertive 'Right to Know.'[55] There have been very significant developments here – especially the shift from discussing Freedom of Information (FOI) to 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;
3. There are some good arguments to deny access but it is important that they are applicable and applied by an independent authority;
4. 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;
5. 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;
6. 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).

There are some restrictions that are frequently touted but rarely justified: -

- Professional advice: governments often claim to be following, or supported by expert professional advice – frequently by lawyers and more recently medical experts. Governments assert that they are the client and insist on client confidentiality especially in legal advice. Lord Bingham sees no problem with this in normal tort and contract actions. However, if the issue concerns the legality of government action, the client might be parliament or the people and, in going to war, those whose lives are on the line. More importantly, in normal litigation, reference to legal advice will void confidentiality. The same approach should be taken to advice to government. We suggest that those providing advice should have practising certificates so that they are subject to ultimate court control (this was not the case for the two lawyers providing public advice to the PM in 2003[56]).

- The Government should fully comply with the international Open Contracting Data Standard[57] as it undertook to do as part of Australia's first Open Government Partnership National Action Plan, and complete due diligence, and publish AusTender contracting data in an OCDS-compliant schema. All contracts should be the product of a tender process except in exceptional circumstances where they are fully disclosed and subject to parliamentary scrutiny.[58]
- Commercial in confidence should not be used by Government to prevent public access to a contract except to protect the privacy of individuals or where the information Commissioner has determined that it would be contrary to the public interest or to the extent necessary to protect the contractor's intellectual property. Procurement rules should require that contractual information be made available to integrity agencies and parliamentary committees.
- Cabinet in confidence: In recent years there has been a regrettable tendency within government to afford Cabinet documents exemption in the Freedom of Information Act far too widely, and then to attempt to defend indefensible claims as to the application of the exemption in legal proceedings. In ART's view, there are only three circumstances in which the Cabinet documents exemption can apply: first, where a document has been prepared by a Minister for the explicit purpose of submission for consideration by Cabinet and secondly, where a document's disclosure would have the effect of revealing the deliberations or decisions of the Cabinet. Thirdly, where disclosure could jeopardise national security, criminal investigation or prosecution, or personal privacy. Pre-existing documents attached to Cabinet documents should not be classified as Cabinet documents. Purely factual documents such as scientific and technical reports should not be regarded as Cabinet documents because, by definition, they cannot disclose the deliberations or decisions of the Cabinet. Attempts by the Government to throw a cloak of secrecy over a diverse array of governmental documents that do not fall within these exceptions should be strongly resisted. Recent attempts to make 'national cabinet' a sub-committee of 'cabinet' to prevent scrutiny is a move in entirely the wrong direction.[59]

In all cases Integrity agencies should have access to any information they require to exercise their powers (e.g. the Ombudsman investigating potential maladministration, the Commonwealth Integrity Commission investigating potential, courts for judicial review, the AAT for merits review and parliamentary committees for oversight). In all cases, they would be required to keep the information confidential unless the Information Commissioner determined that it is in the public interest that the information were released.

NDAs and other settlements should not be used to prevent the public knowing about governmental negligence, mistakes or wrongdoing. Government may be willing to pay up considerable sums of taxpayer money to prevent such revelations. This would be a serious abuse of entrusted power. An instance in our view is there should be a royal commission into the waterfront dispute and its settlement. Ten of the 11 judges in three courts who considered the matter (a single Federal Court judge at first instance, all three judges in the Federal Court of Appeal and six of the seven judges in the High Court) decided that there was sufficient evidence of a conspiracy to grant interim injunctive relief. A good deal of evidence was collected for the trial and a good deal of documentation would have been discovered by the parties. Had the trial proceeded, more documents would have been discovered. Even more evidence uncovered in testimony and cross-examination. The settlement (which included significant government funding) meant that this evidence was not available to the public in the early election that was called later that year.

Recommendation 13

Right to Know: Information produced by the government for the purposes of making and recording decisions is the property of the people. One needs a good argument to deny access by the people to their property. There are some good arguments for such denial but they are overused and should be subject to veto by the Information Commissioner. Withholding information to prevent public discovery that a minister or senior public servant was wrong, foolish, unethical or, especially, lying is a serious abuse of power and therefore corrupt.

Criminal Justice institutions

The Rule of Law requires that criminal justice institutions (ACLEI and future Commonwealth Integrity Commission, CDPP, police) are independent of political control.

There are serious concerns about the independence of the AFP going back to Commissioner Keelty being pressured to walk back on a statement that going to war in Iraq increased the risk of terrorism against Australians. There have been concerns about AFP decisions on investigations of alleged government wrongdoing and raids on journalists, whistleblowers and union offices that are somehow leaked to the press.[60]

Notification of raids and other forms of evidence gathering is a serious abuse of power. It also undermines the purpose of such activities. Raids are used to secure evidence before there is an opportunity to destroy it. Leaks about future raids undermine that purpose and must, logically, be

undertaken for a different reason. This amounts to an abuse of entrusted power and, if done for personal or party political advantage, is seriously corrupt.

The Rule of Law also requires a range of protections for criminal (not civil) defendants, which are also incorporated in the list of Human Rights. These have been eroded too.

Importance of independence for key integrity agencies and their officials

It has long been accepted that judges need to be independent of government and that there are some protections are in place, such as tenure to age 70 for judges (subject only by removal by parliament for proven misbehaviour or incapacity)[61], guaranteed salaries and, in federal jurisdictions, administering their courts[62]. However, court budgets are under the control of parliament and, most importantly of all, appointments are effectively at the sole discretion of the government. Even where there is provision for consultation by Bar or Bench, this is often ignored. While Australia has not seen court stacking on the industrial scale seen in the USA, we must not wait for that looming risk to emerge. To that end, the moment a National party leader demanded the then Attorney-General's recommendation based on extensive consultation be rejected in favour of a 'capital- C' conservative,[63] Australia has been on notice.

Appointment of Judges

What is needed is an independent Judicial Commission that makes recommendations of those who would make suitable judges. While the final choice could be made by the government, it would be much better for the recommendation to be made by a parliamentary committee using the Queensland approach to appointing some key independent officials. This requires a majority of the committee to recommend appointment – with the majority including at least one member from the government and opposition parties. This brilliant exercise in 'pure procedural justice'[64] was suggested by the outgoing National Party government for EARC and CJC and has been adopted for other officials.

