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Incorporating the 2024 National Lecture on Administrative Law
by Emeritus Professor Rosalind Croucher AM

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Recent developments

*Anne Fisher**

Administrative Review Tribunal to commence in October

The Administrative Review Tribunal (ART) will commence operations on 14 October 2024 under the *Administrative Review Tribunal Act 2024* (Cth) (*ART Act*). This new federal review body will replace the Administrative Appeals Tribunal (AAT).

The ART's objective will be to provide administrative review that:

- is fair and just
- resolves applications in a timely manner, with as little formality and expense as possible
- is accessible and responsive to the diverse needs of parties
- improves the transparency and quality of government decision-making, and
- promotes public trust and confidence in the Tribunal.

The *ART Act*, the *Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Act 2024* and the *Administrative Review Tribunal (Consequential and Transitional Provisions No 2) Act 2024* promote these objectives in several ways, including:

- a transparent merit-based appointment process for Tribunal Members
- simpler and more consistent processes
- a focus on non-adversarial approaches to resolving applications
- a new guidance and appeals panel for identifying and escalating systemic issues
- giving the President a function of engaging with civil society on the performance of the ART's functions, to ensure that users' voices and interests are heard directly by the most senior leaders in the ART
- powers for the President to manage the performance, conduct and professional development of Members.

These Acts also implement several recommendations of the Royal Commission into the Robodebt Scheme, including the re-establishment of the Administrative Review Council, whose role it is to inquire into and advise on the federal administrative law system, administrative decision-making practices, and tribunal practice and procedure.

* Anne Fisher (nee Thomas) is the same author of this section as in past issues.

The reforms under these Acts are also aimed at reducing delays and backlogs in migration and refugee matters and enhancing the integrity of the migration system.

The Acts were informed by significant consultation, including guidance from an Expert Advisory Group led by former High Court Justice the Honourable Patrick Keane AC KC, and engagement over many months with AAT staff and members, AAT users, peak bodies, legal assistance providers, advocates and other experts.

Further information about the Acts and administrative review reform can be found on the Attorney-General's website at <https://www.ag.gov.au/legal-system/new-system-federal-administrative-review>.

All matters currently before the AAT will continue as usual and will automatically transition to the ART upon its commencement. People who have applied to the AAT for review of a decision do not need to submit a new application, and all AAT decisions that have already been finalised will not be considered again by the ART.

The Honourable Justice Emilios Kyrou AO is the inaugural President of the ART. Justice Kyrou was appointed President of the AAT on 9 June 2023 and will lead the transition to the ART, and for the remainder of his five-year term.

All ongoing and non-ongoing AAT staff will transition to the ART on its commencement on equivalent terms and conditions.

<https://ministers.ag.gov.au/media-centre/administrative-review-tribunal-commence-october-19-07-2024>

Secrecy offences: reform is needed

The Independent National Security Legislation Monitor (INSLM), Jake Blight, has completed an independent review of key secrecy offences in the *Criminal Code Act 1995* (Cth) — laws that make it a crime to deal with or disclose certain government information. These secrecy offences apply to a broad range of government information, including information relating to national security, law enforcement and international relations.

The report makes 15 recommendations and highlights a number of issues, including significant uncertainty, conflict with rule of law principles, and problems with the proportionality of some offences. Key recommendations include:

- removing reliance on "security classification" alone as the basis for an offence
- narrowing offences applicable to security and intelligence agency information to focus on covert intelligence activities
- repealing some of the offences that currently apply to people who do not work for the government, including journalists.

The review received many submissions, including from media organisations concerned about the chilling effect of secrecy laws. One key issue was with an offence that currently

makes it a crime for individuals, including lawyers and journalists, to "deal with" intentionally — including to receive — certain information, even if they do not publish it. The INSLM concluded that this offence should be repealed as it is not necessary or proportionate.

The review focused on the offences in Part 5.6 of the *Criminal Code Act 1995* (Cth), some of which can attract a penalty of up to 10 years' imprisonment. There have been no prosecutions under these offence provisions since they were enacted in 2018.

The secrecy offences report was tabled in Parliament on 27 June 2024. The full report is available on the INSLM website at <https://www.inslm.gov.au/reviews/secrecy-review>.

<https://www.inslm.gov.au/news-and-media/media-release-secrecy-offences-reform-needed>

Reappointments and new appointments to the Administrative Appeals Tribunal

Reappointments

The Australian Government has made 72 reappointments to the AAT, including two non-judicial Deputy Presidents, 14 Senior Members and 56 Members.

The 72 appointees are current Members of the AAT whose existing appointments expired on 30 June 2024. Each appointee will transition to the ART upon its commencement in October 2024. These reappointments ensure the AAT maintains capacity to hear matters and avoid unnecessary delays for applicants until the new ART commences.

The list of reappointed Members is available at <https://ministers.ag.gov.au/media-centre/reappointments-administrative-appeals-tribunal-21-06-2024>.

We congratulate each of these Members on their reappointments to the Tribunal.

New appointments

On 29 July 2024, the Government also announced 18 new appointments to the AAT. These appointments include 4 Senior Members and 14 Members.

The 18 appointees will initially commence their terms at the AAT and transition to the ART when it commences on 14 October 2024.

New appointees are:

Senior Members

- Mrs Alison Clues
- Mr Glen Cranwell
- Mr Geoffrey McCarthy
- Ms Kim Rosser

Members

- Ms Fiona Brady
- Ms Elim Chan
- Ms Clair Duffy
- Ms Sally Gooch
- Mr Michael Judd
- Ms Anita King
- Ms Jennifer Lock
- Dr Jennifer Maclean
- Ms Louise McDonald
- Ms Sharon Sangha
- Ms Olympia Sarrinikolaou
- Mr Andrew Shelley
- Mr David Stevens
- Ms Mersina Stratos

We congratulate each of these Members on their appointments to the Tribunal.

<https://ministers.ag.gov.au/media-centre/appointments-administrative-appeals-tribunal-29-07-2024>

Appointments to the Federal Court of Australia and the Federal Circuit and Family Court of Australia (Divisions 1 and 2)

The Australian Government has announced the appointments of Mark Anderson, Dr Juliet Behrens and Judge Elizabeth Boyle as Judges of the Federal Circuit and Family Court of Australia (Division 1). Mr Anderson has been appointed to the Parramatta Registry, and Dr Behrens and Judge Boyle have been appointed to the Sydney Registry of the Federal Circuit and Family Court of Australia (Division 1). They commenced on 5 August 2024.

The Government also has announced the appointments of Jane Needham SC and Stephen McDonald SC as Judges of the Federal Court of Australia, and Tuskeen Jacobs, Simone

Bingham and Anna Bertine as Judges of the Federal Circuit and Family Court of Australia (Division 2). Ms Needham has been appointed to the New South Wales Registry and Mr McDonald has been appointed to the South Australian Registry of the Federal Court of Australia, and commenced on 5 July 2024 and 8 July 2024 respectively.

Ms Bertone and Ms Jacobs have been appointed to the Brisbane Registry of the Federal Circuit and Family Court of Australia (Division 2) and commenced on 3 June and 8 July 2024, respectively. Ms Bingham has been appointed to the Melbourne Registry of the Federal Circuit and Family Court of Australia (Division 2) and commenced on 3 June 2024.

We congratulate Mr Anderson, Dr Behrens, Judge Boyle, Ms Needham, Mr McDonald, Ms Jacobs, Ms Bingham and Ms Bertone on their appointments.

<https://ministers.ag.gov.au/media-centre/appointments-federal-circuit-and-family-court-australia-division-2-24-05-2024>

<https://ministers.ag.gov.au/media-centre/appointments-federal-court-australia-and-federal-circuit-and-family-court-australia-division-2-21-06-2024>

<https://ministers.ag.gov.au/media-centre/appointments-federal-circuit-and-family-court-australia-division-1-02-08-2024>

National Anti-Corruption Commission decision not to pursue Robodebt Royal Commission referrals — reasons and Inspector's inquiry

On 6 July 2023 the National Anti-Corruption Commission (NACC) received referrals concerning six public officials from the Royal Commission into the Robodebt Scheme (Robodebt Royal Commission) pursuant to s 6P(2B) of the *Royal Commissions Act 1902* (Cth).

The NACC considered each referral and reviewed the extensive material provided by the Robodebt Royal Commission, including its public final report and the confidential chapter.

The NACC was made aware that five of the six public officials were also the subject of referrals to the Australian Public Service Commission (APSC).

The conduct of the six public officials in connection with the Robodebt Scheme has already been fully explored by the Robodebt Royal Commission and extensively discussed in its final report. After close consideration of the evidence that was available to the Royal Commission, the NACC has concluded that it is unlikely it would obtain significant new evidence.

In the absence of a real likelihood of a further investigation producing significant new evidence, the NACC has determined that it would be undesirable, for several reasons, to conduct multiple investigations into the same matter. These reasons include the risk of inconsistent outcomes and the oppression involved in subjecting individuals to repeated investigations.

In deciding whether to commence a corruption investigation, the NACC takes into account a range of factors. A significant consideration is whether a corruption investigation would add value in the public interest, which is particularly relevant where there are or have been other investigations into the same matter. No value is seen in duplicating work done or being done by others, in this case with the investigatory powers of the Royal Commission and the remedial powers of the APSC.

Beyond considering whether the conduct in question amounted to corrupt conduct within the meaning of the *National Anti-Corruption Commission Act 2022* (Cth) and, if satisfied, making such a finding, the NACC cannot grant a remedy or impose a sanction (as the APSC can). Nor could the NACC make any recommendation that could not have been made by the Robodebt Royal Commission. An investigation by the NACC would not provide any individual remedy or redress for the recipients of government payments or their families who suffered due to the Robodebt Scheme.

On 6 June 2024 the NACC announced that it had therefore decided not to commence a corruption investigation as it would not add value in the public interest. However, the NACC considers that the outcomes of the Robodebt Royal Commission contain lessons of great importance for enhancing integrity in the Commonwealth public sector and the accountability of public officials.

On 13 June 2024 the Inspector of the NACC, Gail Furness, announced that she would inquire into the decision of the NACC not to commence a corruption investigation into the referrals concerning six public officials from the Royal Commission into the Robodebt Scheme. After receiving nearly 900 individual complaints about this decision of the NACC, Ms Furness said: “Many of those complaints allege corrupt conduct or maladministration by the NACC in making that decision.” Ms Furness intends to make her findings public in due course.

<https://www.nacc.gov.au/news-and-media/national-anti-corruption-commission-decides-not-pursue-robodebt-royal-commission-referrals-focus-ensuring-lessons-learnt>

<https://www.naccinspector.gov.au/media/inspector-national-anti-corruption-commission-inquire-decision-not-investigate-referrals-royal-commission-robodebt-scheme>

Information Publication Scheme review identifies areas to improve access to government information

The Office of the Australian Information Commissioner (OAIC) has released its third five-yearly review of the Information Publication Scheme (IPS). The review highlights how a concerted effort is required by government agencies to support proactive release of information.

The *Freedom of Information Act 1982* (Cth) (*FOI Act*) requires the OAIC and Australian Government agencies to review the operation of agencies’ IPS every five years. As part of the 2023 review, the OAIC required agencies to complete a detailed survey questionnaire. The survey fieldwork was conducted across September and October 2023. Out of 209 agencies invited to take part, a total of 196 agencies participated in the survey, representing a strong response rate of 94%.

The IPS requires agencies to publish a broad range of information on their website and authorises agencies to publish other information proactively. The IPS continues to be an important element in ensuring information held by Australian Government agencies is managed for public purposes and is treated as a national resource, in compliance with the objects of the *FOI Act*.

The results of the review, conducted by survey in late 2023, assist both the OAIC and agencies to identify where improvements can be made to support the proactive publication of government-held information and inform the OAIC's priorities as the regulator. Overall, the results provide persuasive evidence that there is much to be done to realise the objects of the *FOI Act*.

Freedom of Information Commissioner Elizabeth Tydd said it was pleasing to see some improvements from previous reviews in 2018 and 2012. "The results show there is strong commitment across the Australian Government to the IPS and a proactive disclosure culture. It is great to see more agencies (94%) have reviewed the operation of the IPS in their agency, up from 82% in 2018."

However, Ms Tydd also noted that the results confirm that the systems to promote and support proactive release of information require a concerted effort by agencies.

- Only 29% of agencies have adopted a strategy for increasing open access to information they hold, down from 35% in 2018.

- Only 73% of agencies publish information that they routinely release in response to freedom of information (FOI) requests, down from 79% in 2018 and 86% in 2012.

- Only 75% of agencies publish consultation arrangements for members of the public to comment on specific policy proposals for which the agency is responsible, slightly above 72% in 2018 but below 86% in 2012.

While some of the results show continued commitment, agencies still face challenges in proactively publishing information, particularly in the areas of IPS governance and administration, and establishing and maintaining IPS information registers.

There were also significant differences between larger and smaller agencies, with smaller agencies being more likely to report challenges in developing policies and frameworks to ensure compliance with IPS requirements.

The OAIC will use the survey findings to drive agency compliance and support better practice.

The Information Publication Scheme 2023 review report can be accessed on the OAIC website at <https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/proactive-publication-and-administrative-access/information-publication-scheme/information-publication-scheme-review-survey-2023>.

<https://www.oaic.gov.au/newsroom/information-publication-scheme-review-identifies-areas-to-improve-access-to-government-information>

Australian Law Reform Commission to inquire into future acts regime in the *Native Title Act 1993* (Cth)

On 4 June 2024 the Australian Government requested the Australian Law Reform Commission (ALRC) to undertake an inquiry into the future acts regime in the *Native Title Act 1993*. Under that regime, a "future act" is an act that either consists of the making, amendment or repeal of legislation which takes place on or after 1 July 1993, or is any other act which takes place on or after 1 January 1994, and affects native title to any extent.

The ALRC review will investigate any inequality, unfairness or weaknesses in the regime, which governs how development projects can occur on land subject to native title.

The review fulfils the Government's commitment in response to the Joint Standing Committee on Northern Australia's report on the destruction of Juukan Gorge, *A Way Forward* (October 2021).

As announced in the 2023–24 Budget, supplementary funding of $550,000 has been provided to enable the ALRC to engage closely with regional, remote and very remote stakeholders in the review. This funding forms part of the Government's $20.8 million 2024–25 Budget measure to improve the native title system.

On 2 August 2024 the Government announced the appointment of Tony McAvoy SC as a part-time Commissioner of the ALRC to co-lead the ALRC's inquiry into the future acts regime with the ALRC President, the Hon Justice Mordecai Bromberg.

Mr McAvoy has been appointed for a period of up to 18 months, or until the inquiry is complete, whichever occurs first.

Information about the inquiry, including the terms of reference, is available on the ALRC website at <https://www.alrc.gov.au/inquiry/review-of-the-future-acts-regime/>.

We congratulate Mr McAvoy on his appointment.

<https://ministers.ag.gov.au/media-centre/australian-law-reform-commission-inquire-future-acts-regime-native-title-act-1993-04-06-2024>

<https://ministers.ag.gov.au/media-centre/appointment-alrc-part-time-commissioner-future-acts-inquiry-02-08-2024>

The Australian Government establishes federal Anti-Slavery Commissioner

The Government has established Australia's first federal Anti-Slavery Commissioner.

The passage through Parliament of the Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023 on 28 May 2024 establishes an independent Commissioner to lead the fight against modern slavery.

The Anti-Slavery Commissioner will further strengthen the work undertaken across government, business and civil society to prevent and respond to modern slavery by supporting victims and survivors, raising community awareness, and helping businesses address the risk of modern slavery practices in their operations and supply chains. The Commissioner will also play a key role in helping to shape the implementation of future modern slavery reforms, including those arising from the statutory review of the *Modern Slavery Act 2018* (Cth).

The Government committed $8 million over four years in the 2023–24 Budget to support the Commissioner's establishment and operation. The Government will now seek to appoint the inaugural Australian Anti-Slavery Commissioner.

Further details about the Amending Act, which is yet to commence, can be found on the Australian Parliament House website at <https://www.legislation.gov.au/C2024A00042/asmade/text>.

<https://ministers.ag.gov.au/media-centre/albanese-government-establishes-anti-slavery-commissioner-28-05-2024>

Appointment of the President of the Australian Human Rights Commission

The Australian Government has announced the appointment of Mr Hugh de Kretser as the next President of the Australian Human Rights Commission (AHRC).

The AHRC promotes and protects human rights in Australia and plays a critical role in upholding the rights of all Australians to be treated with dignity and live their lives free from discrimination.

The President leads the AHRC's work and is responsible for managing its administrative affairs.

Mr de Kretser's five-year appointment commenced on 30 July 2024, following the conclusion of Emeritus Professor Rosalind Croucher AM's appointment on 29 July 2024.

Mr de Kretser is currently the Chief Executive Officer of the Yoorrook Justice Commission. Prior to this, he was Executive Director at the Human Rights Law Centre and Executive Officer at the Federation of Community Legal Centres (Victoria) Inc. He has served as a Commissioner of the Victorian Law Reform Commission and a Director of the Sentencing

Advisory Council. Mr de Kretser has occupied board positions for Flourish Australia, the International Network of Civil Liberties Organizations, the National Association of Community Legal Centres and the Human Rights Law Centre.

For information about the AHRC, including the work of the President, see <https://humanrights.gov.au/our-work>.

We congratulate Mr de Kretser on his appointment.

<https://ministers.ag.gov.au/media-centre/appointment-president-australian-human-rights-commission-24-05-2024>

Reappointment of Reece Kershaw APM as Australian Federal Police Commissioner

The Australian Government has announced the reappointment of Reece Kershaw APM as Commissioner of the Australian Federal Police (AFP) for a period of two years to October 2026.

Commissioner Kershaw has made an extraordinary contribution to the Australian community with a policing career spanning more than 30 years. His contribution to law enforcement in Australia reflects the highest standards of the AFP values of integrity, commitment, excellence, accountability, fairness, trust and respect.

As Australia's national policing agency enforcing Commonwealth law, the AFP's mission of "policing for a safer Australia" is important. The AFP's expertise and partnerships are instrumental in disrupting some of the most significant criminal activity Australia has seen in recent times, and play a pivotal role in fostering safety and security both within Australia and across the world. The AFP's relationships with regional partners are critical to the Government's broader efforts to safeguard Australians through contributing to the overall stability of the Indo-Pacific region.

Mr Ian McCartney has also been reappointed as Deputy Commissioner of the AFP for a period of two years.

These reappointments follow the recent appointment of two new AFP Deputy Commissioners — Krissy Barrett and Scott Lee.