Other Appointments

This approach to appointments should be used for all key independent institutions involved in the accountability process – AAT members, auditors-general, integrity commissions, DPPs, ombudspersons, police commissioner, commonwealth integrity commissioner etc. – though they generally have a shorter fixed tenure.

There does not have to be a different body for each kind of appointment and there may be a combined body like the UK Commissioner for Public Appointments.

A similar approach should be taken to the appointment of Royal Commissioners and the terms of

Recommendation 14

A Judicial Commission should be created to make recommendations and appointment by similar approach to heads of integrity agencies.

A similar approach for appointment of Royal Commissioners and DPPs should be created.

reference. If it is good enough for standing Royal Commissions like an integrity commission, it is even more important for the usual ad hoc royal commissions. They are far more open to political abuse than standing royal commissions because it is not known in advance who or what will be investigated by standing Royal Commissions. However, in calling an ad hoc royal commission, the issue is specified and it is usually pretty clear (in some cases blindingly obvious) who will be investigated. This opens the path to appointing someone whose public pronouncements indicate that they are prepared to go after those the issues government would like to target.

Necessary Funding

Institutions do not operate with a commissioner alone. They need funding and funding should be guaranteed for all integrity and accountability institutions for at least 7 years. It is corrupt to reduce the funding of an independent body after it made adverse findings, pursued misconduct or just started asking awkward questions is corrupt. Governments are not entrusted with power for that purpose. Indeed, it fits TI's definition of corruption i.e. the abuse of entrusted power for personal or party political benefit.

The executive should not control the quantum or timing of access to the funding of integrity agencies. 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.

Recommendation 15

Funding of Integrity Agencies: The role of recommending the funding level to the Parliament should be assigned to a relevant parliamentary committee or an independent commission.

Public Service Independence

Public servants are not expected to have the same degree of independence as integrity agencies. They must faithfully implement the lawful policies established by the government. This enables politicians to use their powers for the purposes they were given and be accountable to Parliament and people for policies promised and delivered. However, the public service is expected to give 'frank and fearless' advice and to confine its actions to those that are lawful and for the purposes granted. This requires recognition of the professionalism of the public service and protections from retaliation.

Codes of Conduct

The PM's current code of practice (the Statement on Ministerial Standards) articulates with the concerns for accountability and public trust. "The Australian people deserve a government that will act with integrity and in the best interests of the people they serve".[65] However, like all previous codes, it fundamentally fails the Rule of Law in leaving decisions on whether there has been a breach of Ministerial Standards and the consequences of that breach in the hands of the PM. Here the PM is fundamentally and irredeemably conflicted because wrongdoing by ministers is likely to reflect upon the PM's government. Seeking the advice of a Departmental Secretary whom governments can dismiss without notice and without reason[66] cannot redeem that conflict. Investigations should be carried out by an "Ethics Commissioner" who should be chosen by the bi-partisan process for other for key integrity agencies and their officials (See section 14 above). The code should not be promulgated and altered by Prime Ministerial fiat. It should be drafted by a bi-partisan senate committee and be voted on by both houses of parliament. Once the content is taken out of the PM's hands, it is reasonable to make it applicable to shadow ministers also.

More generally, a positive, ethical culture supportive of accountability should be fostered in both the House of Representatives and the Senate. This is a responsibility of every Member and Senator, who must respect the respective roles of Speaker of the House and the President of the Senate in enforcing it.

To help ministers, MPs and senior civil servants[67] avoid breaches, an Ethics Counsellor (similar to the integrity commissioner[68] established by the Queensland Parliament in 1999) should also be appointed. The Councillor should offer ethics training during the induction process and at regular intervals afterwards as compulsory and ongoing professional development for MPs[69, 70]. The Ethics Counsellor should also oversee the registers of lobbyists and members' interests' and, most importantly, following the Queensland model to provide confidential advice on conflicts of interest and ethical issues which, if followed, avoids any future adverse findings of unethical conduct.[71]

The code (or network of codes) needs to be more comprehensive in content (most notably workplace bullying and harassment (sexual or otherwise) and reach (covering all MPs, staffers and senior officials with any necessary modifications to reflect their roles). It also needs the authority of at least a resolution of each House of Parliament or, to give it greater legitimacy, an Act of Parliament. The features of a code of conduct for members of parliament are set out by the Commonwealth Parliamentary Association.[72] The code must provide for rigorous investigation of allegations by the Ethics Commissioner who would be able to recommend to Parliament sanctions for proven unethical conduct breaching the code .

It is highly desirable that we should not merely look at avoiding unethical conduct but promote and reward high standards of ethical conduct. The ART Integrity Awards are presented to MPs or Senators who have demonstrated outstanding commitment to integrity over the previous term of Parliament. More generally, public awards and honours should only go to those who have demonstrated high standards of ethical conduct.

Recommendation 16

Codes of Conduct: The code (or network of codes) needs to be more comprehensive in content (most notably workplace bullying and harassment (sexual or otherwise) and reach (covering all MPs, staffers and senior officials with any necessary modifications to reflect their roles). Breaches should be investigated by an "Ethics Commissioner" who should be chosen by the bi-partisan process for other key integrity agencies and their officials. The code should be drafted by a bi-partisan senate committee and be voted on by both houses of parliament.

To help ministers, MPs and senior civil servants avoid breaches; an Ethics Counsellor should also be appointed who can offer ethics training and ongoing advice.

Imposing consequences of lying

Lying to or misleading parliament has long been the one capital offence for politicians – one for which far too few "swing". It is recognised and extended in the Commonwealth Ministerial Guidelines to cover lying to or misleading the public as well. It is based on the fundamental accountability of ministers to parliament and through it to the people. The enforcement mechanism is fundamentally deficient because the PM is hopelessly conflicted and, where their utterances are challenged, is a judge in his own cause (hence flouting the Rule of Law as well).

Some might argue that truth in politics is an oxymoron or that lying and misleading is an exercise in free speech or 'just part of politics'? The results made public in Australia Talks indicates a profound rejection of such views: "89 per cent of us are confident that 'most politicians in Australia will lie if they feel the truth will hurt them politically', which is awkward, because 94 per cent of us also believe that a politician should resign if they lie."[73]

Unfortunately, lies appear to be contagious, generating positive feedback loops making the perpetrators of lies famous rather than infamous.

In the past there were, at least to an extent, negative feedback loops. The weaker the argument, the more criticism would come from and through the media. By the time a politician got to outright lying, he or she would be exposed and become an example of what not to do.

The challenge is to establish negative consequences for lying. This may be done by:

- Independent investigators of parliamentary breaches (with an ethics adviser[74] available to give prior advice);
- Support for independent fact checkers (note that, while it is hard to prove the truth, it is generally relatively easy to uncover false statements and invalid conclusions);
- Truth in political advertising laws (such as that adopted in the ACT, as a starting point);
- Application of laws that apply to corporations in competitive markets for goods and services. It is an offence for any corporation to engage in misleading and deceptive conduct in consumer markets. Corporations have a duty of continuous disclosure to markets. ART argues that politicians, parties and supporters should have the same duty in the 'market of ideas';
- Greater media diversity so that the favoured candidate of major media companies are not given a free ride;
- An exception to the rule that journalists protect their sources. If an MP or a staffer lies to them, then they have a right, perhaps duty, to report it.
- Requiring that all advertisements be endorsed by a senior elected member of the party and subject to the expanded ministerial code for lying and misleading.

Australia's goal must be to increase the risks of lying and misleading the population until that risk is too great for a rational politician to take.

That still leaves the irrational politicians but they are generally not so great a threat

Recommendation 17

Truth in political advertising legislation: It is an offence for to corporations in competitive markets to engage in misleading and deceptive conduct. ART argues that politicians, parties and supporters should have the same duty in the 'market of ideas'. More generally there needs to be negative consequences for lying and misleading.

Accountability of MPs and their parties via elections

Political parties, how they are constituted and their roles and relationships with parliament and executive government are beyond the scope of this Policy Paper in most respects. However, the Rule of Law, Accountability and the Public Trust are relevant to all parties, as discussed below.

The most crucial and central accountability mechanism is through the competition between major parties seeking to be entrusted with the people's power on the basis of promises and performance in the use of that power for the benefit of the people. (Minority parties and independents promise to

either push governments in certain directions and away from others). However, there is a huge temptation to use the power entrusted to them to increase their chances of re-election by other means.

Gerrymandering had a long Australian tradition that died a sudden, unexpected and entirely welcomed death in the 1980s when re-districting was taken out of political hands. Other abuses that would affect electoral outcomes should be treated in the same way.

Timing of elections to coincide with expected peaks of popularity and avoid expected downturns is no longer possible in most Australian jurisdictions where four-year terms and fixed election dates have been written into their constitutions. The Commonwealth should follow suit, putting the power to call elections out of hands that might abuse it.

Government advertising has been shifting from information campaigns to advertising campaigns for government policy. This is a serious abuse of power. Our suggestion is that the Independent Communications Committee be re-formed with power to approve or reject all government advertising. The Committee should be established by legislation. Membership should be subject to bipartisan approval similar to that for independent officers of Parliament. The Committee should report to and be subject to oversight by a Parliamentary Committee. It must not only be genuinely independent, but can also be defended as genuinely independent even in the face of criticisms from cynical voters and disappointed or opportunistic political rivals. Former political staffers will never pass that test.

The role of the Committee could be complemented by a role for the Auditor General similar to that established for the Northern Territory's Auditor General under the Public Information Act 2010. That legislation requires that the Auditor General must, on request of a Member of the Legislative Assembly, conduct a review of information given to the public by a public authority to determine amongst other things whether the material promotes particular party interests or includes statements that are misleading or factually inaccurate. The resulting report by the Auditor General is tabled in Parliament and publically.

Pork Barrelling is a misuse of public funds that involves the expenditure of government funds to increase votes in marginal electorates rather than according to general transparent principles of general application (as expected in good policy making). This involves an abuse of entrusted power (and the people's money) to a party political benefit. ART posts a 'Rorts Register' on its website.[75] Both major parties are expert practitioners at pork barrelling, so additions to the list are made frequently.

In the Australia Talks survey, it was found that 77% of Australians think politicians should resign if they engage in it. Given that the NSW Premier says it is "accepted political practice", such resignations would allow a healthy clean out of politicians on both sides! The claim that it is 'not illegal' is not a defence but

an indictment that they have not yet banned it. Pork barrelling should be seen to be the means for a graceless exit, not a ticket to re-entry to parliament. There are two broad solutions: -

The old fashioned way: government makes policy, sets criteria, independent public service carries it out.

The new fashioned way is to establish independent institutions set up to give advice. If there is a ministerial discretion it must be subject to administrative law review (and integrity commission investigation if need be).

Either way, modern governments should be forced to recognize the distinction between their money and public money – demanded by Parliament and conceded by Charles II 450 years ago!

Coalition Agreements

One challenge to accountability is where two or more parties form a government. Parties compete with each other by promising policies and performance, the delivery of which is scrutinised by parliament and other accountability institutions and held accountable at the following election.

If two parties make the same promises, they operate in the same way as a single party. But if they make different promises at the election and agree to a variation of them, the Parliament and public should know about such agreements. Furthermore, the Coalition agreement should be published. The same should be true where an independent supports a government for confidence and supply and for similar reasons, preference deals should also be public.

Local representation is a central, valued feature of the representative parliamentary system, especially the single member electorates of the House. Meetings with and letters to Members and Senators can have a strong influence on policy and administrative actions, especially where the representation is clearly personal rather than orchestrated by a vociferous minority.

Recommendation 18

Accountability of MPs and their parties via elections: Public funds, resources and powers should not used to create advantages for candidates or parties, whether manipulating electoral boundaries, election timing, government advertising, pork-barrelling or secret agreements between coalition parties.

Money and Politics

Most Australians believe in both democracy and the market. Both involve individual choice. However, the counting principles are different – one vote one value as opposed to one dollar one value. The ever-present danger is that those with more dollars may use them to buy votes for their preferred MPs (or employ them when they retire) and receive benefits in access and policy preferences. Where political campaigning is expensive (as in US and Japan), campaign finance is at the centre of their corruption systems.