We congratulate Commissioner Kershaw and Mr McCartney on their reappointments, and Ms Barrett and Mr Lee on their appointments.

<https://ministers.ag.gov.au/media-centre/reappointment-reece-kershaw-apm-australian-federal-police-commissioner-10-05-2024>

Appointment of the Australian Information Commissioner and head of the OAIC

The Australian Government has appointed Elizabeth Tydd as the Australian Information Commissioner and head of the OAIC, an independent Australian Government agency established under the *Australian Information Commissioner Act 2010* (Cth) as Australia's national privacy and information regulator.

As head of the OAIC, the Australian Information Commissioner is responsible for setting the strategic direction of the agency and for its performance and corporate functions.

Ms Tydd is the current Freedom of Information Commissioner at the OAIC. She brings a wealth of experience and is well-placed to lead the agency. Ms Tydd 's five-year appointment as the Australian Information Commissioner will commence on 16 August 2024, following the conclusion of Ms Angelene Falk's term on 15 August 2024.

We congratulate Ms Tydd on her appointment.

<https://ministers.ag.gov.au/media-centre/appointment-australian-information-commissioner-office-australian-information-commissioner-09-05-2024>

Progressing reforms to Australia's anti-money laundering and counter-terrorism financing laws

The federal Attorney-General's Department has finalised the second stage of consultation on proposed reforms to Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime.

The AML/CTF regime establishes a regulatory framework for combating money laundering, terrorism financing and other serious financial crimes. At its core, the AML/CTF regime is a partnership between the Australian Government and industry. Through the regulatory framework, businesses are asked to play a vital role in detecting and preventing criminals from misusing their sectors and products to launder money and fund terrorism.

The proposed reforms aim to ensure Australia's AML/CTF regime can more effectively deter, detect and disrupt money laundering and terrorism financing, and meet international standards set by the Financial Action Task Force, the international financial crime watch dog. The reforms are critical in supporting law enforcement partners in their fight against transnational, serious and organised crime, and protecting Australians.

The consultation papers released outline the detailed proposals for reform and are available on the Department's consultation hub: <https://consultations.ag.gov.au/crime/reforming-aml-ctf-financing-regime/>. These papers respond to feedback provided in the first stage of consultation, which included targeted consultations and stakeholder submissions.

The Attorney-General's Department also conducted roundtable discussions with affected sectors on sector-specific issues during this consultation stage.

Submissions closed on 13 June 2024.

The Government will invest $166.4 million to enable the Australian Transaction Reports and Analysis Centre (AUSTRAC) to implement the new regime and to support industries to meet their obligations. It will also allow AUSTRAC to deliver comprehensive education and guidance to support businesses, especially newly regulated entities.

<https://ministers.ag.gov.au/media-centre/progressing-reforms-australias-anti-money-laundering-and-counter-terrorism-financing-laws-02-05-2024>

<https://ministers.ag.gov.au/media-centre/boosting-australias-anti-money-laundering-and-counter-terrorism-financing-regime-06-05-2024>

***Crimes Act* annual report 2022–23**

On 22 March 2024 the federal Attorney-General tabled the Commonwealth Ombudsman's report summarising the Ombudsman's oversight of the following covert powers under the *Crimes Act 1914* (Cth):

- controlled operations in the period 1 July 2022 to 30 June 2023
- delayed notification search warrants between 1 January 2022 and 31 December 2022, and
- account takeover warrants between 1 July 2022 and 30 June 2023.

The Office of the Commonwealth Ombudsman made 11 suggestions and 10 better practice suggestions across these three regimes to the Australian Federal Police (AFP), the Australian Criminal Intelligence Commission (ACIC) and the Australian Commission for Law Enforcement Integrity (ACLEI). These agencies were responsive to all key findings and suggestions.

The report noted improvements in agencies' use of controlled operations. Controlled operations are covert (undercover) operations carried out to obtain evidence of a serious Commonwealth offence. They provide legal protection for authorised participants who engage in conduct that would otherwise be unlawful or lead to civil liability. The Ombudsman made more better practice suggestions for improvement regarding use of controlled operations in 2022–23 compared with the previous inspection year.

The report noted that the AFP (the only agency that can apply for a delayed notification search warrant) had not used this power during the reporting period, and the focus of inspections was instead on the AFP's preparedness to do so compliantly.

The report also covers the Ombudsman's first formal inspection of the AFP's use of account takeover warrants. An account takeover warrant allows law enforcement to take control of an online account — for example, social media accounts, online banking accounts and accounts associated with online forums — when investigating a serious offence. No major instances of noncompliance by the AFP in using these warrants was found, although the report notes

room for improvement in the AFP's keeping of records to document its compliance with legal requirements and processes in place to revoke warrants when they are no longer required. The ACIC had not yet used the account takeover warrant powers.

The full report is available from the Commonwealth Ombudsman's website at <https://www.ombudsman.gov.au/__data/assets/pdf_file/0024/302919/Combined-Crimes-Act-Report-PDF-2022-23.pdf>.

<https://www.ombudsman.gov.au/__data/assets/pdf_file/0016/302920/Media-Release-Crimes-Act-annual-report.pdf>

ALRC report on religious educational institutions and anti-discrimination laws

On 21 March 2024 the ALRC report on religious educational institutions and anti-discrimination laws was tabled in Parliament.

The report recommends legislative reforms to ensure the Australian Government's policy regarding anti-discrimination laws and religious educational institutions is given legal effect in accordance with Australia's international legal obligations.

The ALRC conducted over 130 consultations and received over 400 submissions and 40,000 survey responses in drafting the report. The implementation of the Government's policy in accordance with the ALRC's recommended reforms will:

- substantially narrow the circumstances in which discrimination by religious educational institutions against their students and staff is permissible at law
- maximise the enjoyment of human rights and appropriately manage the intersection of rights
- ensure any restriction of rights is justifiable under international law
- make federal law more consistent with state and territory laws and the law in comparable countries.

The Government will now consider the report.

The report can be accessed from the ALRC website at <https://www.alrc.gov.au/news/adl-final-report-tabled/>.

<https://ministers.ag.gov.au/media-centre/statement-tabling-australian-law-reform-commissions-report-religious-educational-institutions-and-anti-discrimination-laws-21-03-2024>

New era of industrial relations in New South Wales as Industrial Court begins work

On 1 July 2024 the Industrial Court of New South Wales commenced operations as a one-stop shop for industrial justice as well as work health and safety matters.

The Industrial Court and the Industrial Relations Commission will be independent umpires for industrial relations in New South Wales, with the power to force unions and government agencies to come together, mediate disputes and arbitrate final outcomes in pay disputes.

Established last year by the *Industrial Relations Amendment Act 2023* (NSW), the Industrial Court will act as a superior court of record, with equivalent status to the Supreme Court and the Land and Environment Court.

Three legal practitioners were formally appointed by the NSW Governor earlier this year:

- Ingmar Taylor SC, a nationally recognised expert in employment law and work health and safety, will be appointed President of the Industrial Relations Commission and a Judge of the Industrial Court.

- David Chin SC, a specialist in work health and safety, industrial, employment and discrimination law, will be the Commission's Vice-President and a Judge of the Industrial Court.

- Jane Paingakulam, who has practised primarily in criminal law and provided advice to government agencies on public sector issues, will be the Commission's Deputy President and a Judge of the Industrial Court.

The Industrial Court will hear all industrial relations matters relating to NSW state government and local government employees. Private sector employees will remain in the Commonwealth's jurisdiction under the Fair Work Commission.

The Industrial Court will hear matters relating to work health and safety in New South Wales and will again have jurisdiction over matters that were transferred to other courts when the Industrial Court was abolished in 2016.

The new court will be temporarily located in Bridge Street, Sydney, while the Commission's premises in Parramatta undergo refurbishment.

<https://dcj.nsw.gov.au/news-and-media/media-releases/2024/new-era-of-industrial-relations-in-nsw-as-industrial-court-begin.html>

Belinda Rigg SC appointed to Supreme Court of New South Wales

On 19 June 2024 Belinda Rigg SC was appointed a Judge of the Supreme Court of New South Wales.

Ms Rigg was appointed Senior Counsel in 2014 and for the past five years she has been the NSW Senior Public Defender.

She has appeared in and advised on hundreds of serious and high-profile criminal matters for people who have been granted legal aid, including appearing in the High Court of Australia in significant and complex matters.

Her case work has been a mix of first instance and appellate work, and for a considerable time mainly focused on large, complex homicide matters.

As Senior Public Defender, Ms Rigg led a team of 29 public defenders located around the state to ensure their work is best serving Legal Aid NSW and the Aboriginal Legal Service.

After being admitted as a lawyer in 1997, Ms Rigg became a barrister and joined Sir Owen Dixon Chambers. She practised there for six years before being appointed as a public defender in 2004.

Ms Rigg was sworn in on 24 July 2024.

We congratulate Ms Rigg on her appointment.

<https://dcj.nsw.gov.au/news-and-media/media-releases/2024/belinda-rigg-sc-appointed-to-nsw-supreme-court.html>

Recent decisions

Application of NZYQ

ASF17 v Commonwealth of Australia (2024) 98 ALJR 782; [2024] HCA 19

The applicant is a citizen of Iran who arrived in Australia as an unlawful non-citizen in 2013. Except for a short period during which he held a bridging visa, the applicant has been held in immigration detention since he arrived in Australia.

While in immigration detention, the applicant made an application for a Safe Haven Enterprise Visa (the visa) in 2015. The application was refused by a delegate of the Minister for Immigration and Border Protection in 2017. An application for judicial review of the delegate's decision was dismissed by the Federal Circuit Court of Australia in 2017. The Circuit Court's decision was upheld on appeal to the Federal Court of Australia in 2018. This engaged s 198(6) of the *Migration Act 1958* (Cth), which required the Department of Home Affairs to remove the applicant from Australia as soon as reasonably practicable.

To facilitate the applicant's removal from Australia, officers of the Department conducted regular interviews with the applicant from 2018. Consistently throughout those interviews, the applicant told officers he would not voluntarily return to Iran and refused to sign a request for removal or to engage with the Iranian authorities in planning for his removal. The applicant consistently told officers he would agree to be sent to any country other than Iran but did not suggest any third country to which he might be removed.

The refusal of the applicant to cooperate in facilitating his removal from Australia and his failure to identify any third country in which he might have a right of residency or long-term stay resulted in an impasse with the Department.

In 2023, following the pronouncement of orders in *NZYQ v Minister or Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005, the applicant applied to the Federal Court of Australia for a writ of habeas corpus on the basis that his continuing detention exceeded the constitutional limitation defined in those orders. In support of that application, the applicant claimed that his reasons for refusing to return to Iran included that he is bisexual and fears being harmed in Iran because of his bisexuality. This reason had not been claimed in his visa application in 2015.

The application for a writ of habeas corpus was dismissed. The applicant appealed the decision of the primary judge to the Full Court of the Federal Court of Australia. This appeal was removed to the High Court on the application of the Attorney-General under s 40 of the *Judiciary Act 1903* (Cth).

The question before the High Court was whether the primary judge was correct in finding that the continuing detention of the applicant did not exceed the constitutional limitation identified in *NZYQ*. The constitutional limitation was explained in that case as follows: "a Commonwealth statute which authorises executive detention must limit the duration of that detention to what is reasonably capable of being seen to be necessary to effectuate an identified statutory purpose which is reasonably capable of being achieved": *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 625 [374], quoted in *NZYQ* at [41]. The purpose in *ASF17* was the removal of an alien from Australia under ss 198(1) and 198(6) of the *Migration Act*. This requires there to be a country to which the alien might be removed, and the removal of the alien to that country must be permissible under the Act: *ASF17* at [35]. Moreover, unless the detention is justified at the time an application for a writ of habeas corpus is determined, the continuing detention of the alien must be characterised as "penal or punitive" and thus repugnant to Ch III of the *Constitution*: at [33].

The High Court dismissed the application with costs, agreeing with the decision of the primary judge.

In giving its reasons, the plurality (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ) noted that where an alien has made a valid application for a protection visa which has resulted in an extant "protection finding", the power and duty to remove the alien is affected by Australia's non-refoulement obligations under s 197C of the *Migration Act*. A protection finding may have arisen if the applicant had raised a claim to fear harm in Iran by reason of his sexual orientation in his original application for the visa. However, as the applicant had raised no fear of harm in Iran there was no extant protection finding made and, as an Iranian citizen, the applicant could potentially be removed to Iran.

The question of whether there was a real prospect of removal of the applicant from Australia to Iran becoming practicable in the reasonably foreseeable future would enable consideration of the administrative processes required, including those requiring the cooperation of the detainee and in which the detainee has the capacity to cooperate.

The plurality held, in conformity with the principle in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, that continuing detention for a non-punitive purpose occurring because of a voluntary decision of the detainee cannot be

characterised as penal or punitive: *ASF17* at [42]. The non-punitive statutory purpose remains for so long as removal could be achieved in the reasonably foreseeable future were the detainee to decide to cooperate in the undertaking of the administrative processes necessary to facilitate that removal.

As such, the plurality held that the applicant could be removed to Iran if he cooperated in the process of obtaining the requisite travel documents from the Iranian authorities. And although he has decided not to cooperate, he still has the capacity to change his mind. Accordingly, there is a real prospect of the applicant's removal from Australia to Iran becoming practicable in the reasonably foreseeable future, such that the constitutional limitation identified in *NZYQ* has not been exceeded, and as such the primary judge was correct.

Justice Edelman, in a separate judgment, while agreeing with the conclusion of the plurality, held that *NYZQ* did not set a precedent which established that one of the legitimate legislative purposes of ss 189 and 196 of the *Migration Act* becomes illegitimate, or will be refuted, because in the application of those provisions there is no real prospect that removal of the alien will be practicable in the reasonably foreseeable future. A Commonwealth law authorising or requiring executive detention will only have an illegitimate, punitive purpose if an inference can be drawn that the law concerns the purposes of punishment, such as retribution or deterrence. According to Edelman J, no such inference can be drawn concerning ss 189 and 196 in the context of the Act as a whole: *ASF17* at [124].

Justice Edelman did agree with the plurality that where the alien lacks capacity or has a protection finding, ss 189 and 196 must be disapplied. However, in this case, as the applicant is capable of providing the assistance required to remove him and he was found by a delegate of the Minister not to have a genuine and well-founded fear of persecution in Iran, these provisions applied, so Edelman J also dismissed the appeal.

Evidence of control for the issue of a writ of habeas corpus

Save the Children Australia v Minister for Home Affairs [2024] FCAFC 81

This case was an appeal from orders made by the Federal Court of Australia in *Save the Children Australia v Minister for Home Affairs* [2023] FCA 1343.

In Syria, there is a refugee camp called Al-Roj, where large numbers of women and children are held because of their actual or perceived association (voluntary or involuntary) with the Islamic State in Iraq and Syria (ISIS). In this camp are women and children with a connection to Australia, including some Australian citizens with children who are, or who are eligible to become, Australian citizens. The Autonomous Administration of North-East Syria (AANES) is a non-state actor that is the de facto governing authority over a region of north-eastern Syria which includes the Al-Roj camp. It was not contended in the proceedings that AANES did not have physical custody of the Australian women and children in the Al-Roj camp.

The appellant, Save the Children Australia, a registered charity, since 2019 has been communicating with the Australian Government, seeking the return to Australia of the Australian women and children in the Al-Roj camp. In October 2022 the Government repatriated four women and thirteen children from the camp.

Despite the appellant's continued efforts, there have been no further repatriations of women and children to Australia, although there was a formal request in May 2023. On 5 June 2023 the appellant filed proceedings in the Federal Court for, among other things, an order that a writ of habeas corpus issue for the Australian women and children. The primary judge, however, concluded that a writ of habeas corpus should not issue because the Australian women and children were not in the custody or control of the respondent, nor was there any arrangement or agreement between the Australian Government and AANES to release or repatriate the women and children, such that the Australian Government had power to effect their release.

The appeal raised five grounds concerning the primary judge's conclusions and reasoning on the habeas corpus application.

Grounds 1 and 2 contended that the primary judge's factual findings about whether the respondents in fact had control over the detention of the Australian women and children involved a factual error.

The applicant identified eight pieces of evidence which, it submitted, created the requisite doubt for a writ to issue. The Full Court accepted it was required to consider the eight pieces of evidence carefully, and to do so cumulatively. In doing so, the Court found, based on the evidence, that the Australian Government did intend to repatriate the Australian women and children and proposed the repatriation to be undertaken in stages (noting the successful repatriation on 28 October 2022). However, according to the Court, this plan to repatriate did not constitute an agreement or arrangement between the Australian Government and AANES. Neither did the fact that AANES was agreeable to repatriation of individuals from the camp amount to control of the Commonwealth over the Australian women and children, as contended by the applicant. Rather, the Court agreed with the Commonwealth's submission that were AANES to decide to move the Australian women and children to a different location, the Commonwealth was not proven to have a level of control over those people that would enable it to prevent, or interfere with, the move occurring. The evidence, considered both singularly and cumulatively, did not render the existence of an overarching arrangement seriously possible. As such the Court found no factual error in the primary judge's findings.

The remaining grounds were based on legal error, namely, the primary judge's approach to determining whether control existed by the Australian Government over the Australian women and children in Al-Roj, in deciding that the "pressure of the writ" to "test" the respondent's contentions about a lack of control did not apply to this case.

In considering these grounds, the Full Court held that the primary judge was correct in reaching the conclusion there was no basis on which to "test" the respondent's control. His reasons clearly disclosed he well understood the legal principles required to be applied and how they were said to apply to the evidence. It was open to him to find, based on the evidence before him, that there was no arrangement or agreement between the Australian Government and AANES relating to the repatriation or release of the Australian women and children capable of conferring control, and the Commonwealth did not otherwise have control over their detention. Moreover, because there was no doubt about the matter, there was no basis for the primary judge to use a writ in order to test whether the respondent's contention

of lack of custody or control was correct, as per the accepted principles in *Barnardo v Ford* [1982] AC 326, *R v Secretary of State for Home Affairs; Ex parte O'Brien* [1923] 2 KB 361 and *Rahmatullah v Secretary of State for Defence* [2013] 1 AC 614.

The Court dismissed the appeal.