Some may see that political donations are an exercise in free speech. ART emphatically rejects that notion.[76]

- Money is not speech;
- Money enhances speech;
- Enhanced speech for some drowns out the speech of those with less money.

Once the free speech argument has been parried, we can fully recognise that only a tiny number of corporations and other businesses make political donations and of those that do, a disproportionate number are beneficiaries of direct or indirect government approvals and contracts.

Political donations need to be regulated with: -

- disclosure in real time;
- limits on any single donor;
- retention of public funding for elections (this is actually cheaper as most of those who invest in politicians expect a high rate of return);
- bans on some donors such as foreign governments and corporations (as in US) and industries that have too much to gain from governmental decisions. There is a respectable case for banning corporate donations on the basis that they are either for corporate benefit (which makes them corrupt) or not (which makes them in breach of their duties to shareholders).[77] This argument does not technically apply to union donations but we would argue that there MUST be a level playing field and, if freed from the burden of funding political campaigns unions could concentrate on other needs of their members;
- broad coverage of entities to prevent avoidance through US style 'Super Pacs' and less spectacular Australian arrangements like the Greenfields Foundation;
- While charities should not be used to circumvent political donations' caps, those engaged in advocacy for the charitable purposes they were established to pursue should not have their charitable status threatened. The removal of charitable status should be subject to AAT merits review and judicial review. Any review should include, and possibly start with, the oldest charities engaging in politically relevant comment.

In -kind donations should also be considered: -

- Volunteering of time– from leafleting to *pro bono* legal work. This probably does not have to be changed

But what about provision of:

- office space;
- telephone banks (political call centres);
- seemingly endless column inches attacking one side of politics (this would be enormously expensive if a paid for advertisement which would not be as effective in swinging votes , Should these be treated as campaign donations with relevant expenses and forgone revenue denied tax deductibility? (See below.)

However, one of the key drivers of political donations is the absence of caps on campaign expenditure. Caps restricting campaign spending release the pressure to solicit donations, as in New South Wales as well as in many countries including New Zealand, Canada and the United Kingdom. Australian federal election spending should be capped at the per-voter equivalent of the NSW levels.

Recommendation 19

Money and Politics: Cash and in kind Political donations be regulated with: disclosure in real time; limits on any single donor, retention of public funding for elections, anti avoidance mechanisms, bans on some donors such as foreign governments and corporations (as in US) and industries that have too much to gain from governmental decisions.

The Media as an Accountability Mechanism

The media are a key accountability measure, not just at elections but between them as well. They are the '4th estate'.

They are needed to expose lies and corruption and both provide and contribute to public debate on the merits of the promises and performance of parties competing to be entrusted with the people's power. To enable them to fulfil that role, they have, and seek, 'Freedom of the Press' and its various concrete manifestations (e.g. abrogated privacy, limits to defamation and non-revelation of sources).

Media institutions capable of reaching large numbers of citizens have generally been capital intensive so there have been significant barriers to new entrants. Even if the cost of printing has dropped massively

and accessing the Internet is very cheap, regularly accessing large numbers of citizens is expensive and is regularly achieved only by those with large institutions and recognised 'mastheads'.

This gives media institutions a good deal of power. Like all power, it can be abused. They may play favourites in promoting some politicians over others or secure particular favours under the implied threat of the former. This is particularly dangerous where the favours sought lead to an increasing concentration of media ownership that increases the implied threat. Politicians have a joint but rarely concurrent shared interest in limiting such concentration. But the lure of support and the threat of its removal prevent them uniting. Where media is foreign owned there is a risk that coverage will reflect the interests of the country where the owner has chosen to live rather than Australia.[78]

In recent years, there has been an increasing concern that the lack of profitability of the press and other media has made it more difficult for media organisations to continue to fund investigative units. They are expensive in that many months of work may be required to produce one story or perhaps come to the conclusion that there is no story.

The option of government funding for journalism is seen by some as having the potential to give rise to conflicts of interest. In Australia, the reductions in funding to the ABC may reflect the Government's view that the ABC's investigative journalism is unwelcome. In Europe, several countries provide direct subsidies to newspapers apparently without raising concerns about press freedom.[79]

There are a number of ways these issues can be addressed: -

- Diverse ownership and editorial control, including multiple proprietors and encouragement of a diversity of views;
- 'Angel investors' who do not have an agenda but want to support quality news;
- Trust ownership (e.g. *The Guardian*);
- Supporting the ABC, financially and otherwise, as the quality standards-setter in Australian journalism;
- Adoption and enforcement of ABC style standards for all news media i.e. "the gathering and presentation by the Corporation of news and information is accurate and impartial according to the recognised standards of objective journalism";
- Professionalisation of journalists and editors with editorial charters to ensure their independence from the views of owners, effectively transforming 'freedom of the press' into 'freedom for journalists'. Under this scenario the protections for media organisations (e.g. 'shield laws', protection of sources and limitation on defamation) are increased, but only for those organisations in which boards, editors and journalists commit to professional standards

and independent enforcement. The rest of the media can continue to operate (as, effectively, entertainment) but without the existing protections;

- Professional firms of journalists – with journalists who have won a high profile working in existing media companies to start electronic journals (see Alan Kohler's various enterprises as a positive example);
- Financial support for investigative journalism. This idea is not new to Australia. For example, the Select Committee on the Future of Public Interest Journalism report (February 2018) recommended: 'that the Commonwealth develop and implement a framework for extending deductible gift recipient (DGR) status to not-for-profit news media organisations in Australia that adhere to appropriate standards of practice for public interest journalism'.
- Funding for those who use journalist's content: The 'rivers of gold' from classified advertising that once cross subsidized journalism have dried up. Larger 'Amazonian' rivers of gold have emerged that flow into the coffers of Google, Facebook and Amazon, part of which is based on the journalistic exertions of others. ART supports payments by those tech giants with the following additional requirements:
    - the recipient media organisations are not engaged in tax minimisation (which should not be an issue if they are so cash strapped)
    - the funding goes to fund professional journalism
    - the arrangements are legislated rather than negotiated between the parties. The idea that oligopolists in two related fields should be encouraged to sit down and bargain with each other to their mutual advantage is incredible. As Adam Smith put it: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."
    - These arrangements are not an alternative for requiring that the tech giants pay tax on their Australian revenue.