The FOI Act and the deliberations and decisions of Cabinet

Warren v Chief Executive Officer, Services Australia [2024] FCAFC 73

The appeal concerned 10 documents to which the applicant, Mr Warren, seeks access. On 14 January 2017 the applicant made a request for the provision of documents pursuant to the *Freedom of Information Act 1982* (Cth) (*FOI Act*) relating to the Pay As You Go (PAYG) data matching initiative, as it was then described, which subsequently became known as Robodebt. The request was made to the Department of Human Services, which identified 13 documents in its possession within the scope of the request, but refused access in reliance on the Cabinet documents and investigative procedure exemptions under ss 34 and 37(2)(b) of the *FOI Act*.

The applicant initiated a review by the Australian Information Commissioner. On 11 November 2019 the Information Commissioner set aside the Department's decision for seven documents in issue and affirmed the decision in relation to three documents. On 29 November 2019 Services Australia (which had assumed responsibility for the functions of the Department), applied to the Administrative Appeals Tribunal (AAT) for review of the Commissioner's decision, maintaining the documents were exempt.

On 2 December 2022 the AAT affirmed the decision of the Information Commissioner in respect of four documents and set aside the decision in relation to seven documents, concluding that those documents were exempt from disclosure pursuant to one or more of ss 34(1)(d), 34(3) and 47C of the *FOI Act*.

The applicant appealed the decision of the AAT in relation to two fundamental issues. One, the applicant was denied procedural fairness by the AAT when the respondent successfully applied to reopen its case to tender supplementary evidence; and two, the AAT misconstrued the exemption under s 34(3) of the *FOI Act* for documents containing information that would reveal a Cabinet deliberation or decision unless the existence of the deliberation or decision has been officially disclosed. The documents going to the exemption under s 34(3) concerned new policy proposals (NPPs), draft NPPs and costing documents relating to NPPs.

In relation to the first issue, the applicant contended that the AAT's failure to give reasons for the decision to allow the respondent to reopen was an error of law because the AAT failed to give "sufficient reasons" for the decision as required by s 43(2) of the *FOI Act*.

The Court found that it is a decision made pursuant to s 43(1) which engages the obligation to give reasons. Section 43(1) requires the Tribunal to make a decision in writing which varies the decision under review, or sets it aside and substitutes another decision for it, or remits the matter for reconsideration. In this case, the decision to grant leave to reopen was not

one to affirm, vary or set aside the decision of the Information Commissioner. In other words, the Tribunal is required to include its findings on material questions of fact and a reference to the evidence or other material on which those findings were based, but is not required to set out reasons for the exercise of its discretion: *BVD 17 v Minister for Immigration and Border Protection* (2018) 261 FCR 35 at [48]. In addition, the AAT did provide oral reasons for granting leave to reopen, which is permitted under s 43(2). It is only a decision determining the review pursuant to s 43(1) that requires reasons to be in writing. Despite the Deputy President stating he would include reasons in his final reasons on the substantive matter, this cannot be taken as engaging the statutory obligation where it did not otherwise apply.

The applicant also contended in relation to this issue that the AAT's failure to evaluate several submissions of substance in writing and orally constituted jurisdictional error in relation to the decision to reopen the case.

On this point, McElwaine J considered the statement in *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 96 ALJR 497 at [25] that "the requisite level of engagement" varies "according to the length, clarity and degree of relevance of" the material: *Warren* at [95]. In this case, "the submissions and evidence for and against raised multiple questions of some complexity of fact and law which required resolution as the foundational material for the proper exercise of the discretion to grant leave": *Warren* at [97]. In these circumstances, McElwaine J found that the Tribunal was obliged to engage with and evaluate the submissions of the applicant in order to resolve the FOI application. The failure to do so deprived the applicant of the procedural fairness to which he was entitled. This amounted to jurisdictional error.

Justices Katzmann and Kennett took a different view on this point. While they held that McElwaine J was correct in that the procedural decision to permit the respondent to re-open its cases did not engage the duty to give reasons in s 43 of the FOI Act, it was not possible to infer from the AAT's reasons, as McElwaine J did, that any of the complex and detailed arguments presented by the parties was overlooked or not grappled with. This ground, in their view, was not made out.

The applicant also contended that the new evidence submitted by the respondent as part of the reopening of the case was evidence that materially altered the case advanced by the respondent. However, the applicant was not fairly notified so he could respond to the new case. The Court agreed the applicant suffered procedural fairness disadvantages as a result. The applicant was entitled to know the case he was required to meet, particularly when he was not privy to the confidential evidence.

The Court found that the denial of procedural fairness in this case was serious and was akin to the circumstances identified in the plurality's reasons in *Nathanson v Minister for Home Affairs* (2022) 276 CLR 80 at [33]. This ground was held to have been made out.

Regarding the second fundamental issue, the Court held that the AAT erred in the construction of s 34(3) of the *FOI Act*. The Court found that the provision is confined to information contained in a document which would reveal a deliberation or decision of Cabinet, and it is only to that extent the exemption applies. This requires focus on the content of the information contained in the document claimed to be exempt, that is, it is the information

which itself must reveal deliberations or decisions of the Cabinet. The exemption applies where the document discloses what Cabinet deliberated on or decided. The exemption does not apply where the information in the document concerns a topic deliberated on by Cabinet. This contextual analysis is consistent with the statutory object and legislative history of the provision, which demonstrates an intention to narrow the scope of the Cabinet exemption progressively over time.

As such, the Court applied the decision in *Secretary to the Department of Infrastructure v Asher* (2007) 19 VR 17, finding that the exemption is a limited one, such that the document must itself contain information which reveals a Cabinet deliberation or decision, but not necessarily quote the Cabinet deliberation or decision. What must not occur to engage the exemption is, as was done by the Tribunal, to look at other evidence revealing the deliberation or decision of Cabinet and then conclude the document in issue is itself exempt. The mere fact of subsequent deliberation or a decision taken by Cabinet is not sufficient to establish that the document in issue contains information revealing the deliberation or decision: *Warren* at [160].

As to the second part of the exemption under s 34(3), the Court found that, "unless the existence of the deliberation or decision has been officially disclosed", the AAT had made several errors in its construction. The Court held that the exemption operates on the existence of the deliberation or decision and does not require disclosure of the substance, or detail, of the deliberation or decision. An announcement that Cabinet has decided a matter is itself a disclosure of the existence of the decision. The substance of the deliberation or decision does not need to be disclosed, as was incorrectly concluded by the Tribunal.

This second ground was also found to have been made out.

The appeal was allowed, setting aside the decision of the AAT. The matter was remitted to the AAT for rehearing and determination according to law.

Judicial review of integrity bodies

*Jeremy Kirk**

The topic of this conference — difficult conversations about values and administrative law — readily calls to mind the role of integrity bodies, the remit of which involves both values and law. By "integrity bodies" I mean here to refer loosely to anti-corruption commissions, ombudsmen, ad hoc commissions of inquiry and the like. Such bodies seek not only to expose legal wrongdoing, but more broadly they seek to uphold community and public sector values, for example by exposing maladministration or "corrupt conduct", where those notions are commonly defined in broad terms.[1] They can do much good. That the lack of a federal anti-corruption commission became a significant issue in the last election suggests that they are also popular. They are bodies commonly granted significant legal powers by statute. Such powers must themselves be exercised within their due limits.

In my time as a barrister I appeared in, for and against integrity agencies. Such bodies are usually led by people of integrity and goodwill. Yet they are human institutions. Even such people may err in fact or law, or become over-zealous in their pursuit of what they perceive to be wrongdoing. In what follows I seek to offer some high-level observations on the significance of the findings of such bodies; why people may seek to challenge their decisions; and the limitations of such challenges.

I have long had an affection for the High Court's decision in *Clough v Leahy*, decided 120 years ago.[2] It makes a point which is counter-intuitive at one level and obvious at another. Chief Justice Griffith, speaking for the Court, held that the power of inquiry is not a prerogative right, in the sense of being a special power distinct to the Crown. He explained:

> The power of inquiry, of asking questions, is a power which every individual citizen possesses, and, provided that in asking these questions he does not violate any law, what Court can prohibit him from asking them?[3]

Anyone can inquire into anything. Similarly, anyone can express an opinion, including on whether someone within government has engaged in maladministration or corrupt conduct. Indeed, the High Court said in *Clough v Leahy* that such an inquiry can extend even "into the question of the guilt or innocence of an individual", subject to the limitation that "[a]ny interference with the course of the administration of justice is a contempt of Court".[4]

A non-statutory inquirer can reach their opinion however they like, including by holding public hearings and asking for submissions. They can subject witnesses to questioning. In 2008, for example, the then New South Wales Premier appointed a barrister, Chris Ronalds SC,

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1 See, eg, the Hon James Spigelman, "The Integrity Branch of Government" (2004) 78 *Australian Law Journal* 724 at 725–6.

2 (1904) 2 CLR 139.

3 Ibid 156–7.

4 Ibid 159–61.

to investigate allegations of misconduct by a Minister, which led to litigation in the Court of Appeal.[5] Very occasionally a private body or group will produce a report after some kind of inquiry. The thoughtful report produced by Peter Shergold and others into the response of Australian governments to COVID-19, funded by three philanthropic foundations, is a recent example.[6]

What such non-statutory inquirers cannot do, as the Chief Justice noted in *Clough v Leahy*, is compel any witness to appear and answer questions.[7] Nor can they require the production of documents, let alone tap telephones or seize hard drives. And any opinions they express may be actionable for defamation.

These points have dual significance for integrity agencies. First, such bodies *do* in general have the compulsive powers and the legal protections that ordinary people lack. Second, just as for private inquirers, commonly the findings they reach and conclusions they express are matters of evaluation or opinion, being matters on which reasonable people might reach different conclusions. These two points are important in understanding the significance of the conclusions reached by such agencies and the limits of judicial review of such matters.

It is rare for the conclusions reached by such agencies to have direct legal effect. Their function generally is to investigate, make findings of fact, express conclusions and make any recommendations.

The conclusions of such bodies may lead to further decisions by others which may have legal effect. A person the subject of adverse comment may be dismissed or may choose to resign. There is the possibility of the information gathered and the conclusions reached being referred to and acted upon by police, a public prosecutor, a professional disciplinary body or a government agency such as the Australian Taxation Office. Occasionally, an adverse report may lead to legislative measures. An example of that was the Act passed by the O'Farrell government in New South Wales to cancel without compensation a coal exploration licence held by NuCoal Resources Ltd — a publicly listed company with some 3,000 shareholders — because the Independent Commission Against Corruption (ICAC) had reached a conclusion that the grant of the licence to its original holder had been affected by corrupt conduct.[8]

Whether or not further legal consequences follow, reputational harm might be caused to those involved.

Given the usual absence of direct legal effect, the significance of the reports of integrity agencies generally lies in the perceived weight and moral authority of their conclusions. It is worth reflecting on why the conclusions and opinions they express tend to carry greater

5 *Stewart v Ronalds* (2009) 76 NSWLR 99.
6 Peter Shergold AC et al, *Faultlines: An Independent Review into Australia's Response to COVID-19* (Report, 20 October 2022).
7 *Clough v Leahy* (n 2) 157.
8 *Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014* (NSW).

weight than those of other persons or bodies, who may equally have opinions about, for example, whether a local councillor or public servant has engaged in corrupt conduct. Those reasons might be thought to include that such bodies commonly have, and are seen to have, the following characteristics:

1. They have information-gathering powers and resources not available to others.

2. They are subject to some, limited, requirements of fairness which may be thought to reinforce the significance of their conclusions.

3. They are typically led by persons of perceived neutrality and integrity.

4. They are tasked within the framework of government to carry out such inquiries.

5. In general their conclusions will be set out in reasoned written reports.

Because such bodies are exercising statutory powers they can be subject to legal challenges arguing that they are acting or have acted inconsistently with the laws which govern them. Such challenges are not generally open against ordinary persons acting under their own steam.[9]

Why are such judicial review challenges brought? Some challengers do not wish to be subjected to the compulsive processes that may be involved — for example, the recipient of an order for production of documents or to appear to give evidence.[10] More usually, it is because the person fears that they may suffer or have suffered harm from the results of the inquiry, whether that be reputational harm or harm from the actions that others might take or have taken in light of the conclusions of the inquiry. If the inquiry is not yet complete, or not yet published, then commonly the relief sought will be injunctive in nature. If the inquiry is complete and published, then usually the only relief available is declaratory in nature, because of the general absence of direct legal consequences.[11]

The fact that a concern about reputation is the usual motivation to litigate in this context explains why there are more judicial review challenges to anti-corruption bodies than there are to investigations of ombudsmen.[12] The former are more likely to single out particular individuals for criticism than the latter. In that context Professor John McMillan said in 2010 that, having been Commonwealth Ombudsman for seven years, the notion of having "the judge over your shoulder" was to him "quaint but illusory".[13] I note that McMillan's record of avoiding public law litigation later came to an end when he was Acting Ombudsman of New South Wales.[14]

9 Cf the discussion in *Stewart* (n 5) at [59]–[75], [108]–[114], [130]–[137].
10 See, eg, *A v Independent Commission Against Corruption* (2014) 88 NSWLR 240.
11 See *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 580–2.
12 Cf Anita Stuhmcke, "Ombudsman Litigation: The Relationship between the Australian Ombudsman and the Courts", ch 9 in Greg Weeks and Matthew Groves, *Administrative Redress In and Out of the Courts* (Federation Press, 2019).
13 John McMillan, "Re-thinking the Separation of Powers" (2010) 38 *Federal Law Review* 423 at 427.
14 *Kaldas v Barbour* (2017) 107 NSWLR 341.

What is important to understand is that judicial review offers relatively limited scope for those wishing to preserve or salvage their reputation. As this audience will well understand, judicial review is not merits review. Courts do not consider whether the findings or conclusions reached by integrity agencies are right or wrong, compelling or weak. Judicial review is not the same thing as appeal. That a court rejects a judicial review challenge does not mean that it agrees with the agency's conclusion. The issue for the court is simply whether or not the agency has acted within the legal limits of its powers.

It is useful to differentiate three broad types of judicial review challenge which may be made in this context.

The first relates to the jurisdiction of the agency, in the sense of whether or not it is authorised to engage in the type of inquiry in question with respect to the persons or topics the subject of the inquiry. Such challenges tend to face an uphill battle because the modern trend is for wide and encompassing grants of jurisdiction to these agencies. But there are still limits and there will be cases at or beyond the borders. Such cases may well arise where the investigation relates to persons outside government or for alleged conduct outside the scope of a person's government employment.

The challenge of Margaret Cunneen SC, then a Deputy Senior Crown Prosecutor, to the proposed investigation into alleged aspects of her personal conduct by ICAC succeeded in persuading majorities of the Court of Appeal and the High Court that the Commission's jurisdiction did not extend to such conduct.[15] In contrast, Jeff Shaw, a former Attorney General and judge of the NSW Supreme Court, failed to prevent a proposed investigation by the then Police Integrity Commission into the sad aftermath of a suburban parking accident whilst he was under the influence of alcohol.[16]

The issues which arise at this stage generally involve construction and application of the terms of the constitutive statute of the agency in question. As for many legal questions, the answers may be reasonably contestable, as the split decisions in the *Cunneen* case illustrated. Nevertheless, they are essentially *legal* questions, not evaluative questions of fact or opinion.

The second type of challenge relates to the manner in which the inquiry has been undertaken. Most significantly, the statutory inquirer is generally subject to a duty to accord procedural fairness to any person whose interests or reputation may be harmed by the agency's conclusions.[17] That means that the agency must accord such a person a fair chance to be heard before adverse conclusions are recorded in a report. However, it is important to note that such inquiries are not held to the standards of a court. That reflects the fact that these bodies are investigators, not bodies determining legal rights in a conclusive way. Thus, for example, there is no general right of a person subject of the inquiry to cross-examine witnesses.[18] The person heading the inquiry may be an ex-judge but they are not required

15 *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1.
16 *Police Integrity Commission v Shaw* (2006) 66 NSWLR 446.
17 For a recent example see *AB v Independent Broad-based Anti-corruption Commission* (2024) 98 ALJR 532 at [25]–[26].
18 See, eg, *National Companies and Securities Commission v News Corp Ltd* (1984) 156 CLR 296 at 314, 323–6.

to act judicially. They may, for example, participate in questioning of witnesses in a fashion which would not survive appellate review if they had been sitting in a court. And the principle of open justice does not apply. There is, for instance, no generic right to make closing oral submissions even after a public inquiry has been held.

Despite these limits, the right to be heard is one of importance. Thus, for example, Mr Len Ainsworth and his company successfully obtained a declaration from the High Court that the Criminal Justice Commission of Queensland had failed to observe the requirements of procedural fairness in making comments adverse to them in a report on gaming machines.[19]

The other key requirement of procedural fairness is the absence of actual or apprehended bias. Apprehended bias was made out in two cases of note. In the first, Tony Morris QC had been appointed lead commissioner, with two deputies, under the *Commissions of Inquiry Act 1950* (Qld) to inquire into concerns raised with respect to Dr Jayant Patel at the Bundaberg Base Hospital. After publication of an interim report, two hospital managers brought proceedings against the commissioners. Justice Moynihan of the Queensland Supreme Court held that Mr Morris had manifested ostensible bias in displaying a "contemptuous or dismissive" approach to the two managers, in "stark contrast" with his treatment of other witnesses; in challenging cross-examination by one of the managers' counsel in an "aggressive" and "hostile" manner; in issuing an interim report for an improper purpose of seeking "to 'flush out' Patel"; and in having private meetings with interested persons which only "came to notice" of the legal teams for the managers through press reports.[20]

The other case of note is the recent decision of Acting Justice Kaye in *Drumgold v Board of Inquiry (No 3)* relating to the final report of a Board of Inquiry appointed under the *Inquiries Act 1991* (ACT) constituted by Mr Walter Sofronoff KC.[21] His Honour held that the conduct of Mr Sofronoff was such that certain of his conclusions were infected by a reasonable apprehension of bias against the plaintiff; that one conclusion had been reached without affording the plaintiff the right to be heard; and that another was affected by legal unreasonableness.

Like the first category I identified, challenges relating to the manner in which an inquiry has been undertaken involve application of well-established legal requirements, albeit that issues of degree may arise to perhaps a greater extent for this category than the first.

It is important to note the significance of a finding that an integrity body has acted contrary to the requirements of procedural fairness. Put simply, it means the report of the body is, in legal terms, worthless. That is so because the conclusions reached were made beyond power in that the body in question breached the fundamental requirements of conducting a fair, unbiased process.

19 *Ainsworth* (n 11).
20 *Keating v Morris* [2005] QSC 243; quotations from [91], [107], [112], [116], [130] and [157].
21 *Drumgold v Board of Inquiry (No 3)* [2024] ACTSC 58.