It should be noted that shield laws would only apply to the professional journalists. Those protections would only be extended to platforms and media companies engaged in entertainment where they were either paying their own journalists or buying the protected content from the journalists (and agree to be bound to follow Press Council requirements for retractions etc).

Recommendation 20

The Media as an Accountability Mechanism: To ensure that the media play their roles in holding governments to account, professional journalism should be supported and concentration of media ownership should be reduced by diverse ownership, 'Angel investors' and charities which do not have an agenda but want to support quality news, Trust ownership (e.g. The Guardian); supporting the ABC, financially and otherwise, as the quality standards-setter in Australian journalism; adoption and enforcement of ABC style standards for all news media. Professionalisation of journalists and editors with editorial charters to ensure their independence from the views of owners is essential.

WHAT SHOULD WE DO?

Deploying the insights of many disciplines

The litany of problems identified may lead some to despair but there is no shortage of proposed solutions. Unfortunately, too many are based on the perspective of single disciplines, each of which has a different view of the nature of institutions, their problems and solutions. When lawyers look at institutions, they see formal rules (either constitutions or networks of contracts). They see problems arising from poorly drafted rules and the answer lying 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 or applied to those at the coalface and they see the answer lying in properly doing so. Economists see institutions in terms of incentives and disincentives. Problems arise from perverse incentives and the answers lie in aligning incentives with the behaviour required. Political scientists see institutions in terms of power and institutional problems arise from those who exercise it and or how they exercise it.[80]

All of these have important but limited insights into the nature, problems and solutions for institutions. No single discipline can solve institutional problems alone, but in combining their insights they go a long way towards developing necessary solutions. The suggestions ART makes in this Policy Paper draw on all of these 'governance disciplines'. They start with clarity of values including values about means (the rule of law, public trust and accountability) and the ends for which politicians promise to deliver if entrusted with the people's power. 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: -

- clear what is 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 (through record keeping and auditing/investigatory institutions) those who choose to do the wrong thing.

Integrity Systems and an Enduring Governance Reform Commission

The problems outlined above cannot be solved by the input of a single discipline, nor can they be solved within a single institution. A strong integrity commission (see above) based on the Hong Kong, NSW and

Queensland models is needed. However, an integrity commission must be part of an integrity system in which other, complementary, institutions operate to suppress corruption and to enhance integrity. This combination of mechanisms and public institutions and agencies (including courts, parliament, police, prosecutors), watchdog agencies (ombudsman, auditor general), NGOs, laws, norms and incentive mechanisms is primarily directed at pursuing the positive goal of good governance rather than the negative goal of limiting corruption. As indicated above, this combination has been called an 'ethics regime', an 'ethics infrastructure', a 'National Integrity System' and an 'Integrity and Accountability System'. The reforms suggested in this Policy Paper will go a long way to addressing the inadequacies in Australia's national integrity system. As in Queensland's Fitzgerald reforms, the first new institution should be a world-class integrity commission. The other reforms we have suggested could be implemented quickly.

Governance Reform Commission

However, in the medium term, ART strongly recommends establishing an enduring national Governance Reform Commission following the model of Queensland's 'Electoral and Administrative Reform Commission.' EARC was tasked with reviewing every aspect of governance in Queensland and making recommendations to Parliament (recommendations that were generally very hard to ignore) and to develop an expertise in such reforms and a strong understanding of the need for new and reformed institutions to understand the other's roles and the ways in which they could be mutually supportive.

Recommendation 21

Governance Reform Commission: An enduring national Governance Reform Commission (following the model of the Queensland 'Electoral and Administrative Reform Commission') would review all aspects of governance and make recommendations to Parliament (which would be very hard to ignore) and develop an expertise in such reforms and a strong understanding of the need for new and reformed institutions to understand each other's roles and the ways they could be mutually supportive.

Culture

Some see institutional nature, problems and solutions in terms of culture. It can be useful to recognise and compare different kinds of culture (ethics, compliance, risk, professional, service, sales, innovation and toxic cultures) and the mix of such cultures in institutions. All should certainly strive for an ethical or standards-based culture 81 and avoid a 'sales' culture and refuse to tolerate toxic cultures. However,

'culture' is a particularly ambiguous term. Raymond Williams sees it as one of the two or three most complicated terms in the English language. Hayne referred to it as "wrestling with a column of smoke". Culture 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' or lack thereof, can be an excuse for not achieving them. Culture can become an amorphous 'catch-all' concept 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. For example, if employees continue to defy a particular rule, despite codified prohibitions, substantial penalties and tone from top executives and immediate supervisors, then it can be tempting to blame 'culture' as the 'something else' causing the misconduct. Something in the black box has gone wrong and the imagined black box makes it appear harder to see the breakdown that has caused it to go wrong. 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 is to change behaviour. The way to change behaviour is through changes to ethical standard setting, legal regulation, economic incentives, and institutional design. Civics education in schools and ethics education at all levels is also critically important in populating our institutions with staff who understand and value those institutions and want do deploy public power for the purposes it was created. But idealistic young graduates rarely change institutions by themselves. This brings us back to the concrete steps included in this Policy Paper. These concrete steps can be introduced quickly and can be effective. We need look no further than Queensland's five-year journey from an ethical laughing stock to global exemplar. For those who say that the Commonwealth is not nearly as bad as Queensland was, it should presumably be much quicker – one year, two years, or maybe as long as a 3 year parliamentary term. But why wait? For those who might think 'Please God, make me good, but not just yet'[82] electors are entitled to say 'make yourself good now or resign immediately! If you do not, you deserve the wrath of God if you believe in Him but the wrath of the Electors in any case.' It is our power you exercise not yours.

Ethical Leadership

When institutions falter and fail us, when cultures turn toxic, we naturally blame leaders and demand new ones. That is what accountability is all about. But the change of leaders will not automatically fix institutional problems. If a barrel is full of rotten apples, replacing the apples at the top with fresh ones will not stop the rot of the apples below; it will not fix the barrel. The state of the barrel overall rests with the apples below or with our analogy, may well be the result of past leaders' unethical leadership.