The legal significance of a bias finding is powerfully illustrated by the High Court's decision in another context in the *Oakey Coal* case in 2021.[22] In that case the Queensland Land Court undertook an inquiry relating to the extension of a coal mine. It was exercising administrative power for the purpose of making a recommendation to a Minister under a statutory scheme. The original hearing of the Court lasted some 100 days but was found to be infected by apprehended bias. The High Court held that not only that decision but the subsequent decisions built upon it had to be set aside and the process started again.

Further, beyond the legal worth of such a report, the very reason that courts may grant declaratory relief in such cases is to afford some *practical* justice after a misuse of public power. The plurality in *Ainsworth* explained that the report there "has already had practical consequences for the appellants' reputations", and the "consequences may extend well into the future", stating that granting a declaration "may redress some of the harm done".[23] As I indicated earlier, the reasons we attribute significance to the conclusions of integrity agencies include that they are subject to some limited requirements of fairness and that they are typically led by persons of perceived neutrality and integrity. At least the former, and potentially the latter, may be undermined by a conclusion that procedural fairness has not been provided.

The third category of review relates to challenges to the conclusions reached by the agency. Error of fact is not, of course, itself a ground of review.[24] In some instances the challenger may be able to establish that the agency misdirected itself on some legal principle, as in effect was held in *Greiner v Independent Commission Against Corruption* in 1992.[25] Otherwise, a challenger must rely on grounds such as "no evidence" or legal unreasonableness. Such challenges rarely succeed. The partial success of the plaintiff in the *Drumgold* case is a rare exception. More typical is the result in *D'Amore v Independent Commission Against Corruption*, where the NSW Court of Appeal rejected such attacks put in a range of ways.[26] As Beazley P explained there, "ICAC's state of satisfaction that the appellant had engaged in corrupt conduct had to be reasonable in the sense that it was a state of satisfaction that could be reached by a person with an understanding of the nature of the statutory function being performed", and "had to be based upon facts or inferences supported by logical grounds".[27] However, "disagreement with a conclusion of an administrative decision-maker does not constitute jurisdictional error", even if that disagreement is "emphatic".[28]

The difficulty for challengers here reflects one of the points I started with. The conclusions reached by integrity agencies are matters of evaluation or opinion on which reasonable people might reach different conclusions. The courts no more rule on whether they consider those opinions are right or wrong than they do for private inquirers such as Professor Shergold and his colleagues.

22 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 272 CLR 33.
23 *Ainsworth* (n 11) 582.
24 See, eg, *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 340–34 (Mason CJ).
25 (1992) 28 NSWLR 125.
26 (2013) 303 ALR 242.
27 Ibid [91].
28 Ibid [191].

As a result, persons the subject of adverse findings by an integrity agency have limited recourse in the courts. Unless they can make out that the agency exceeded its investigational remit, acted unfairly, manifested some procedural or technical error, misdirected itself in law, or acted unreasonably or without any evidence, they are unlikely to succeed in any judicial review proceeding.

For some, an adverse finding will have ongoing consequences, even if no legal action is taken against them as a result. It can, for example, impede employment opportunities, reflecting the perceived force and authority that conclusions of such bodies can have. Others seem to bounce back.

It has sometimes been suggested that the consequences can be such that there should be a right of merits review. Yet that would simply lead to another evaluative conclusion or opinion reached by someone else, again of no direct legal effect, which does not seem an efficient use of resources. A partial form of redress may be found in a right of complaint to some inspector or the like of the integrity agency.[29] More generally, the weight of the conclusions of such a body are always open to attack simply on the basis of the reasoning employed.[30]

Any governmental process has limits, potential flaws, and may not get everything right. As in all things, a balanced perspective is required. Integrity agencies have great advantages in potentially being able to expose maladministration, corrupt conduct or other wrongdoing. But they are also human institutions which are not above reproach. The courts have some role to play in keeping such agencies within legal limits. As I have sought to show, however, that role is a relatively limited one.

29 See, eg, *Independent Commission Against Corruption Act 1988* (NSW) pt 5A.
30 Note *King v Ombudsman* (2020) 137 SASR 18, [101].

Difficult conversations — the cultural shift to rights-mindedness

*Rosalind Croucher AM**

Delivering the 2024 AIAL National Lecture is a very special moment for me, as it is my last formal address in my role as President of the Australian Human Rights Commission (AHRC). I will complete my seven years of service in this role on 29 July, on top of the 10+ years at the Australian Law Reform Commission (ALRC).

There are so many things I could speak about under the main title of the conference — "difficult conversations" — if I just stopped there. I could start with over 40 Senate Estimates appearances, having worked with 8 attorneys-general, 4 secretaries of the Attorney-General's Department and 38 commissioners — 19 at the AHRC, all full-time, and 19 at the ALRC, many part-time — including two who have gone on to be Chief Justice of the High Court (French and Kiefel).

But the conference theme of course has a second part — "values and administrative law" — and an invitation to explore sub-themes on the ethics of public servants, the role of values and ethics in administrative decision-making, and addressing and implementing recommendations of the recent royal commissions.

Such a rich menu of topics!

As this is my last "gig" for the AHRC, and as this has been the year in which there is wind in the sails of possibility for human rights law reform and a national Human Rights Act, I will speak of the Commission's contributions in filling those sails.

The title of my presentation reflects what we would see as the outcome of a revitalised human rights framework through a cultural shift to what I've described as "rights-mindedness" — in policy and legislative design, in accountability and responsibility.

When I speak of "wind in the sails of possibility" for a transformation of our Human Rights Framework, I am referring to the alignment of recommendations — of the Commission itself, of the Parliamentary Joint Committee on Human Rights (PJCHR), and of the Disability Royal Commission.

I will focus mainly on our work and that of the PJCHR. Suffice it to say that the Disability Royal Commission gave a ringing endorsement of our framing of discrimination law reform and embedding rights protections in statutory form.

The Commission's Free + Equal recommendations

First, we delivered a comprehensive suite of recommendations, from December 2021 to December 2023, through our "Free + Equal" project — taking its name from the first article

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of the *Universal Declaration of Human Rights* (*UDHR*) of 1948: "All human beings are born *free and equal in dignity and rights*."[1]

In December 2021 we released a position paper setting out a comprehensive reform agenda for federal discrimination laws.[2] It sought to remedy deficiencies in the current laws, shifting the focus from a *reactive* model that responds to discriminatory treatment and with the burden of protection lying with the complainants, to a *proactive* model that seeks to prevent discriminatory treatment in the first place and by introducing co-regulatory approaches to enable governments and businesses to be better equipped to prevent and deal with discrimination.

And in March 2023, we released our second position paper putting forward a national Human Rights Act for Australia,[3] because addressing discrimination *alone* is not enough to ensure that people's human rights are protected. The recommendations in this paper were designed to complement protections against discrimination and deal pre-emptively with issues that discrimination laws cannot address, with a focus on the "upstream" of policy and legislative design.

Then in December 2023 I presented the Attorney-General with the final report of the full five-year program of work, under the title of *Free and Equal: Revitalising Australia's Commitment to Human Rights*.[4]

Our National Human Rights Framework is built on five pillars. The first two reflect the papers for discrimination law reform and a national Human Rights Act. Third is the strengthening of the role of Parliament in protecting human rights, through enhancing the processes for parliamentary scrutiny and the introduction of new oversight mechanisms for Australia's human rights obligations. Fourth is the introduction of a national human rights indicator index to measure progress independently on human rights over time; and fifth is the requirement of an annual statement by the Australian Government to Parliament on human rights priorities.

The National Human Rights Framework will also be enabled by the following foundations:

- a national human rights education program;
- an effective and sustainable national human rights institution; and
- support for vibrant and robust civil society organisations to protect human rights.

1 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948), art 1 (emphasis added).

2 Australian Human Rights Commission (AHRC), *Free & Equal: A Reform Agenda for Federal Discrimination Laws* (Issues Paper, December 2021).

3 AHRC, *Free & Equal — Position Paper: A Human Rights Act for Australia* (December 2021). It was also the principal recommendation of the National Human Rights Consultation Committee (NHRCC) led by Father Frank Brennan AO SJ: see NHRCC, *National Human Rights Consultation Report* (Attorney-General's Department (Cth), September 2009) (NHRCC Report).

4 AHRC, *Free & Equal: Revitalising Australia's Commitment to Human Rights* (Final Report, December 2023).

Each of these elements has a role to play in an integrated human rights framework.

The model Human Rights Act, which is a central recommendation in the framework, is strongly democratic, and is anchored in the strength and supremacy of Parliament. It is based on conceptual "bookends" of responsibility and accountability:

- *Responsibility* — of public authorities to consider and act compatibly with human rights in policies, legislation and practice — through a positive duty as exists in the state and territory human rights statutes. Our model includes enhanced added duties to ensure the effective participation of Indigenous peoples, persons with disability and children, and to ensure equal access to justice.

- *Accountability* — through actionable breaches for individuals, interpretive provisions that align the understanding of human rights to the international jurisprudence, a national human rights indicator index to measure progress on human rights over time, and an annual statement to Parliament in relation to human rights priorities.

Together, responsibility and accountability, through a Human Rights Act and Human Rights Framework, support a cultural shift towards rights-mindedness becoming part of the national psyche, not just an afterthought.

The Parliamentary Joint Committee on Human Rights report

Just after we released the second position paper, the Attorney-General requested the PJCHR to inquire into a human rights framework, expressly referring to the Commission's work. The PJCHR's final report, released on 30 May, provided a strong endorsement of the Commission's recommendations for a revitalised human rights framework and, centrally, a Human Rights Act, based on the Commission's model.[5]

There was a dissenting report, from the Coalition members of the Committee.[6] I want to use this lecture as an opportunity to address the issues raised.

Majority report

The majority report observed a "clear need" for a comprehensive and enforceable rights-based framework[7] — to ensure a "fair go" for all.[8] It agreed with us that existing protections were "piecemeal".[9]

Submissions received "overwhelmingly" favoured an Australian Human Rights Act[10] — 87.2% — and the PJCHR was reassured about the positive impact such an instrument can

5 Parliamentary Joint Committee on Human Rights (PJCHR), Parliament of Australia, *Inquiry into Australia's Human Rights Framework* (Report, May 2024) (PJCHR Report).
6 "Coalition members dissenting report" in ibid, 333–50 (Dissenting Report).
7 PJCHR Report (n 5) [9.7].
8 Ibid [1.1].
9 Ibid xvii.
10 Ibid [5.2].

have by the experiences in the three jurisdictions with them: the Australian Capital Territory, Victoria and Queensland. It said these showed how human rights legislation "could help embed a rights-respecting culture"[11] and "has not led to overwhelming litigation".[12]

The report made 17 recommendations,[13] including the enactment of an Australian Human Rights Act broadly reflecting the Commission's model. The Act would protect rights based on those under international treaties to which Australia has agreed to be bound, and in addition to civil and political rights would include basic aspects of economic, social and cultural rights, such as the rights to education, health and social security. The framing of cultural rights, and a right to a healthy environment, would be informed by consulting with Aboriginal and Torres Strait Islander peoples.

This is a clear reflection of the Commission's recommendations in relation to the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*).[14] Many of the most pressing human rights concerns facing people in Australia relate to economic, social and cultural rights (under the *ICESCR*). These include access to adequate health care, education and housing. And the restriction of these rights is often linked to civil and political rights — like the right to non-discrimination.

ICESCR rights are also closely linked with the realisation of self-determination for Indigenous peoples, and are essential to meeting "close the gap" targets, which address socio-economic indicators of disadvantage.

The Australian public strongly values economic and social rights, indicating that the lack of implementation of the *ICESCR* does not reflect the democratic will of the people. This was a clear outcome of the 2009 National Human Rights Consultation, which identified that

> [t]he right to adequate housing, the right to the highest attainable standard of physical and mental health, and the right to education are particular priorities for the community.[15]

The Human Rights Act would impose a positive duty on public authorities to comply with and properly consider human rights in their decision-making and actions. The positive duty would be directly enforceable by a federal court, where conciliation by the Commission was unsuccessful or not appropriate. Courts would also need to interpret statutes so as not to breach human rights, so far as is reasonably possible.

11 Ibid [9.7].
12 Ibid [9.8].
13 Ibid xxii–xxviii.
14 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (*ICESCR*).
15 NHRCC Report (n 3) 96. The AHRC noted that many of the most pressing human rights concerns facing people in Australia relate to economic, social and cultural rights, especially access to adequate health care, education and housing: AHRC, *Submission to the National Human Rights Consultation Committee* (2009) [58]. The NHRCC commissioned a Colmar Brunton Social Research report in support of its conclusions: Colmar Brunton Social Research, *National Human Rights Consultation — Community Research Phase* (Final Report, 2009).

The majority report also supported the Commission's recommendations for increased parliamentary scrutiny through the PJCHR itself.[16] Additionally, it recommended extensive human rights education in schools and the broader community, in part to drive the cultural changes needed to realise rights fully.

By contrast, a minority of the committee, the Coalition members, recommended an Australian Human Rights Act *not* be introduced. The report of the majority of the Committee expressly traversed such arguments against a Human Rights Act — and answered them comprehensively.[17]

Dissenting report

There will much be analysis of the dissenting report. If an Exposure Draft Bill were to follow, that is when the model put forward can be subject to further full public consultation and review, which would be a welcome next step in law reform.[18]

For now, I would like to unpack, or rather unravel, the various threads of objection.

"We don't need one"

The dissenting report opposed the introduction of a Human Rights Act on the basis that it would "weaken our parliamentary democracy and politicise our judiciary".[19] It said that rights were composed "in a politicised way" and that Parliament was "surrendering its responsibility to defend human rights, by throwing open the interpretation of an Act which contains excessive uncertainty to final determination by an unelected and unaccountable judiciary".[20] Such points are more of the old canards of objection with respect to the *idea* of a Human Rights Act.[21]

As a general observation, I agree that the *absence* of a Human Rights Act does not mean that we do *not* have a strong tradition of rights and freedoms — we do — and they go back directly to the *Magna Carta* of 1215 and the *Bill of Rights Act 1688*,[22] but it does mean that the rights and freedoms enshrined in the international human rights instruments, and which Australia has promised to the world that we *will* respect domestically, are not directly *enforceable* in Australia. It also means that rights and freedoms can be conveniently "distanced", where the politics — or the politicians — of the day choose to push the issue, with little accountability or channels of challenge.

16 PJCHR Report (n 5) [9.73]–[9.89].
17 Ibid [5.73]–[5.95].
18 A misplaced criticism in the dissenting report: Dissenting Report (n 6) [1.8].
19 Ibid [1.6].
20 Ibid [1.7].
21 See, eg, Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009) 29.
22 See, eg, Australian Law Reform Commission (ALRC), *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (ALRC Report 129, December 2015) ch 2. I had the privilege to lead this inquiry at the ALRC.

As to the charge of "weakening" our democracy, the Commission's model, endorsed by the majority of the PJCHR, rather *strengthens* our democratic and rule of law principles. It is a *parliamentary* model*,* by preserving parliamentary supremacy in a model based on dialogue. It *enhances democracy* by improving the quality of public debate and enabling minority and vulnerable groups to have a voice in decisions that affect them (through procedural duties) and to hold decision-makers accountable.

As the majority of the PJCHR stated:

> The statutory model of a HRA [Human Rights Act] respects parliamentary sovereignty — ensuring our elected representatives can continue to make the laws Parliament deems necessary. But with a HRA in place, Parliament would need to expressly consider human rights when making laws, and importantly, public authorities, including government departments, agencies and the Australian Federal Police, would need to consider rights when making decisions and act compatibly with rights (unless Parliament had directed them to do otherwise). …
>
> The committee considers that there is a clear need for a rights-based legal framework. Our current piecemeal approach to human rights protection is not adequate to ensure rights and freedoms are properly respected, protected or promoted. The committee considers that a HRA would be a framework by which the public sector can look at legislation, policies, practices and service delivery and consider their impact on individuals.[23]

Writing recently in *The Guardian* and reflecting his keynote contribution to the Commission's Free + Equal conference on 7 June 2024, the Hon Michael Kirby AC CMG expressed his disappointment with the committee members on the Liberal side of politics in their rejection of a Human Rights Act. Instead, he said, they presented the argument of Sir Robert Menzies and Sir Owen Dixon, "the great chief justice of Australia in those days", that "parliament does not need the additional accountability that a Human Rights Act would provide".[24]

Why then, Kirby asked, have our governments needed to apologise? He referred specifically to the apology to all members of the LGBTQ+ community by the NSW Premier, Chris Minns, in late June, following the example already set in other states. "We're sorry", Minns said, "for every person convicted under legislation that should never have existed; for every person that experienced fear as a result of that legislation … for every life that was damaged or diminished or destroyed by these unjust laws." "Why did we need an apology from the NSW Premier?" Kirby asked.

> Why did we need an apology to the stolen generations? Why have we needed so many royal commissions to uncover the countless incidents by which Australian governments and their laws have trampled on people's basic human rights?[25]

Kirby said that a Human Rights Act is "precisely the tool Australia needs to ensure that parliament is held to account for upholding human rights, and to give people access to justice in case their rights are violated or simply ignored".[26]

23 PJCHR Report (n 5) [9.6]–[9.7].

24 Michael Kirby, "History shows Australian laws have left minorities marginalised. A Human Rights Act would help fix that", *The Guardian* (online, 30 June 2024) <https://www.theguardian.com/commentisfree/article/2024/jun/30/australia-human-rights-act>. The theme of this op-ed reflects Kirby's remarks in his keynote address at the Free + Equal Conference, 7 June 2024.

25 Ibid.

26 Ibid.

We do have strong and stable democratic institutions that we should rightly be proud of, but this has not prevented human rights abuses by departments and agencies,[27] nor the eventual recognition of our Commonwealth, state and territory leaders of the need to apologise.

The weakness in the existing framework of protection, and especially the jurisdiction of the Commission itself, was also exposed during the COVID-19 pandemic of 2019–21. That framework simply was not good enough.

Mechanisms to raise complaints of breaches of human rights, apart from the four Discrimination Acts, are extremely limited. Our general human rights complaints jurisdiction, referable to the international treaties and without any redress to remedial pathways, is very limited. The only conclusion is a report to the Attorney-General. Speaking in relation to this function at its inception, then Attorney-General, Senator the Hon Peter Durack, said, somewhat expectantly, that the reports would ensure that governments and parliaments were "aware of situations in which there needs to be a redefinition of the rights of different individuals" and that this would "stimulate them to take appropriate action".[28] But in 2017, even this obligation of tabling was removed. And here we are with report number 170 having just left my desk, still making recommendations which, in many cases, have essentially no possibility of effective remedy.

Having been responsible for signing over 50 of these human rights complaints reports in my seven years,[29] and having observed the care and diligence of the Commission's mediators and lawyers, and the respectful engagement we have established with the principal responding department, the Department of Home Affairs, I have to acknowledge that it is an important jurisdiction. Important, yes, but deeply dismaying.

And during the COVID-19 pandemic, the Commission received hundreds of complaints under this general human rights jurisdiction from Australians locked out of their own country.

We heard heartbreaking stories of people separated from dying relatives, in need of urgent medical assistance in Australia, and yet who could not get any engagement from their government to consider their personal situation. The existing legal protections were simply ineffective and basically disregarded by the government. It took us months even to find a relevant part of "the Commonwealth" to act as respondent to these complaints, landing eventually with the Department of Infrastructure.

The existing mechanisms are simply insufficient and do not provide the human rights protections that all people in Australia are entitled to — and expect.

Without comprehensive legal protection, education and other measures to promote an understanding of human rights, and the processes for monitoring compliance with them, Australia is not fully meeting its obligations to ensure that the human rights of all Australians are respected, protected and fulfilled. We are also letting so many people down — when human rights abuses continue hidden and unseen.

27 PJCHR Report (n 5) [5.55]–[5.64].
28 Commonwealth, *Parliamentary Debates*, Senate, 25 September 1979 (Peter Durack, Attorney-General).
29 The first report I signed as President was number 119.

To say that our existing protections are good enough is not only complacent, but *contemptuous* of those we have let down.

A Human Rights Act is not the only answer, and it will not work by itself. This is why the Commission has recommended that it be accompanied by substantial reform to embed consideration of human rights into the planning and development of legislation and policy. This substantive structural reform, endorsed strongly by the majority of the PJCHR, will lead to a greater level of rights-mindedness and ultimately better human rights outcomes.

"It didn't make a difference in Victoria"

The Coalition members said that during the COVID-19 pandemic, in Victoria the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Victorian *Charter*) did not protect citizens from "draconian government overreach"[30] nor had the human rights instruments in the ACT, Victoria and Queensland "influenced any positive outcomes".[31] They considered that the Commission's model "would simply entrench the failures of these existing state and territory" provisions.[32]

In contrast, Rob Hulls, the instigator of the Victorian *Charter*, spoke strongly at our conference of how the *Charter* had been vital in cultural change in the public sector, moving consideration of rights impacts "from the periphery of government to the core", and emphasised that the cultural change was "the most important part".[33] He said that the impacts had included "something as simple" as getting a shower curtain for a woman in aged care to protect her privacy.[34]

The rejection in the dissenting report of the validity of the specific illustrations of the effective and positive impact that the legislation in the ACT, Victoria and Queensland had had in those jurisdictions, trivialises the very real and human story of people like the woman of whom Rob Hulls spoke — and the *101 Cases* compiled by the Human Rights Law Centre, upon which those illustrations drew.[35]

With respect to some limitations in effectiveness during the COVID-19 pandemic,[36] which the dissenting report argued as a reason for showing the ineffectiveness of Human Rights Acts in places like Victoria, rather than *undermining* the case for human rights protections in legislation, they suggest where such protections should be *strengthened* — as in the proposed model included in the PJCHR report. Such an argument also ignores the real and

30 Dissenting Report (n 6) [1.78].
31 Ibid [1.77].
32 Ibid [1.83].
33 Rob Hulls, "Keeping it real: accountability and human rights" (Panel discussion, Free + Equal Human Rights Conference, Sydney, 7 June 2024), Recording transcript, 00:52:32.
34 Ibid 00:53:23.
35 Human Rights Law Centre, *Charters of Human Rights Make Our Lives Better: Here Are 101 Cases Showing How* (Website, 2022) <https://www.humanrightsact.org.au/101-cases>. See also Caitlin Reiger, "Australia is the only liberal democracy without a Human Rights Act — that could finally change", *Right Now* (online, 11 June 2024) <https://rightnow.org.au/opinion/australia-human-rights-act-change/>.
36 Dissenting Report (n 6) [1.78]–[1.79].

practical impact that the Human Rights Acts *did* have during the pandemic — as set out in a specific section of the *101 Cases* report.[37]

The majority report cited the Victorian Equal Opportunity & Human Rights Commission (VEOHRC), which described the *Charter* as "a vital mechanism to frame concerns expressed by organisations and community members that public health measures unfairly limited their human rights".[38] VEOHRC highlighted instances of direct *Charter* impact:

> The Charter required that public authorities considered and acted in accordance with human rights in decisions made by them to introduce and update public health measures, as well as in the implementation of public health orders. The Charter remained relevant to decisions by the Chief Health Officer about whether limitations on rights were necessary and proportionate when making public health orders. Furthermore, in 2021 the government introduced a new legal framework to manage pandemics — setting out how the Charter applies to the making of pandemic orders, with new checks and balances designed to further embed human rights considerations into government responses.[39]

And as the Hon Pamela Tate AM KC observed in evidence before the Committee in August 2023,

> at least people … were able to come to a court and have a court carefully dissect whether the particular restrictions that had been placed on their freedom, including a curfew, were a defensible interference with human rights, given the importance of the objectives of the curfew, or whether, in fact, they were a breach of an obligation of human rights … There was a provision of an analytical framework which enabled people who had a grievance to have that grievance intelligently considered in a formal and analytical way.[40]

Surrendering to an "unelected and unaccountable judiciary"[41]

The dissenting report said that "it is against the public interest for the Parliament to surrender their responsibility to defend human rights to the unelected judiciary".[42] This ignores the fact that the role of the judiciary remains *unchanged*.

Given the clear constraints of our constitutional separation of powers, the Commission's model retains the principle of parliamentary supremacy. There is no power for the courts to declare legislation invalid on the basis that it is incompatible with human rights.

Instead, the Human Rights Act would be a powerful statement by the Parliament that departments, agencies and public servants should act in a way that is compatible with human rights, and that legislation should be interpreted, so far as reasonably possible, in a way that is compatible with human rights.

The role of the courts would be to carry out these two tasks set by Parliament: determining human rights disputes and interpreting legislation.

37 Human Rights Law Centre (n 35) 58–65, Cases 89–101.
38 Victorian Equal Opportunity & Human Rights Commission (VEOHRC), *Submission 162*, 28, quoted in PJCHR Report (n 5) [5.31].
39 VEOHRC, *Submission 162*, 28, quoted in PJCHR Report (n 5) [5.31].
40 Quoted in PJCHR Report (n 5) [5.32].
41 Dissenting Report (n 6) [1.7].
42 Ibid [1.30].

And litigation is *not* the point. In the context of the unlawful discrimination jurisdiction under the federal Discrimination Acts it is the *possibility of litigation* that provides the leverage to the whole process of seeking redress and, in appropriate cases, a pathway to enforceable remedies. And only a small percentage of conciliated matters ever get anywhere near a court — fewer than 4% of complaints.

But without the possibility of a remedial pathway to the courts, we are stuck with the existing paper tiger, or limp lettuce, jurisdiction of human rights complaints. The recommended cause of action would make the Commission's model stronger than the state and territory models — and more effective.

As one committee member, the late Peta Murphy MP, expressed it during the hearings for the inquiry, the benefit of a Human Rights Act "is not necessarily the litigation that one might be able to commence based on it, but the benefit of driving a human rights culture within the Public Service".[43] And, moreover, concerns about an increase in litigation have not manifested in relation to human rights instruments in Australia, the United Kingdom or New Zealand.[44]

As for the remark about our judiciary being "unelected" — this is the *strength* of our judiciary and the bulwark of its independence. Heaven forbid that we should ever go down the United States' road of having elected judges!

The dissenting report seems overly reflective of the US model of rights protection, which is a constitutional one. Our model is *not* a constitutional model. It is *not* like the US model. It is a dialogue model — one recommended in the National Human Rights Consultation Committee's report in 2009.[45] Dialogue models grant each branch of government a distinct role to play, in line with the ordinary institutional functions each performs. Most significantly, they do *not* involve the ability of the judicial branch to override legislation of the Parliament. The model is *not* "quasi-Constitutional" in nature.[46]

"It will create excessive uncertainty in determination"

The dissenting report says that human rights involve "abstract and vague concepts"[47] that judges are not equipped to deal with and the consequence of this would be an increased politicisation of the judiciary that would be entirely undesirable. Parliamentarians, they said, are "more capable of weighing community expectations as opposed to judges".[48] They referred to the experience in the UK, stating that the PJCHR's equivalent body in the Human Rights Committee "can be a more effective defender of human rights than a judiciary acting under the framework of a Human Rights Act".[49] What this argument ignores is that

43 Quoted in PJCHR Report (n 5) [9.52].
44 Ibid [5.93]. See, eg, the submission of the Law Council of Australia, quoted at [5.92].
45 NHRCC (n 3).
46 Dissenting Report (n 6) [1.37].
47 Ibid [1.31].
48 Ibid [1.33].
49 Ibid [1.29].

the Human Rights Committee is working through the lens of the UK's own *Human Rights Act 1998* — and not the international treaties which are the lens for the PJCHR — under which the UK courts have a jurisdiction which even includes a power to declare legislation incompatible with the Act.

With respect to the "excessive uncertainty" in interpretation, all legislative provisions — indeed all common law concepts — require interpretation and, through interpretation, develop jurisprudential certainty. That is the role of our independent judiciary. Common law concepts like "foreseeability", the "neighbour principle" and the "reasonable man", as well as concepts included in legislation, may all be attacked similarly. The model proposed focuses on setting out rights, including economic, social and cultural rights, in a way that would be justiciable.

Courts are regularly called upon to apply evaluative standards set by statute when making decisions, and the Australian national Human Rights Act would be no different.

What the Commission's model provides is a *middle* ground between a constitutionally suspect approach that would grant too much interpretive power to the courts to alter the meaning of legislation and an approach that would simply be akin to, but stronger than, the existing common law principle of legality. The model also sets out a sensible framework for navigating the intersection of varied rights and freedoms.

Some other concerns about the specific wording of rights can be navigated when any Exposure Draft Bill is put to the public for consideration.

"The AHRC model departs from international standards"

This argument is made in the dissenting report in two ways. First, it is said that the Commission's model does not use the *precise* language of articles 7 and 18 of the *International Covenant on Civil and Political Rights* (*ICCPR*)[50] in relation to freedom of religion. This was addressed in the PJCHR draft by inserting the exact language from the Convention. Our model was a bit tidier, but that is not a matter of real concern.

Second, it is said that a general limitations clause, based on a proportionality test, departs from the variety of different limitation standards in the *ICCPR*.

But for a Human Rights Act to be workable, it needs to be easy to understand and apply, and we considered a single limitation clause to be preferable to separate limitation clauses for each right. The Commission's proposal, focused on proportionality, is consistent with guidance from the Human Rights Committee that rights can only be limited when the limitation is necessary, reasonable and proportionate to a legitimate object.

50 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

"We don't need a Human Rights Act because we have an enviable human rights tradition"

The Coalition PJCHR members contended that "Australia's enviable human rights tradition is secured within the very fabric of Australian society, rather than through legislation or constitutional provisions".[51]

I agree that a Human Rights Act is "not a guarantee of achieving protection of human rights".[52] But *it is not designed to be*. It is a mechanism of building responsibility through cultural change and providing tools of accountability and remedies — those conceptual bookends I described earlier.

In his powerful opening keynote speech at the Free + Equal conference in Sydney on 7 June, Michael Kirby said that "sometimes you need some deep principles as tools".[53] He explained that Parliament is not the solution to injustices because "Parliament doesn't always fix things up. Parliament is good in fixing up the problems of majorities."[54] In the complementary second part of the keynote presentation, Australian lawyer Jennifer Robinson, speaking of her experience in the UK with the *Human Rights Act 1998*, said that it was a "modest" but foundational tool and that it was the impact "in the upstream" that had been much more significant than litigation.[55] In one example of its practical application, she said that "the only thing" that then stood between Julian Assange and the extradition demanded by the USA for so long was the *Human Rights Act*.[56]

Without the tools that a Human Rights Act would provide to build a culture and a responsibility of rights-mindedness, we are left with a *passive system of rights protection*. And in a passive system of rights protection — "the very fabric of Australian society", to which the Coalition members of the Committee referred — human rights abuses may go unchecked until the case becomes so compelling that the government establishes a royal commission.

Our experience with the royal commissions into Robodebt and the abuse experienced by persons with disability and in aged care is that they have exposed egregious human rights breaches and shown how our existing systems are just not adequate. Complacency and a rosy glow about the "incomparably robust" nature of democracy in Australia are shown to be wanting. Access to human rights protection should not depend on where a person lives or which level of government carries the responsibility.

This has to change. Not another Aged Care or Robodebt Royal Commission!

My own experience in leading the AHRC convinced me absolutely of the case for a national Human Rights Act. I have spoken of this as a journey in three parts.[57]

51 Dissenting Report (n 6) [1.13].
52 Ibid [1.17].
53 Michael Kirby and Jennifer Robinson, "Revitalising Australia's human rights framework" (Keynote address, Free + Equal Human Rights Conference, Sydney, 6 June 2024), Recording transcript, 00:14:56.
54 Ibid 00:13:46.
55 Ibid 00:26:29, 00:27:18.
56 Ibid 00:29:13.
57 My first expression of this three-part journey was in a speech to open Law Week in Perth in 2019. A reduced version was published as "Law, lawyers and human rights" (2019) 46(5) *Brief* 22.

Part one is a recognition that, while the common law strongly embeds the idea of rights, the common law has its limits.

Protection of serious invasions of privacy, for example, has become stuck. The common law needs a great leap forward, as it achieved in *Donoghue v Stevenson*[58] in relation to negligence, but we have not got there yet. Perhaps the "age of drones" is the contemporary equivalent of the "age of railroads" to provide the necessary catalyst for the common law.

Part two is a realisation that the statutory expression of rights is played out *in the negative*, reliant on individual disputes, and what coverage there is, is patchy. They are framed in terms of what you *cannot* do and rely on a dispute before offering a solution.

Part three is the realisation of the *effectiveness* of the complaint-handling jurisdiction of the Commission, when it is dealing with claims of unlawfulness under Australian law, and the *ineffectiveness* of the general human rights jurisdiction without the leverage of potential access to our independent judiciary.

Final thoughts

Australia was, proudly, a founding signatory to each of the three international instruments that together comprise the "International Bill of Rights" — the *UDHR*, the *ICCPR* and the *ICESCR* — and, as a nation, we stepped forward in embracing the commitments of these great documents. Australia has signed and ratified each of the key international treaties since then — and it has *not* been a party-political exercise.

Both sides in our Westminster system of government, both Labor and Coalition, *and in equal measure*, have signed and ratified them over the years, affirming these human rights as core to our identity and a pillar of our robust democracy.[59] Translating these obligations into domestic law should, therefore *and necessarily*, be above party-political divisions.

Without comprehensive legal protection, education and other measures to promote an understanding of human rights, and the processes for monitoring compliance with human rights, Australia is not fully meeting its obligations to ensure that the human rights of all Australians are respected, protected and fulfilled.

For a country that prides itself on the fair go, and which values decency and dignity, it is troubling that we do not give meaning to our long-held values in our national legal framework.

And yet there is a state of denial by some about this lack of protection — as is so palpably evident in the dissenting report.

58 [1932] AC 562.

59 Apart from the Second Optional Protocol to the *ICCPR* on the abolition of the death penalty which I am sure would have been supported by both sides of politics, it is an equal split for the remaining 20 signing and ratification moments.

At the Commission's recent national conference on human rights on 7 June, Professor George Williams described this denial as akin to "walking out into the rain" without an umbrella "and pretending it's not raining".[60]

Let's protect people's rights instead of having another generation of royal commissions forensically examining the damage we inflicted on people by not respecting their rights in the first place. Or, after generations of harm, to see our state and national leaders apologising for actions of the past.

"Our governments are good at many things", said Michael Kirby, and "we are one of the world's oldest parliamentary democracies".[61] But, he reminded us,

> it was our government that enabled the stolen generations, the dispossession of Indigenous land, the laws oppressing women, LGBTQ+ people and people with disabilities. The aged care and Robodebt royal commissions make it clear that anyone's human rights can be trampled by government decisions at any time — not just people in minority groups. History shows that parliament and public officials do not always do well at protecting individual human rights. Particularly for minorities.
>
> That is why we need to embed the principles espoused in the UDHR in our national laws, as tools to support parliament in protecting human rights. Doing so will ensure members of parliament are mindful of the core principles that unite us as human beings. It will help to ensure that the laws and policies they oversee are consistent with those principles.[62]

Kirby's hope was that future generations would read these core principles in a national Human Rights Act — on their tablets and phones — much as he cherished the copy of the *UDHR* that his teacher, Mr Gorringe, gave him as a 10-year-old.

> Then they will know their rights are, finally, protected by the law of this country. Parliament will still have the last word, but the people will have new means to get action before inquiries and apologies are needed.[63]

60 "Getting in on the act: delivering an Australian Human Rights Act" (Plenary panel 1, Free + Equal Human Rights Conference, Sydney, 7 June 2024), Recording transcript, 00:10:45.
61 Kirby (n 24).
62 Ibid.
63 Ibid.

Values in the Australian Public Service

*Rachel Bacon**

I will explore the conference theme of values in the public service through a discussion about the fundamental importance of trust in government. Because the relationship between trust and strong values is reciprocal.

When trust is low, we can struggle to have difficult conversations in constructive ways. When trust is low, we can get into defensive mindsets and forget to bring empathy and humanity to our design work and administrative decision-making. And when trust is low, we can lose sight of our values as the true north for our work as public servants.

Conversely, when we live our values, we build trust. One of the primary purposes of the values set out in s 10 of the *Public Service Act 1999* (Cth) is to ensure the Australian Public Service (APS) conducts itself in ways that earn and maintain the trust of the Government, the Parliament and — ultimately — the public that we all serve.

The importance of trust in government

Trust comes in many guises. It is the backbone to positive relationships with family, friends and colleagues. It is a pillar for successful commerce. And it is critical for government to meet the needs of its people.

When citizens trust their government, it creates a fertile ground for progress and prosperity. People see their tax dollars contributing to services and systems that support all Australians — Medicare, public education, protecting our unique ecosystem, supporting emerging businesses. Governments can only create value for their people when the people are willing and able to engage with the system — and that happens most fruitfully when there is trust.