- Ethical leaders are needed – as individuals and as institutional reformers. The two are closely related.[83]
- Individual Ethics involves asking hard questions about your values, giving honest and public answers and living by them. If you do, you have integrity. If you don't the first person you cheat is yourself because you are not the person you have claimed yourself to be.

As it is for individuals, so it is for Institutions: -

- institutional ethics involves asking hard questions about the values the institution stands for; giving honest and public answers and the institution living up to them. If so, can we say that the institution has integrity? (If not, the institution is … insert your own words).

Of course the processes for asking for and answering values are different – with institutions having to pose questions and involve their members in debate and discussion. Living by individual values involves a number of personal qualities such as determination, sensitivity, courage, and strategic thought from an individual. For an institution it needs, as we have seen a combination of ethical standard setting, 'political' structures, economic incentives, and general institutional design.

Any ethical leader should be an exemplar of individual ethics and a leader in the process of identifying and embedding values in an institution.

It is important to recognize that this kind of leadership is not confined to those at the top. In many institutions, the most respected ethical leaders are those who have worked in that institution for many years. These are the long term MPs in Parliament and the dedicated public servants who value the institutions where they work and who should be valued by their leaders. It is also important to recognize the difference between transformational leaders who build and rescue institutions and those who develop those institutions by improving the values delivered by their institutions.

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. It 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.

NEXT STEPS

This is a dynamic text, that will be evolving and changing as our understanding and practice of the Rule of Law, Accountability and the Public Trust are shaped and reshaped by the multifaceted systems of which they are a part.

Because this is a dynamic text, this means it will be revised and updated from time to time. We invite comments and contributions from **Accountability Round Table** members and others who share its objectives:

> *The Accountability Round Table is dedicated to improving standards of accountability, transparency, ethical behaviour and democratic practice in Commonwealth and State parliaments and governments across Australia.*

Please send your comments and contributions to: Charles Sampford <c.sampford@griffith.edu.au>

ENDNOTES

[1] Australia Talks (2021) Available from https://australiatalks.abc.net.au/

[2] Geoffrey Watson QC (https://thenewdaily.com.au/news/politics/australian-politics/2021/03/06/christian-porter-rule-of-law/), Dr Lisa Burton Crawford (**https://auspublaw.org/2021/03/would-a-non-judicial-inquiry)** and Justin Gleeson (https://www.abc.net.au/news/2021-03-09/christian-porter-historical-rape-allegation-gleeson/13229880). Even his defamation lawyer who pointed out that the presumption of innocence does not mean someone is not guilty

[3] First in 2000-2006 KCELJAG and TI, led by Professor Sampford (see Chaos or Coherence? Strengths, Opportunities and Challenges for Australia's Integrity Systems, Griffith University and Transparency International Australia, 2005) and a second in 2015-19 led by Professor A.J. Brown et al Australia's National Integrity System: The Blueprint for Action (Griffith University and Transparency International Australia, 2020).

[4] https://australiatalks.abc.net.au/

[5] Sampford, Charles, 'From Deep North to International Governance Exemplar: Fitzgerald's Impact on the International Anti-Corruption Movement' (2009) 18 *Griffith L. Rev.* 559-575.

[6] Ideals that are similar ('or congruent') to the Rule of Law are found in almost all cultures. The Rule of Law (and hence the English language version) emerged in the 17th century in opposition to absolutist tendencies in the Scottish Kings (it is a Moot point if they would have stood up to another Tudor like Elizabeth 1, let alone Henry VIII. The Rule of Law and related 'Rechsstaadt' ideals were at the centre of the enlightenment, though so much more effective when supported by other enlightenment governance values.

[7] Indeed, the ethics of such officials were central to the development of he Rule of Law in the UK. Citation

[8] The term appears to have first been used by the English republican writer James Harrington, in his tracts *The Prerogative of Popular Government* (1657) and *The Commonwealth of Oceana* (1656), in slightly different terms: "an empire of laws and not of men". The revised version is widely used: for example, Toohey (1993). James ancestor (Sir John Harrington) coined the chilling ditty:

'Treason never prospers: What's the Reason?
For when treason prospers, none dare call it Treason'

[9] Thomas Fuller '*Be ye* never *so* high, the *law is above you*' is another rhetorical flourish in the same vein

[10] See Sampford, Charles (2006) *Retrospectivity and the Rule of the Law*. Oxford University Press, United Kingdom, Chapter 7.

[11] Even if we were ruled by algorithms, they would have to be encoded by human beings

[12] Raz, Joseph. 1979. "The Rule of Law and its Virtue." In *The Authority of Law: Essays on Law and Morality.* Oxford University Press. Bingham, L. (2007). *The Rule of Law*. The Cambridge Law Journal, 66(1), 67-85.
See also Hon Chief Justice Bathurst AC's Challenges to the Rule of Law in Modern Society, April 2021

(https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2021%20Speeches/Bathurst_20210406.pdf,

[13] Like most theorists since Lon Fuller they recognise that sometimes retrospective legislation is justified. See Sampford, Charles (2006) *Retrospectivity and the Rule of the Law*. Oxford University Press, United Kingdom.

[14] Natural Justice is the traditional term. The concept of 'procedural fairness' has been developed by the Australian High Court in recognizing that fair procedures may vary depending on context.

[15] In countries that are not democracies, the power may be that of the monarch who entrusts officials to exercise delegated power for his benefit. This would be an unattractive form of the Rule of Law. If the power belongs to the officials, there is really no Rule of Law.

[16] Bingham, L. (2007). *The Rule of Law*. The Cambridge Law Journal, 66(1), 67-85, 78.

[17] It is called a 'nullity'.

[18] Bingham, L. (2007). *The Rule of Law*. The Cambridge Law Journal, 66(1), 67-85, 69.

[19] Bingham provides a standard list: open courts, independent courts, adequate opportunity to be heard, a person potentially subject to any liability or penalty should be adequately informed of what is said against him; that the accuser should make adequate disclosure of material helpful to the other party or damaging to itself; that where the interests of a party cannot be adequately protected without the benefit of professional help which the party cannot afford, public assistance should so far as practicable be afforded; that a party accused should have an adequate opportunity to prepare his answer to what is said against him; and that the innocence of a defendant charged with criminal conduct should be presumed until guilt is proved.