High trust in government also fosters a sense of civic duty and responsibility. Australians are more likely to volunteer, participate in community initiatives and engage in political processes when they believe their government is acting in their best interests. Active citizenry strengthens democracy. It creates a more resilient society.

Conversely, low trust in government can lead to a range of harms across society. This was recently apparent when people in some parts of the world doubted their government's intentions and made them less likely to comply with public health measures, such as vaccination programs or social distancing guidelines. This exacerbated public health crises and undermined efforts to protect the community.

We understand this relationship of trust through different lenses — through our own personal interactions with government, through the roles many of us have as stewards of different parts of the system, and through centuries of deep thinking and philosophy exploring the concept.

* Dr Rachel Bacon is Deputy Commissioner of the Australian Public Service Commission. This article is an edited version of her plenary speech at the Australian Institute of Administrative Law 2024 National Conference in Canberra on 18 July 2024.

Rousseau's social contract theory provides a provocative exploration of the relationship between citizen and state.

According to Rousseau, citizens forgo certain freedoms, money and property to be subject to the state. This is done on the condition and expectation that the state will use its power for the benefit of the public. For this to work there needs to be trust. Citizens need to be able to trust that for what they give up, there will be a greater return. And the state needs to trust that citizens will maintain their side of the contract.

I would not call the world of 1762 simple, but it would be an understatement to say things have become more complex. Globalisation, the scale of the modern nation-state and changes in economies have increased the distance between the public and its governing bodies. The greater the distance, the greater the required trust and confidence in public institutions. This distance can be exacerbated by the impact of technology, such as algorithms within social media that can drive echo chambers.

Complex global challenges require collaborative solutions, economic uncertainties demand effective leadership, and citizens increasingly rely on governments to provide essential services and address inequalities.

Representative and responsible governments are founded on the principle that public institutions exist to serve the public interest.

It's a mutually reinforcing, reciprocal relationship. For Australia, if the government and the public service as a whole is understood to be trustworthy, the public is more likely to comply with policies, accept government decisions and actively participate in Australia's democracy.

The intersect between administrative law and trust

Administrative law is fundamental to the regulation of the relationship between the government and the public — consequentially supporting the social contract and therein trust.

To adapt a legal aphorism: for government decisions to be done well they must be *seen* to be done well. Administrative law lifts the veil of bureaucratic decision-making for sometimes life-changing decisions.

Having worked in administrative tribunals, I've seen the benefits that come from people having the opportunity to understand and engage with the basis for government decisions that affect them, and from decision-makers being highly accountable for the impacts of the decisions they make.

Citizens do not have to understand the complexities of administrative law in order to *use* it. If a family considers a decision made by Centrelink is wrong, or a person with disability believes the National Disability Insurance Agency has been unfair, or an entrepreneur believes they have an incorrect decision from the Australian Taxation Office, then administrative law provides them with a pathway to seek recourse.

Allowing citizens to right perceived wrongs without a lawyer, in a forum where the merits of their claim to fairness will be considered, maintains and can even build trust in relationships with government.

Checks and balances like this reflect the conditional power entrusted by the people to institutions of government.

Trust is an essential ingredient in a well-functioning system of administrative decision-making and review.

Good administrative decision-making is a central and vital part of the government's role.

In making decisions, public servants must safeguard the rights and interests of individuals and the public, follow universally accepted standards of good decision-making and ensure they can justify their decisions.

The APS Values set out in s 10 of the *Public Service Act* reinforce and give character to how public servants must approach our decision-making roles — in particular, we need to be ethical, respectful and accountable.

A recent survey on the changes to the Administrative Appeals Tribunal found that for 62% of respondents the most important element in a federal administrative review system was fairness. This ranked far above other considerations such as accessibility (6%) or cost (4%). This data reflects how strongly the public feels about the administrative law system being built on good decision-making, guided by values.

As owners of the integrity and employment frameworks set out in the *Public Service Act*, the Australian Public Service Commission (APSC) has an important role to play in promoting and upholding values across the Service.

Regulatory frameworks, with guardrail institutions like the APSC, the National Anti-Corruption Commission, the Australian National Audit Office and the Commonwealth Ombudsman to enforce them, set standards for behaviour, recruitment decisions and quality in the APS, with legal consequences for non-compliance.

Supporting this system is the right thing to do, no matter the circumstances. It is equally valuable to address incidents of crisis as it is to reinforce cultural expectations that help to avoid issues in the first place.

Unlike the public service in many other countries, the APS has a strong set of principles underpinning good public administration in our legislation. The APS Values provide a critical foundation to drive high standards in Australia's public service. These values complement other legislated mechanisms to ensure transparency around what to expect from our public service.

As I've mentioned, the APS Values in s 10 are at the forefront of ensuring the public's confidence and trust in the way the public service will behave.

The APS Values focus on *how* public servants should serve the public; they require us to be impartial, committed to service, accountable, respectful and ethical.

And with the recent passage of the *Public Service Amendment Act 2024* (Cth), stewardship has become a new APS Value (I'll come back to this shortly).

The Employment Principles, also set out in the *Public Service Act*, guide employment and workplace relationships in the APS.[1] They foster a positive culture, stewardship, high performance and leadership. All APS agency heads are required to uphold and promote the Employment Principles.[2]

The Code of Conduct in the Act builds on these foundations by providing a clear statement to those within the APS and to the Australian public of the expected standard of behaviour of public servants.[3] The integrity and proper conduct of each APS employee — and a clear understanding of what that means — is critical to maintaining public trust in the APS as an institution. All APS employees are required to comply with the Code of Conduct. This means always behaving in a way that upholds the APS Values and Employment Principles, and the integrity and good reputation of their agency and the APS.[4] A breach of the Code of Conduct can result in sanctions, ranging from a reprimand to termination of employment.[5] In complying with these requirements, employees demonstrate that they as individuals can be trusted to act in the public interest.

We have these obligations as public servants, to ensure the relationship between the public and government is one of trust and quality interaction.

Trust and quality

And we know from our data that the quality of public services is a cornerstone of public trust. As highlighted in the Organisation for Economic Cooperation and Development (OECD) *Trust and Public Policy* report, alongside social tensions, the effectiveness and responsiveness of public service delivery significantly influences citizens' perception of government legitimacy and trust.[6]

Drawing from insights from the APSC's *Trust in Australian Public Services: 2023 Annual Report*, we found that satisfaction and trust is affected by several factors that make up the service experience, and the expectations of the kind of help services will provide.[7] Factors

1 *Public Service Act 1999* (Cth) s 10A.
2 Ibid s 12.
3 Ibid s 13.
4 Ibid s 13(11).
5 Ibis s 15.
6 Organisation for Economic Cooperation and Development (OECD), *Trust and Public Policy: How Better Governance Can Help Rebuild Public Trust* (OECD Public Governance Review Report, 27 March 2017), ch 3.
7 Australian Public Service Commission (APSC), *Trust in Australian Public Services: 2023 Annual Report* (Report, 21 November 2023).

most strongly associated with service satisfaction were, to name a few:

- "I got what I needed",
- "Information from the service was accurate", and
- "The amount of time it took to reach an outcome was acceptable".[8]

Ensuring these factors are consistently met for public services will encourage and catalyse engagement and trust in services in the future.

The impact of a breakdown of trust in government

We have seen a series of concerning integrity issues emerge in recent years, the foremost being the findings of the Royal Commission into the Robodebt Scheme.[9]

These findings highlighted ethical failures in public administration, such as not abiding by the law, operating in silos, and not ensuring decision-makers are properly briefed.[10]

We know that Robodebt will continue to have lasting and tragic impacts on affected families and the Australian public, and has put significant pressure on the public's trust in government and the APS as a whole.

For the APS, we commit to learning from the mistakes made and being held to account for this. We know we have more work to do.

Work to strengthen trust in government

Compared to many countries in the world, we have a strong base from which to do better.

The OECD recently published their 2024 report: the *OECD Survey on Drivers of Trust in Public Institutions*, which follows Australia's participation in the 2021 survey.[11] This report found that:

- Australians' trust in the federal government increased significantly from 38% in 2021, to 46% in 2023, exceeding the OECD average of 39%, which places Australia in the top 10 out of the 30 countries surveyed.
- Between 2021 and 2023, Australians' perceptions of trust drivers — that is, fairness, reliability, openness, responsiveness, and integrity — all improved on average. We were only one of two countries showing improvements across all five drivers since 2021.

8 Ibid 9.
9 *Royal Commission into the Robodebt Scheme* (Final Report, 7 July 2023).
10 Ibid ch 23.
11 OECD, *OECD Survey on Drivers of Trust in Public Institutions — 2024 Results* (Report, 10 July 2024).

Fostering a pro-integrity culture

While we have strong foundations, we need to remain vigilant and continue to do better if we are to maintain this standing. To strengthen the Australian public's trust in government, the Commission and the APS as a whole are focused on fostering a pro-integrity culture across the Service.

Many of you here play an important role in ensuring that the APS can implement the Australian Government's policies lawfully. However, legality is only the minimum standard expected of public servants.

We need to ensure APS staff not only uphold their obligations but are empowered to model the highest ethical standards of behaviour. There needs to be a pro-integrity culture.

Integrity in the APS is about the pursuit of high standards of professionalism in both what we do and how we do it. At the Commission, we define integrity as "doing the right thing at the right time" to "deliver the best outcomes for Australia sought by the government of the day".[12]

A pro-integrity culture will enhance overall public trust in the APS by delivering better decision-making, exemplifying high professional standards, and protecting against misconduct. However, without clear systems and accountability mechanisms that incentivise the behaviour we want, a pro-integrity culture cannot exist.

The APSC has a central role in driving a pro-integrity culture across the APS. Under its statutory functions, the APSC continues to strengthen the integrity architecture of the APS at a whole of system level by setting and ensuring the standard for the Service on integrity and conduct.

Under its stewardship role, the APSC works closely with the Secretaries Board to drive pro-integrity initiatives at the whole of Service level.

And through forums such as the Future of Work subcommittee of the Secretaries Board, the APSC drives initiatives to strengthen psychological safety — a foundation to building and sustaining a pro-integrity culture.

APS Integrity Taskforce

In February 2023, the Secretaries Board endorsed a joint proposal by the Department of the Prime Minister and Cabinet, the Attorney-General's Department and the APSC to establish an Australian Public Service Integrity Taskforce that would provide the APS's top leadership body — the Secretaries Board — with a "bird's-eye view" of the APS integrity landscape.

The taskforce found varying levels of integrity maturity across Australian Government agencies that highlighted both gaps to address and good practices to cross-pollinate across the APS.

12 "Integrity in the APS", *Australian Public Service Commission* (Web page, 8 December 2021) <https://www.apsc.gov.au/working-aps/integrity>.

The Integrity Taskforce's final report, delivered in September 2023 and titled *Louder than Words — An APS Integrity Action Plan*, detailed the actions to build a pro-integrity culture in the APS under 15 recommendations that nested over 50 actions for agencies and departments to implement.

Recommendations focused on culture, systems and accountability, and highlighted the role of agencies at the centre like the APSC, the Attorney General's Department, the Department of Finance, and the Department of the Prime Minister and Cabinet, in leading whole of system improvements to integrity.

Taskforce recommendations, as well as the recommendations from the Royal Commission into the Robodebt Scheme, and a suite of integrity-related APS Reform initiatives have been incorporated into the APSC's Integrity Roadmap finalised in May 2024.

Work to implement all these initiatives is underway across the Service.

SES Performance Leadership Framework

This includes work to embed the Senior Executive Service (SES) Performance Leadership Framework, which provides a standard set of minimum requirements that must form part of each APS agency's performance practices for SES employees.

The Framework is an initiative of the APS Reform Agenda and has been introduced to strengthen behaviour and outcomes-based performance management.

By formalising a requirement for behaviours to be considered equally with outcomes, we are setting the expectation that how we deliver things in the APS is just as important as what we deliver.

In this context, the Framework confirms that excellent performance in what is delivered cannot be used to offset or minimise deficiencies in how those outcomes are achieved.

Ethical decision-making and independence of government lawyers

A pro-integrity culture across the Service will assist leaders and public servants in exercising ethical decision-making, particularly when faced with ambiguity and shades of grey.

In these situations, we want our leaders and public servants to have the support they need to make decisions in a way that is right and proper as well as legally and ethically correct. Decisions made with integrity will ultimately strengthen the trust in how the government exercises its authority.

One of the recommendations from the Royal Commission into the Robodebt Scheme focused on the need to reinforce the independence of government lawyers.

The Royal Commission observed, in its own words: "A lawyer must not act as a mere mouthpiece for their client."[13]

A pro-integrity culture across the APS will provide government lawyers with a strong foundation when faced with ethical dilemmas — where the duty to maintain their independence is of most significance.

We want our lawyers to have the support to feel confident in providing advice to decision-makers and escalating concerns if advice is not heeded.

The significant body of work underway by the Attorney General's Department to implement recommendations from the Royal Commission will reinforce this outcome.

Public Service Amendment Act 2024

And finally, the *Public Service Amendment Act* introduced amendments to the *Public Service Act* which established foundational initiatives of the APS Reform Agenda: strengthen the core values of the APS; build capability and expertise; and support good governance, accountability and transparency.

As I mentioned earlier, the amendments introduce stewardship into the existing APS values.

This is a significant addition to our values which have remained unchanged for many years. The Amendment Act defines the value of stewardship as follows:

> The APS builds its capability and institutional knowledge, and supports the public interest now and into the future, by understanding the long-term impacts of what it does.[14]

Part of the APS's role as a steward is good record-keeping — ensuring there is an accurate and complete account of actions taken and the reasons why. Incomplete records are detrimental to the integrity of the service. These issues have been highlighted in many reviews, inquiries and audits. Good record-keeping is essential for demonstrating accountability in decision-making and the way we use public resources — helping us maintain the public's trust and confidence in government.

Beyond this, an APS that embodies stewardship is one that the public can trust — a public service that can be trusted to advise on and implement the priorities of government with integrity, over a longer time horizon than three-year political cycles.

Our new value of stewardship is reflective of a public servant's commitment to leave the service better than how it was found. And in this, we are privileged to heed the lessons from the oldest living culture on earth and think carefully about the footsteps each of us will leave behind as we strive to improve the institutions we are proud to serve.

13 *Royal Commission into the Robodebt Scheme* (n 9) 519.
14 *Public Service Amendment Act 2024* (Cth) s 2, inserting *Public Service Act 1999* (Cth) s 10(6).

Values in the public service

*Paul Brereton AM**

Over the last year, I have spoken often about integrity in the public sector, and the importance of organisational culture in shaping behaviours, values and decision-making. In this article I discuss first the role of culture and values in shaping integrity in governance. Then, I discuss two key components of the concept of corrupt conduct: breach of public trust, and abuse of office. Finally, I turn to the first year of the National Anti-Corruption Commission (NACC): what we are seeing and, in general terms, some of the policy issues and controversies.

The role of culture and values in shaping integrity in governance

How people respond to ethical dilemmas is determined more by organisational culture than by policy and protocol. Culture is the sum total of ways of living built up by a group of humans, which is transmitted from one generation to another. It establishes accepted bounds and decision points for behaviour. It provides organisational norms and boundaries for value-based decisions that affect the group and the society in which it operates. Culture is what people do, not what formal policies might tell them to do.

Leaders in the Australian Public Service (APS) are instrumental in shaping a service that demonstrates integrity in everything it does. Leaders must foster in our institutions, from the top down and at every level, a culture in which decisions are made and advice is given honestly, impartially and in the public interest; in which matters are reported honestly, without embellishment or omission; and in which responsibility is accepted, including for the inevitable mistakes.

Integrity also involves taking early responsibility for mistakes, learning from them, and above all implementing action to rectify what can be put right. Mistakes are inevitable; we all make them. But integrity issues arise from seeking to avoid responsibility for mistakes. It is almost always the coverup, not the initial error, that causes grief. This is particularly prevalent in organisational cultures in which it is perceived that the honest reporting of bad news will be unwelcome. I say perceived, because often it is not in fact the case, and the superior will never have intended to create such an impression; but it is easy to overlook how intimidating senior leaders are seen to be by our subordinates, by virtue of the standing, status and authority implicit in our position. It requires active engagement with staff — and demonstration by the outcomes for others who do the right thing — to convince them that they are safe to report wrongdoing and confess errors.

As we reflect on the role of leadership in enhancing and cementing integrity across the Commonwealth public service, it is pertinent to refer to the newest APS value — stewardship.

* The Hon Paul Brereton AM, RFD, SC is Commissioner of the National Anti-Corruption Commission. This article is an edited version of his plenary speech at the Australian Institute of Administrative Law 2024 National Conference in Canberra on 18 July 2024.

The notion was very well captured in the second reading speech, in which Minister Gorman described it this way:

> Stewardship involves learning from the past and looking to the future. It involves conservation and cultivation — leaving things in a better place than you found them. It involves seeing your role as part of the whole — preserving public trust and the public good. Stewardship has deep roots here in Australia. First Nations Australians are this country's original stewards — caring for country over tens of thousands of years and multiple generations.[1]

At the core of the notion of stewardship is the idea that you have a responsibility to care for the agency you have joined, and when you come to depart, to leave it in a better and stronger condition than it was in when you came to it. It gives priority to the welfare of the organisation, rather than the career of the individual.

Stewardship is related to the existing APS value of accountability. Ethical leadership involves being prepared to be accountable, not avoiding being held to account. Accountability includes for success in achieving outcomes — not only in the short term, but also in the long term; it also includes the welfare of employees; compliance with law, good governance, and morality; and reputational impacts — not only your own, but those of the agency, the service, the government and the nation.

Corrupt conduct

Corruption is essentially about the misuse of public power, position, privilege or property, for private purposes. It results in the diversion of public resources and the undermining of trust in our public institutions.

The touchstone of the NACC's jurisdiction is a "corruption issue". That means a question of whether a person has engaged, is engaging, or will engage in corrupt conduct.

Under the *National Anti-Corruption Commission Act 2022* (Cth) (*NACC Act*), a public official engages in corrupt conduct if they breach the public trust, abuse their public office, or misuse official information.[2] In addition, any person — not confined to public officials — engages in corrupt conduct if they do something that could cause a public official to behave other than honestly and impartially in performing their public duties.[3] In this way, the Act captures conduct by any person that could adversely affect a public official's honest or impartial exercise of powers or performance of duties. This extends to conduct of public officials themselves that affects the honest and impartial performance of their own functions. The definition of corrupt conduct extends to attempting, conspiring or planning to engage in any of those types of conduct, and participating in another's corrupt conduct;[4] these notions are analogous to accessorial liability in the criminal law.