[20] UN General Assembly, *2005 World Summit Outcome: resolution / adopted by the General Assembly*, 24 October 2005, A/RES/60/1.

[21] *Security Treaty between Australia, New Zealand and the United States of America* [ANZUS], signed 1 September 1951 (entry into force generally: 29 April 1952) ATS 1952 2.

[22] Sampford seems to have been the first but this application of Rawls' distinction between two kinds of theory of justice has since occurred to some other theorists quite independently. See Sampford, C *Globalising the Rule of Law* paper at Griffith University Symposium (19 August 2000), published in Sampford, C 'Reconceiving the Rule of Law for a Globalizing World in S Zifcak (ed), *Globalisation and the Rule of Law* (Routledge 2005), 9-31.

[23] Sampford, C 'Institutionalising public sector ethics' in Noel Preston (ed), *Ethics for the public sector: education and training* (Federation Press, 1994) 14-34.

[24] OECD *Ethics in the Public Sector: Current Issues and Practices*, (OECD 1996).

[25] Transparency Internationals preferred term. Pope, J, *TI Source Book 2000* (Transparency International, 2000). Pope, TI's first CEO, worked with Sampford to develop the methodology for national integrity system assessments

[26] see https://cabinet.qld.gov.au/documents/2009/Nov/Integrity%20and%20Accountability%20Reforms/Attachments/response-to-integrity-accountability.pdf Prof Sampford was a member of the Premiers "Integrity Round Table that drew this up.

[27] We use the term "Commonwealth integrity commission." ICAC is a widely used recognized term – though such bodies appear under various names – Criminal Justice Commission, Crime and Misconduct Commission, Crime and Corruption Commission, Independent Broad Based Anti-Corruption Commission and, in many Asian jurisdictions 'Ombudsman'. ART has no problem with the proposed name (Commonwealth Integrity Commission): we want it to have the powers and functions of the most advanced ICACs and explicitly eschew the kind of provisions that the Newman government introduced and were soundly rejected by ART and other experts.

[28] "If I stand down from my position as Attorney-General because of an allegation about something that simply did not happen, then any person in Australia can lose their career, their job, their life's work, based on nothing more than an accusation that appears in print. If that happens, anyone in public life is able to be removed simply by the printing of an allegation". See 'Read the full press conference transcript, Christian Porter denies historical rape allegation' *ABC News* (3 March 2021) https://www.abc.net.au/news/2021-03-03/christian-porter-press-conference-transcript/13212054

[29] This is a common error among the legal laity as most try to avoid breaching the criminal law and are faced with media the report and dramatize criminal law.

[30] In many developing countries, political corruption takes the form of self-enrichment and TI's founding chair, Dr Peter Eigen was motivated by his experiences with the World Bank in Africa. However, corruption in the US and Japan largely funds electioneering. Peter was initially wary of making the obvious extension for fear of offending Americans. He accepted the point.

[31] Montesquieu, *The Spirit of the Laws* (New York: Cambridge University Press, 1748/1989).

[32] This varies from jurisdiction to jurisdiction with Federal courts having more control over their administration

[33] The Senate Committee for the Scrutiny of Bills.

[34] Parliamentary Joint Committee on Human Rights.

[35] This reflects the fact that, if the content of the regulation had been included in the authorising Act, it would have had to pass both Houses of Parliament before it became law.

[36] In the Commonwealth, by the Senate Standing Committee for the Scrutiny of Delegated Legislation

[37] Senate Standing Committee for Scrutiny of Delegated Legislation. 'Final Report: Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight'. Parliamentary Report. Canberra ACT: Australian Senate, Parliament House, 16 March 2021. Australia. https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Final_report

[38] *United Nations Convention against Corruption* Adopted by the UN General Assembly 31 October 2003, by resolution 58/4 (entered into force 14 December 2005) art 36.

[39] UN General Assembly, *Rome Statute of the International Criminal Court*, 17 July 1998.

[40] See article by Michael Pascoe on Josh Frydenberg's $3.8 billion in the 2021 budget. https://thenewdaily.com.au/finance/2021/07/27/michael-pascoe-election-budget/

[41] As emphasized earlier, there are no provisions of natural justice in the termination of a minister's commission. A minister may well be required/permitted to make a statement by parliament. But the PM may decide to terminate his commission. As long as PM has the confidence of parliament, ministers can be dismissed by the PM. If the PM does not have the confidence of parliament, all the PMs other ministers are 'liable to retire on political grounds'. There is no presumption of innocence but the presumption of convenience.

[42] Sampford, Charles and Margaret Palmer, 'The Constitutional Power to Make War: Domestic Legal Issues Raised by Australia's Action in Iraq' (2009) 18(2) Griffith law review 350-384.

[43] This could be provided by the Solicitor General or a panel of former Chief Justices.

[44] Note that the Australian government avoided accountability in the International Court of Justice by limiting its acceptance of compulsory jurisdiction to those countries which had accepted such jurisdiction for at least a year before they sued us. This change occurred almost exactly 12 months before we joined in the attack on Iraq.

[45] Sampford, Charles and Margaret Palmer, 'The Constitutional Power to Make War: Domestic Legal Issues Raised by Australia's Action in Iraq' (2009) 18(2) *Griffith law review* 350-384; Sampford, Charles, 'A better Westminster way to war? The pro-ANZUS case for an inquiry into Iraq and Australian war powers' (2012)(10) *Viewpoint* 30-34.

[46] More than a century of rulings in Parliaments around Australia are based on a Speaker's Ruling that "the Minister is not obliged to answer any question", supplemented by later rulings that "the Minister may answer the question in any way that he (or she) sees fit" have opened the way for the present abuse of Question Time. Coghill & Hunt (1998) "REFORMING QUESTION TIME" *Legislative Studies,* Vol. 12, No. 2, Autumn 1998, pp. 36-51

[47] Standing Committee on Procedure 2021 *A window on the House: practices and procedures relating to Question Time*

[48] Accountability Round Table 2021 submission (39) to the Inquiry into the practices and procedures relating to question time, Standing Committee on Procedure.