1 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 June 2023, 4280 (Patrick Gorman, Assistant Minister to the Prime Minister).
2 *National Anti-Corruption Commission Act 2022* (Cth) s 8(1)(b), (c), (d) (*NACC Act*).
3 Ibid s 8(1)(a).
4 Ibid s 8(9).

The idea of causing a public official to act dishonestly — for example, by a bribe, inducement or duress — and that of misuse of official information, are easily enough understood. But it is the other two limbs — breach of public trust and abuse of office — that lie at the core of corrupt conduct.

Breach of public trust

Although it is not the only form of corrupt conduct within the definition, breach of public trust is central. The concept of public trust recognises that public powers are conferred on public officials for the public benefit; and it will be a breach of that public trust — within the definition of corrupt conduct — if a power is not exercised honestly for the purpose for which it is conferred. At common law it has long been held that the overarching principle required for breach of public trust is bad faith.[5] The term is not defined in the legislation, but the Revised Explanatory Memorandum for our Act provides guidance, stating:

> Public office is a public trust — public officials hold their official powers, functions and duties on trust for the public, and are expected to exercise their powers, and to perform their functions and duties, for the purpose for which those powers, functions and duties were conferred. Public officials are also expected to exercise official powers in the public interest. If a public official exercises their official powers for an improper purpose or exercises their powers or performs their functions and duties contrary to the purpose for which those powers, functions or duties were conferred, their conduct would amount to a breach of public trust (see *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 165 (Mahoney JA)). The concept of a breach of public trust does not depend on personal gain, or benefit for a third party; the key feature of a breach of trust is the exercise of a power, or the performance of a function or duty, for an improper purpose. Examples could include the use of official powers to advance a personal interest; or using, applying, or awarding public resources to achieve a purpose for which those resources were not appropriated, designated or otherwise given.[6]

The concept in a closely similar statutory context was described by Mahoney JA in *Greiner*, which is referred to in the Revised Explanatory Memorandum. His Honour, who was in dissent in the outcome, but not on this point, said:

> The Commissioner considered that what Mr Greiner and Mr Moore did was also a breach of public trust within s 8. There is no definition of that term in the Act. However, the concept of "public trust" in administrative law is not unknown … It is not necessary to attempt a precise definition of the term as used in s 8(1). It includes the misuse of an office or of the powers of an office in circumstances such as the present. The Commissioner concluded that Mr Greiner and Mr Moore used their position, their power and the influence it gave them to procure the preferment of Dr Metherell for the purpose of achieving for them a political advantage and, perhaps, in the case of Mr Moore, to assist a friend. This is a use of the trust confided in them for a purpose for which it was not given.[7]

In *Cunneen v Independent Commission Against Corruption*, Basten JA suggested that there was an "overlap" between concepts of honesty and impartiality and breach of public trust.[8] Referring to *Greiner*, his Honour said that Mahoney JA's reference to the use of trust for a purpose for which it was not given meant, "[b]roadly speaking, … the concept of

5 *R v Barron* (1820) 106 ER 721; Peter Hall, *Investigating Corruption and Misconduct in Public Office* (2nd ed, Lawbook, 2019), p 15.

6 Revised Explanatory Memorandum for the National Anti-Corruption Commission Bill 2022 (Cth), [2.34] and following.

7 *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 165 (Mahoney JA).

8 *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421.

improper purpose in administrative law, which extends beyond the concepts of honesty and impartiality".[9] Bad faith in administrative law includes a lack of an honest or genuine attempt to deal with the subject-matter of the power conferred on the executive. Though not capable of a precise definition, it can include cases where no attempt is made, knowingly, to act conformably with duty.

In *Flori v Winter*,[10] the Queensland Court of Appeal considered whether abuse of public office extended beyond the exercise of power for an improper purpose, in the context of a comparable statutory scheme. In that case, the Court was asked to decide whether engagement by two police officers in a public act of indecency could, if established, amount to a breach of the trust placed in the police officers by reason of their office. The Court accepted that conduct that was "damaging to the public trust" placed in public officials could constitute a breach of public trust and, in the circumstances of that case, reasoned that as police exercise extraordinary power within the community, and public trust in police discipline and restraint is foundational to the exercise of that power, the alleged misconduct was damaging to the public's trust in police discipline and restraint, and therefore constituted a breach of public trust. This may extend the concept to, if not beyond, its limits.

In the High Court appeal in *Independent Commission Against Corruption v Cunneen*,[11] it was observed that the ordinary meaning of corruption in public administration implies dishonest or partial exercise of an official function,[12] and that the notion is concerned with the *probity* of the exercise of the function, and does not capture conduct "having nothing to do with corruption in public administration as that concept is commonly understood".[13] However, the scope for legitimate difference of opinion in this area is demonstrated by the dissents of Bathurst CJ in the Court of Appeal, and of Gageler J (as his Honour the Chief Justice then was) in the High Court.

To sum up, then, the concept of "breach of public trust" is concerned with the exercise of official powers and performance of official functions in bad faith and/or for an improper purpose. Arguably, it extends to official misconduct that erodes public trust in the probity or integrity of public officials in the performance of their duties.

Abuse of office

Often overlapping with breach of the public trust, it will be an abuse of office for a public official to use their powers or office improperly to obtain a benefit for themselves or to inflict a detriment on someone else. The notion refers to the conduct that constitutes, conduct that involves, and conduct that is engaged in for the wrong or improper use of a position of duty, trust or authority by a public official.

9 Ibid [77]–[78].
10 *Flori v Winter* [2019] QCA 281.
11 *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1.
12 Ibid [38].
13 Ibid [52].

Again, the term is not defined, but it is informed by the common law notions of misconduct in public office. The Revised Explanatory Memorandum provides the following guidance in relation to the meaning of the phrase:

> Paragraph 8(1)(c) would provide that conduct of a public official that constitutes, involves, or is engaged in for the purpose of abusing the person's office as a public official would constitute corrupt conduct. The concept of an abuse of office by a public official involves the official engaging in improper acts or omissions in their official capacity, that the public official knows to be improper, with the intention of gaining a benefit for themselves or another person or causing a detriment to another person. However, conduct may still constitute corrupt conduct even if it were not for the personal benefit of the public official or other persons involved in the conduct (see subclause 8(8) and further information at paragraph 2.54). In the context of an abuse of office, this means that a public official may still abuse their office if the public official intended to cause a benefit that was indirect, intangible, or several steps removed from themselves or the other persons involved in their conduct. An abuse of office can be committed through the exercise of influence arising from the person's public office or the use of information obtained in their capacity as a public official.[14]

The features of abuse of office outlined in the Revised Explanatory Memorandum require the public official to engage in improper acts or omissions in an official capacity knowing that the conduct is improper. An issue arises whether s 8(1)(c) requires the public official to have the intention of obtaining a benefit for themselves or another or causing a detriment to another. This requirement is not expressed in the Act. The common law offence of abuse of office does not require proof of personal benefit. Similarly, if abuse of office is read synonymously with impropriety in the context of "making improper use of his or her position", then the cases of *Chew v The Queen*[15] and *R v Byrnes*[16] suggest that intention of benefit or detriment is not required.

In any event, s 8(1)(c) is not confined to abuses of public office resulting in a direct pecuniary benefit or detriment. Section 8(8) and the Explanatory Memorandum make clear that the benefit may be intangible or several steps removed from the persons involved in the conduct. In some circumstances, benefits as intangible as political advantage could constitute a benefit in this regard.

Some important qualifications

However, it is crucial to recognise that mistakes, bad decisions, negligent maladministration, and monumental stuffups are not in themselves corrupt conduct. Generally speaking, an element of bad faith and/or personal benefit (for the perpetrator or another) is necessary to make conduct corrupt.

It is also important to realise that the *NACC Act* does not legislate new standards of behaviour. The conduct it characterises as corrupt conduct has always been regarded as improper, at least by right-minded people. The difference is that now there is an agency with the function and powers of detecting, investigating and exposing it. Through the Commission, the Act provides a vehicle for upholding standards of integrity and conduct that already exist. For that reason, it is entirely appropriate that our jurisdiction extends to corrupt conduct that occurred before the Commission's establishment.

14 Revised Explanatory Memorandum (n 6).
15 (1992) 173 CLR 626.
16 (1995) 183 CLR 501.

The first year of the National Anti-Corruption Commission

Initially, our operational efforts were focused on receiving and assessing reports of corruption. This began on day one. Increasingly, as these referrals have been triaged and assessed, our main effort has shifted to the conduct of investigations.

In our first year to 30 June 2024, the Commission received 3,189 referrals of suspected corrupt conduct. About 90% are excluded at the triage stage, because they do not concern a Commonwealth public official or do not raise a corruption issue. In the assessment process we opened 29 preliminary investigations, of which 7 were completed, all resulting in a conclusion that no corruption issue arose. We opened 26 corruption investigations, 7 of them jointly with other agencies, and we referred 9 corruption issues to other agencies for investigation.

In 252 cases which passed triage, we decided to take no further action. Typically, this was because there are insufficient prospects of finding corrupt conduct, or the matter is already being adequately investigated by another agency, or a corruption investigation would not add value in the public interest. One of our investigations has already resulted in an individual being charged with soliciting a secret commission. We also progressed seven active investigations that were commenced by the former Australian Commission for Law Enforcement Integrity. Of them, three resulted in convictions and one in a committal for trial.

There are two dominant domains in which we are seeing both perception and actuality of corrupt conduct. They are in the fields of procurement, and of recruitment and promotion. Concerns in both those areas relate to the preferring of family, friends and associates; and the misuse of official information to gain an advantage.

There are three constant themes, which we have adopted as providing the focus for our corruption prevention and education work in 2024.

The first is *conflicts of interest*. Everyone in public life will sometimes encounter situations where they may have a private material or personal interest or connection that is relevant to their public duty. Not every such situation results in corrupt conduct; most do not. Yet at the heart of almost every case of corruption is a conflict of interest, where someone prefers their own interest to the public interest.

The second is *ethical decision-making*. Recent controversies, such as Robodebt, have given renewed prominence to the challenges that can confront public servants in an environment where the public service is expected to be responsive to government. Ultimately, reinforcing the decision-making process is crucial, because corruption involves subverting the public decision-making process to serve a private purpose. So equipping decision-makers to exercise their functions ethically, in an environment where they can be exposed to many pressures, is vital. We are addressing this, rather than by reinvestigating what has already been exposed in the Robodebt Royal Commission, by investigating similar behaviour elsewhere, as well as through our education and prevention activities.

The third theme is *corruption risks and vulnerabilities that are likely to arise in the context of an election*. This is particularly relevant with a federal election due in less than a year. These include issues such as political donations and fundraising, government advertising, appointments, and pork-barrelling, particularly through grants schemes. Grants in particular have already attracted our interest and are a current focus of both our investigatory and prevention lines of operation.

Our function

It will be apparent from the statistics I have already quoted that the public perception of corruption greatly exceeds the actuality. That is not a cause for complacency, for two reasons: first, because the perception itself bespeaks a lack of trust and confidence in our institutions; and second, because there is still an actuality that underlies the perception. However, it is necessary to emphasise that the Commission is an anti-corruption commission, with the function of detecting, investigating and exposing serious and systemic corrupt conduct in the Commonwealth public sector. We are not a complaints handling agency, or an administrative decisions review authority. Making a referral to us is not like making a complaint to the Ombudsman or an application to the Administrative Review Tribunal. For us, referrals are a source of information to assist us in deciding what to investigate, not individual complaints on which we are bound to adjudicate.

How we decide what to investigate

Sometimes people wonder how we decide what to investigate, and why we do not investigate some matters. We triage and assess referrals to determine whether they are within jurisdiction, whether they raise a corruption issue, and if so whether and how to deal with them. There are two tiers to this process. The first we call "triage", which involves asking whether the matter is within jurisdiction (that is, does it concern a Commonwealth public official) and whether it raises a corruption issue. At this stage, the question whether a corruption issue arises is analogous to a strike-out of pleadings test: does the referral articulate, expressly or implicitly, all the elements of a corruption issue, in a more than merely colourable way? Or does it found a viable hypothesis that someone has engaged in corrupt conduct?

The second tier is assessment, in which we decide whether a referral raises a corruption issue that could be serious or systemic, and whether and if so how to deal with the issue.

As you might expect, I have declined invitations to provide a list of matters that do or do not qualify as serious or systemic. However, drawing on decisions about the notion of "serious harm" in the law of defamation, I have issued a guideline[17] that "serious" means something that is significant: something more than "negligible" or "trivial", but it does not have to be "severe" or "grave";[18] and "systemic" means something that is more than an isolated case: something that involves a pattern of behaviour, or something that affects or is embedded in a system. Factors can include whether the conduct is potentially criminal, and if so the penalty; the seniority of those involved; the nature and egregiousness of the conduct; the amount involved; and the potential impacts.

17 Under *NACC Act* (n 2) s 279.
18 Cf *Rader v Haines* [2022] NSWCA 198, [27].

We can deal with a corruption issue by: (1) investigating it, solely[19] or in conjunction with another agency,[20] if it could involve corrupt conduct which is serious or systemic;[21] (2) referring it to another agency;[22] or (3) taking no further action.[23] That decision is ultimately made by our Senior Assessment Panel, in which I am advised by the three deputy commissioners, and the heads of our legal, operational, capabilities and evaluation branches.

To help decide whether a corruption issue arises, and if so how to deal with a matter, we can conduct preliminary investigations, in which we can exercise some of our powers to compel production of documents and provision of information.

In deciding what we will investigate, we consider the prospects of whether an investigation will discover corrupt conduct — some referrals that on their face raise corruption issues contain allegations which are so fantastically conspiratorial as not to warrant further investigation. In distinction to the "strike-out" test at the triage stage, this is analogous to but more flexible than a *General Steel*[24] summary dismissal test. Then we prioritise our efforts, usually according to the gravity and scale of the conduct, our strategic priorities, and whether an investigation is likely to add value in the public interest. For example, historical matters are less likely to add value in the public interest — so I have reluctantly declined to exercise my extraordinary powers to investigate the alleged conspiracy that resulted in the dismissal in 1975 of the Whitlam Government. And where a matter has already been fully investigated and exposed in another forum, or another process can provide remedies that we cannot, it may not add value to conduct another investigation simply for the sake of characterising the conduct as corrupt. On the other hand, where other agencies might encounter obstacles in gaining access to information, our extraordinary powers may be a reason for us to conduct an investigation. Sometimes, the value may lie in "clearing the air" — providing a conclusion that there was not corrupt conduct, where there has been an allegation or perception of corruption, may assist in restoring public confidence and reputations. An important corollary of this is that just because we open an investigation does not mean that we necessarily think there is corruption to be found.

Transparency and secrecy

Sometimes people wonder why they do not know what we are investigating. You would not expect an intelligence agency to announce what it is investigating, and nor should we. We do not want those under investigation to know, at least until the appropriate time arrives. Moreover, we are conscious of the effect on reputations of an announcement that someone is being investigated for corrupt conduct, in a context where many of the protections that attend a criminal investigation and prosecution are absent. In order to provide some visibility of our activity, we publish weekly statistics of referrals, assessments and investigations. However, we will generally not disclose the subject-matter or status of a matter under consideration, unless or until it enters the public domain through court or other public action.

19 *NACC Act* (n 2) s 41(1)(a).
20 Ibid s 41(1)(b).
21 Ibid s 41(3).
22 Ibid s 41(1)(c), (d).
23 Ibid s 41(6).
24 *General Steel Industries Inc v Commissioner for Railways* (NSW) (1964) 112 CLR 125.

The legislation that governs us requires that ordinarily our proceedings be conducted in private, chiefly to avoid the risk of unfair and premature damage to reputations that can be caused when unproven allegations of corruption are publicised. In accordance with the legislation, we will conduct public hearings where the circumstances and the public interest justify an exception to the general rule that they be held in private. As you would expect, what are "exceptional circumstances" will emerge on a case-by-case basis and will not be prescribed in advance. They have not arisen yet.

It is important to recognise that the purpose of a hearing is to elicit information and evidence, to inform a decision as to whether there has been corrupt conduct, not to have a show trial from which the safeguards of the criminal law are absent. Private hearings avoid unfair premature damage to reputations, and potential jeopardy to the fairness of a criminal trial, arising from the conduct of public hearings in circumstances where the protections that apply in a criminal trial are not present. Moreover, many witnesses are more comfortable in giving evidence and making disclosures in a private hearing than in public. This results in a better quality of evidence.

If we find there has been corrupt conduct, then that can be and will be exposed through our reports. Although, in those exceptional cases where there has been a public hearing, a public report is mandatory, we can also publish our reports if satisfied it is in the public interest to do so, and generally speaking it will be in the public interest to do so where there has been a finding of corrupt conduct, and sometimes to clear the air of unsubstantiated allegations.

Judicial review

Finally, for this audience, I will touch on where judicial review might and might not be available.

The *NACC Act* expressly states that there is no duty to consider whether to deal with a corruption issue, regardless of by whom it is referred.[25] It must follow that there is no obligation to give reasons for not dealing with an issue. In my view, our decisions whether or not or how to deal with a referral are not amenable to judicial review.

However, a corruption investigation may culminate in a finding that a person has engaged in corrupt conduct, and a report may include such a finding.[26] That is an administrative finding of fact, not a finding of criminal guilt,[27] for which different rules of evidence and proof apply. Of course, any such finding can be made only after a person affected is afforded procedural fairness, and we apply the *Briginshaw*[28] standard in making a finding of corrupt conduct. Such a finding is amenable to judicial review.

25 Ibid s 41(7).
26 Ibid s 149(3).
27 Ibid s 150.
28 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

Some more legal implications of pork barrelling — part 3: New South Wales developments

*JC Campbell**

This article seeks to outline some provisions of the law of the Commonwealth that have a bearing on pork barrelling, as well as some developments in the law of New South Wales relevant to pork barrelling. It builds on and updates a 2022 article on the subject in relation to New South Wales.[1] The present article is in three parts. Part 1 covered the *Public Governance, Performance and Accountability Act 2013* (Cth) and subordinate legislation made under it, and the role of the Commonwealth Ministerial Code of Conduct.[2] Part 2 continued the focus on the Commonwealth by looking at relevant Commonwealth sanctions and investigatory powers.[3] In this issue, Part 3 focuses on relevant New South Wales legislation and case law that clarifies principles around pork barrelling.

The NSW ICAC Report

Events leading to the report

In recent years there have been several investigations by different governmental bodies in New South Wales that are relevant to the topic of pork barrelling.