[49] See *Australian Constitution* s49 and *Egan v Chadwick* (1999) 46 NSWLR 563.

[50] Subsection 46(1) of the Public Governance, Performance and Accountability Act 2013 (PGPA Act)

[51] Sampford, Charles "From From Deep North to Global Governance Exemplar: Fitzgerald's Impact on the International Anti-corruption Movement" Griffith Law Review 2009

[52] Parliament of Victorian 2017. Research Paper. Available from https://www.parliament.vic.gov.au/publications/research-papers/download/36-research-papers/13807-independence-of-parliament

[53] "**The Path of the Law**", 10 *Harvard Law Review* 457 (1897)

[54] This would build on *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 High Court of Australia

[55] See Solomon, D, S Webbe and D McGann, 'The Right to Information: Reviewing Queensland's Freedom of Information Act ', FOI Independent Review Panel, (June 2008).

[56] See Sampford, Charles, 'Get New Lawyers!' (2003) 6(1) Legal Ethics 85-105.

[57] Open Contracting Data Standard https://www.open-contracting.org/

[58] 5 procurement strategies for navigating the COVID-19 crisis from around the world. https://www.open-contracting.org/2020/04/08/5-procurement-strategies-for-navigating-the-covid-19-crisis-from-around-the-world/

[59] See Zifcak, S. When is a Cabinet not the Cabinet? When the Prime Minister says that it is Pearls and Irritations, 3.9.2021

[60] Waterford, J. *Soft cops are soft-soaping us* (Canberra Times 23.2.2019).

[61] *Australian constitution s72.*

[62] In some states, courts are administered by the state department of Justice/Attorney General.

[63] Hon Daryl Williams QC had developed a model for consultation and in 1998 proposed a highly regarded judge for appointment to a High Court vacancy. However, Hon Tim Fischer demanded a 'capital-C' conservative and Hon Justice Ian Callinan was appointed

[64] Even if both parties want to have one of their own in that position, they cannot achieve it and are forced to seek someone that both parties trust.

[65] Department of the Prime Minister and Cabinet, *Statement of Ministerial Standards* (30 August 2018).

[66] *Barratt v Howard* [1999] FCA 1132.

[67] The list of public officials who can be given such advice is very broad in Queensland – down to part time board members of public entities. There is no reason to limit it and there may be others to be considered (one example that is currently relevant is Royal Commissioners facing claims of potential or perceived conflict of interest.

[68] To avoid confusion with the Commonwealth Integrity Commission, we do not recommend the use of the term 'Integrity Commissioner' for this office

[69] Lewis, Colleen, 'Compulsory Professional Development for Members of Parliament' in Colleen Lewis and Ken Coghill (eds), Parliamentarians' Professional Development: The Need for Reform (Springer International Publishing, 2016) 101-119.

[70] The UK House of Commons experimented with a voluntary two-hour online session aimed to raise awareness of unconscious bias (2020).

[71] Sampford, Charles, 'Prior Advice is Better than Subsequent Investigation' in Jenny Fleming (ed), *Motivating Ministers to Morality* (Ashgate, 2002).

[72] The Commonwealth Parliamentary Association recommends the appointment of an ethics adviser to provide confidential advice. See Coghill, K., Neesham, C., & Kinyondo, A. (2015). Recommended Benchmarks for Codes of Conduct Applying to Members of Parliament. In CPA Secretariat (Ed.). Retrieved from https://www.agora-parl.org/sites/default/files/agora-documents/Codes%20of%20Conduct%20for%20Parliamentarians%202016.pdf

[73] Crabb, A, 'Australia Talks reveals we have very little faith our politicians will do the right thing') https://www.abc.net.au/news/2021-06-16/annabel-crabb-analysis-australia-talks-polticians-accountability/100214236

[74] Recommended Benchmarks for Codes of Conduct Applying to Members of Parliament.

[75] Accountability Round Table (2021) Rorts Register. Available from https://www.accountabilityrt.org/rorts-register/

[76] Colleen Lewis (2016) When political self-interest decides donations rules, what chance reform in the public interest? Available from https://www.accountabilityrt.org/2165-2/

[77] While we do not adhere to this strong view and consider that boards are entitled, even obligated, to take into account principles of corporate social responsibility there is a concern.

[78] Alastair Campbell's memoire reported that Rupert Murdoch phoned then UK PM Tony Blair and told him that, if he went to war he would have the full backing of his newspapers. Going to war is the most serious responsibility of any government, going to war illegally (which the vast majority of international lawyers say it was) is in flagrant breach of the UN Charter. The Australian refused to publish a letter from 43 experts in public international law arguing, as most international lawyers did, that the proposed war was illegal. On the day the war began, the Australian did have a piece from one of them (Prof Gillian Triggs) but brandished next to it a letter in support of the war signed by 21 lawyers whom the headline misleadingly referred to as international lawyers but of whom only 8 had ever practiced or taught public international law (the main claim to fame of one of them was in tax minimisation schemes).

[79] Tom Greenwell 2017 "Journalism is in peril. Can government help?" 29/6/2017 Inside Story)

[80] Sampford 2020 Submission to the Enquiry into Media Diversity by the Senate Standing Committees on Environment and Communications

[81] 'Ethical culture' refers to: *all the qualities and elements of the organisational culture that substantially bear on the organisation's ethical behaviour, risks, and outcomes—including the conduct of organisation members.* Ethical culture results "from the interplay among the formal (e.g., training efforts, codes of ethics and declared institutional purpose) and informal (e.g., peer behaviour, norms concerning ethics and beliefs about them) systems that potentially enhance the ethical behaviour among employees". See Pablo Ruiz-Palomino and Ricardo Martínez-Cañas, "Ethical Culture, Ethical Intent, and Organizational Citizenship Behavior: The Moderating and Mediating Role of Person-Organization Fit," *Journal of Business Ethics* 120 (2014): 96

[82] The modern version of St Augustine's request to defer chastity.

[83] Sampford Senate lecture, "Ethics and Politics", Canberra, November 13, 2009; published in "Parliament, Political Ethics and National Integrity Systems**,"** *Australian Journal of Professional and Applied Ethics* (2011).