The State Archives and Records Authority issued a report in January 2021 into the adequacy of the record-keeping that there had been concerning a particular NSW grants program, the Stronger Communities Fund (SCF).[4] The report sprang from an allegation that some working notes relating to recommendations for grant approvals had been shredded. The State Archives and Records Authority had responsibilities relating to creation and retention of records, but not concerning any wider questions of probity or legality of the grants administration itself. The relevance of that report for present purposes is that proper record-keeping is essential if one is to understand the process through which government money came to be spent in a particular way, and thus to understand why it was spent in that way.

Prompted in particular by these events concerning the SCF, the Public Accountability Committee of the NSW Legislative Council conducted an inquiry into the "integrity, efficacy and value for money of NSW Government grants programs" and issued reports on that

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1 JC Campbell, "Some legal implications of pork barrelling" (2022) 52 *Australian Bar Review* 129; also published as Professor Joseph Campbell, "Appendix 3: Some legal implications of pork barrelling", Independent Commission Against Corruption (NSW), *Report on Investigation into Pork Barrelling in NSW* (Report, August 2022) 186 (ICAC Report).

2 See JC Campbell, "Some more legal implications of pork barrelling — part 1: relevant Commonwealth legislation" (2023) 109 *AIAL Forum* 101.

3 See JC Campbell, "Some more legal implications of pork barrelling — part 2: Commonwealth sanctions and investigatory powers" (2024) 110 *AIAL Forum* 81.

4 State Archives and Records Authority (NSW), *Recordkeeping Assessment Matter Raised by Mr Greg Warren MP: Alleged Non-compliant Disposal of Records Relating to the Stronger Communities Fund* (Report 20/0424, January 2021).

inquiry in March 2021 (*First Report*)[5] and February 2022 (*Final Report*).[6] The *First Report* found that the SCF

> tied grants round was an alarming example of the lack of transparency and accountability in NSW Government grant programs. The fund was originally established to assist councils created from the NSW Government's failed council amalgamations, but morphed into a brazen pork-barrel scheme. Ultimately the Coalition designed a scheme with so few checks and balances that $252 million of public money was handed out on a purely political basis to sort out the Coalition's political problems, to gain an advantage in the 2019 state election and to punish any council that had objected to being forcibly merged.[7]

The *Final Report* examined the administration of a wider range of government grants, in particular bushfire relief grants and arts and cultural grants. It recommended as follows:

> **The Department of Premier and Cabinet should:**
>
> 1. develop a model for grant administration that must be used for all grant programs administered in NSW that:
>
>   - is based on ethical principles outlined in the *Government Sector Employee Act (2013)* such as impartiality, equity and transparency
>   - ensures assessments and decisions can be made against clear eligibility criteria, and limits politically-biased outcomes
>   - ensures accountability for decisions and actions of all those who are involved in the program including public servants, elected representatives and political staff
>   - includes minimum mandatory administration and documentation standards including for interactions between ministers, ministerial staff and public servants
>   - requires any ministerial override of recommendations to be documented, with transparent consideration of probity and conflict of interest.
>
> **The Department of Planning and Environment should:**
>
> 2. ensure that guidelines prepared for all grant programs are published and include a governance framework that includes accountabilities and key assessment steps.[8]

The Auditor-General released a report in February 2022 on the integrity of grant administration concerning the SCF,[9] which made the following findings:

> The assessment and approval process for Round 2 of the Stronger Communities Fund lacked integrity. The government decided to prioritise funds for councils that had worked constructively with the government through the 2016 merger process.
>
> However, this information was not included in the program guidelines. The program guidelines were not published and did not contain details of selection and assessment processes. Councils and projects

5 Public Accountability Committee, Parliament of New South Wales (Legislative Council), *Integrity, Efficacy and Value for Money of NSW Government Grant Programs: First Report* (Report No 8, March 2021) (*First Report*).

6 Public Accountability Committee, Parliament of New South Wales (Legislative Council), *Integrity, Efficacy and Value for Money of NSW Government Grant Programs: Final Report* (Report No 10, February 2022) (*Final Report*).

7 Public Accountability Committee, *First Report* (n 5), Chair's foreword, viii.

8 Audit Office (NSW), "Integrity of grant program administration" (Web page, 8 February 2022) <https://www.audit.nsw.gov.au/our-work/reports/integrity-of-grant-program-administration>.

9 Auditor-General (NSW), *Integrity of Grant Program Administration* (Performance Audit Report, Audit Office (NSW), 8 February 2022).

were instead identified by the former Premier, Deputy Premier and Minister for Local Government and communicated to [the Office of Local Government] with little or no information about the basis for the council or project selection. There was no merit assessment of identified projects. This process resulted in 96 per cent of funds allocated to coalition state seats.[10]

The Independent Commission Against Corruption (ICAC) has summarised some of the more detailed findings of the Auditor-General in that report:

- the fund involved the distribution of $252 million of public funds to 24 councils that had amalgamated in 2016 or been subject to a merger proposal
- 96% of available SCF funding was allocated to projects in NSW Government-held state electorates
- funding for councils was determined by the then premier, deputy premier and minister for local government and communicated by their staff through emails to the Office of Local Government (OLG), with little or no information about the basis for the council or project selection. The OLG administered payment of these funds without questioning or recording the basis for selection
- for the 22 councils where funding allocations were determined by the former premier and deputy premier, the only record of their approval is a series of emails from their staff
- a briefing note prepared for the former premier by a member of her staff contained the following statement: "We have continued to work on how we allocate this funding to get the cash out the door in the most politically advantageous way". The Auditor-General noted that this indicates that the preferential allocation of funding to government-held electorates was deliberate.[11]

The Department of Premier and Cabinet and the NSW Productivity Commissioner issued a joint report in May 2022 that reviewed grants administration in New South Wales and made 19 recommendations.[12] In June 2022 the NSW Government announced its "support or support in principle for all of the recommendations".[13]

Reasons for ICAC inquiring

Against the background of those inquiries and reports, ICAC decided to conduct its own inquiry into pork barrelling, dubbed "Operation Jersey". The reasons it gave for making its own investigation arose from its particular statutory obligations concerning the investigation and prevention of corruption:

> The Commission has not previously made a finding that pork barrelling is corrupt. Nor is it aware of any other Australian anti-corruption commission having made such a finding.
>
> However, based on the evidence collected in Operation Jersey and the findings of the Auditor-General summarised above, the Commission has concluded that pork barrelling can, under certain circumstances, involve serious breaches of public trust and conduct that amount to corrupt conduct. The Commission determined that it was in the public interest to examine and report on those circumstances. The reasons for doing so include:
>
> - The Commission is concerned that some elected officials may hold the misguided view that their discretion to spend public funds on pork barrelling schemes is unfettered.

10 Audit Office (NSW) (n 8).
11 ICAC Report (n 1) 11–12.
12 Department of Premier and Cabinet (NSW and NSW Productivity Commissioner, *Review of Grants Administration in NSW* (Final Report, April 2022).
13 Treasury (NSW), "NSW Government responds to Grants Review recommendations" (Media release, 7 June 2022) <https://www.treasury.nsw.gov.au/news/nsw-government-responds-grants-review-recommendations>.

- It is important that public officials be provided with information about the metes and bounds of conduct that is likely to be corrupt or attract the Commission's attention.

- Putting the possibility of corrupt conduct to one side, the Commission has a statutory obligation to promote the integrity and good repute of public administration. An examination of pork barrelling aligns with that obligation.[14]

The scope of the Commission's investigation was identified as follows:

1. Consider the circumstances in which the allocation of public funds and resources to targeted electors for partisan political purposes (known as "pork barrelling") may allow, encourage or cause the occurrence of corrupt conduct or conduct connected with corrupt conduct. The scope of the investigation will include, as considered appropriate, an examination of particular grant funding programs including:

   - the Stronger Communities Fund — Tied Grants Round Program (Round 2)

   - the Regional Cultural Fund established in 2017

   - the Community Sport Infrastructure Grant Program established 2018 (a federal grant program).

2. Identify whether any laws governing any public authority or public official need to be implemented or changed and whether any methods of work practices or procedures of any public authority or public official could allow, encourage or cause the occurrence of corrupt conduct and, if so, what changes should be made.[15]

Thus, the investigation related to the legal and institutional setting within which pork barrelling that might amount to corrupt conduct, within the meaning of the *Independent Commission Against Corruption Act 1988* (NSW) (*ICAC Act*),[16] might occur, and did not extend to whether any particular person had engaged in corrupt conduct.

Further, the investigation did not take the form of a public inquiry. Instead it took the form of commissioning several expert reports that were made publicly available, and holding a day-long forum that was live streamed on the Commission's website. The Commission took the view that this "provided an adequate opportunity for relevant issues to be brought to the attention of interested public officials and members of the public".[17]

Findings of the ICAC Report

Following that investigation, ICAC issued pursuant to s 74(1) of the *ICAC Act* a report on its review of grants administration in New South Wales (ICAC Report).[18] Its findings include that, in certain circumstances, pork barrelling can constitute corrupt conduct within the meaning of the *ICAC Act*:

> While individual matters should always be assessed on a case-by-case basis, … a minister, for example, may engage in corrupt conduct involving pork barrelling, within the meaning of s 8 of the ICAC Act, if the minister:
>
> - influences a public servant to exercise decision-making powers vested in the public servant, or to fulfil an official function, such as providing an assessment of the merits of grants, in a dishonest or partial way

14 ICAC Report (n 1) 12.
15 Ibid.
16 *Independent Commission Against Corruption Act 1988* (NSW) pt 3 (*ICAC Act*).
17 ICAC Report (n 1) 13.
18 ICAC Report (n 1).

- applies downward pressure to influence a public servant to exercise decision-making powers vested in the public servant, or to fulfil an official function, such as providing an assessment of the merits of grants, in a manner which knowingly involves the public servant in a breach of public trust
- conducts a merit-based grants scheme in such a way as to dishonestly favour political and private advantage over merit, undermining public confidence in public administration, and benefiting political donors and/or family members
- deliberately exercises a power to approve grants in a manner that favours family members, party donors or party interests in electorates, contrary to the guidelines of a grant program which state that the grants are to be made on merit according to criteria
- exercises a power to make grants in favour of marginal electorates, when this is contrary to the purpose for which the power was given.

In summary, those who exercise public or official powers in a manner inconsistent with the public purpose for which the powers were conferred betray public trust and so misconduct themselves.[19]

It also found that pork barrelling could be corrupt conduct within the meaning of s 9[20] of the *ICAC Act*:

> It may do so, for example, by conduct amounting to a substantial breach of the Ministerial Code of Conduct[21] or the Members' Code of Conduct. In particular, substantial breaches of the following clauses of the Ministerial Code could arise in a pork barrelling scheme:
>
> - clause 3, stating that a minister must not knowingly breach the law
> - clause 5, stating that ministers "must not knowingly issue any direction or make any request that would require a public service agency or any other person to act contrary to the law" and "must not direct that agency to provide advice with which the agency does not agree"
> - clause 6, stating "A Minister, in the exercise or performance of their official functions, must not act dishonestly, must act only in what they consider to be the public interest, and must not act improperly for their private benefit or for the private benefit of any other person".[22]

The ICAC Report also recognised that

> [i]n circumstances where pork barrelling is serious and wilful, it may constitute conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder, such that criminal punishment is warranted. Such conduct could potentially satisfy the elements of the criminal offence of misconduct in public office and, consequently, also satisfy s 9 of the ICAC Act.[23]

ICAC made 21 recommendations for practical steps that could be taken to prevent pork barrelling and better regulate the environments in which there was a risk that it might occur.[24] While anyone with a serious interest in the topic should read the report and consider all

19 Ibid 6–7.
20 Section 9 is set out in Appendix 3 of this article.
21 *Independent Commission Against Corruption Regulation 2017* (NSW) Appendix (NSW Ministerial Code of Conduct).
22 ICAC Report (n 1) 7.
23 Ibid 8.
24 Ibid 7–9.

the recommendations made, some of the more significant ones are recommendations 2, 3 and 5, respectively:

> That the *Government Sector Finance Act 2018* be amended to mirror s 71 of the *Commonwealth Public Governance, Performance and Accountability Act 2013* by including obligations that a minister must not approve expenditure of money unless satisfied that the expenditure would be an efficient, effective, economical and ethical use of the money and that the expenditure represents value for money.[25]
>
> That the grant funding framework, or equivalent requirements, apply to the local government sector. This should include situations where local councils are both grantees and grantors.
>
> That clause 6 of the Ministerial Code [of Conduct] be amended to read, "A Minister, in the exercise or performance of their official functions, must not act dishonestly, must act in the public interest, and must not act improperly for their private benefit or for the private benefit of any other person".[26]

ICAC recommended that its report be made public forthwith, and that recommendation has been acted on.

2023 NSW legislation

Some legislation was passed in New South Wales in 2023 to tighten the circumstances in which grants are made. The *Government Sector Finance Amendment (Grants) Act 2023* (NSW), which commenced on 1 July 2023,[27] added a new s 10.3A to the *Government Sector Finance Act 2018*:

> **10.3A Administration of government grants**
>
> (1) The following persons must not knowingly breach a mandatory requirement contained in a Grants Administration Guide —
>
> (a) a Minister,
>
> (b) a person employed by a Minister under the *Members of Parliament Staff Act 2013*,
>
> (c) an employee of a government sector agency within the meaning of the *Government Sector Employment Act 2013*, other than a person employed in or by a State owned corporation.
>
> (2) A Minister must not approve a grant to which the Grants Administration Guide applies unless satisfied that the grant —
>
> (a) is an efficient, effective, economical and ethical use of money, and
>
> (b) achieves value for money.
>
> (3) When approving or declining a grant to which the Grants Administration Guide applies, a person must have regard to the key principles of grants administration specified in the Guide.

25 Recommendation 2 has now been acted on. See discussion under "2023 NSW legislation" beginning on this page.

26 In the version of the Ministerial Code that was current at the time of the ICAC Report, clause 6 did not include the words "must act in the public interest" but stated instead "must act only in what they consider to be the public interest". ICAC's recommended change to clause 6 of the Code had not been made at the time of writing (early July 2023).

27 *Government Sector Finance Amendment (Grants) Act 2023* (NSW) s 2.

> **Note —** The key principles specified in the Grants Administration Guide published in the Gazette on 19 September 2022 are robust planning and design, collaboration and partnership, proportionality, an outcomes orientation, achieving value with relevant money, governance and accountability and probity and transparency.
>
> (4) In this section—
>
> ***Grants Administration Guide*** means a Grants Administration Guide issued from time to time by the Premier and published in the Gazette.
>
> ***mandatory requirement***, of a Grants Administration Guide, means a requirement contained in the Guide that is expressly identified by the Guide to be a mandatory requirement.

The obligations that are imposed on the people to whom the new s 10.3A applies repeat almost word for word ones imposed on ministers and certain Commonwealth officials under the *Public Governance, Performance and Accountability Act 2013* (Cth) (*PGPA Act*).[28] Thus, cases decided on one of these Acts will be useful precedents for construction of the other Act.

One of the important effects of this new section is that it provides a new way in which any of the people identified in para (a), (b) or (c) of s 10.3A(1) could commit "misconduct" within the meaning of s 9.15 or s 9.16 of the *Government Sector Finance Act 2018* (NSW), and thus come under an obligation to repay the amount of government money paid out through that misconduct, or make good the loss caused by the misconduct.[29]

This new s 10.3A has its substantive content decided by the current *Grants Administration Guide*, which was issued in September 2022.[30] The grants to which the guide applies, and therefore those grants concerning which the obligations in s 10.3A(2) and (3) apply, are "all grants administered by the government sector", but it "does not apply to local government or SOCs [State-owned corporations]".[31] The guide is a booklet 40 pages long. It cannot be easily summarised, but some of its provisions that would be relevant to pork barrelling are set out in Appendix 2 to this article.[32]

The *Government Sector Finance Amendment (Grants) Act 2023* also made an amendment to the *Government Information (Public Access) Regulation 2018* (NSW) to require:

> information relating to grants administered, or proposed to be administered, by an agency is prescribed as open access information of the agency if the information is required, under a mandatory requirement of the Grants Administration Guide, to be published by the agency on a website specified in the Guide.[33]

28 Section 10.3A(2) of the *Government Sector Finance Amendment (Grants) Act 2023* (NSW) has an obvious analogy in s 71 of the *Public Governance, Performance and Accountability Act 2013* (Cth) (*PGPA Act*). Section 10.3A(2)(a) and (b) draw on the definition of "proper" in the *PGPA Act*, and the principles of grant administration quoted in the note to s 10.3A(3) are identical with those required by cl 6.2 of the *Commonwealth Grants Rules and Guidelines 2017*, quoted in Campbell, "Some more legal implications of pork barrelling — part 1: relevant Commonwealth legislation" (n 2) 113.

29 The way that liability arises is discussed in Campbell, "Some legal implications of pork barrelling" (n 2).

30 Department of Premier and Cabinet (NSW), *Grants Administration Guide* (September 2022) <https://www.nsw.gov.au/sites/default/files/2022-09/Grants%20Administration%20Guide%20-%20September%202022_0.pdf>.

31 Ibid 3 [1.2].

32 Appendix 1 was published in Campbell, "Some more legal implications of pork barrelling — part 1: relevant Commonwealth legislation" (n 2).

33 *Government Sector Finance Amendment (Grants) Act 2023* (NS) sch 3 cl 6A, adding s 6A to the *Government Information (Public Access) Regulation 2018* (NSW).

The NSW Government has established a website that gives information about the various types of grants that are available.[34] Having information about the availability of grants publicised would tend against the type of pork barrelling that could occur if only those who were intended to be favoured knew that government money was available for particular types of project.

Developments concerning the Obeid and Macdonald matters

In the 2022 article there was mention of some then-unfinished litigation concerning two ministers in the NSW Government, Mr Obeid and Mr Macdonald. Court decisions since then cast some light on principles that are relevant to the application of the crime of misconduct in public office to pork barrelling.

The judgments

An additional judgment not mentioned in that article, but relevant to the more recent decisions, is *R v Macdonald (No 18)*.[35] It is the judgment of Fullerton J given on 21 October 2021 on the appropriate sentence to impose on those found guilty of a conspiracy to commit the common law offence of wilful misconduct in public office. It arose from the grant by Mr Macdonald, in his role as a Minister, to some companies in which Edward Obeid and Moses Obeid had an interest, of mining licences in the Bylong Valley.

Her Honour imposed a sentence on Mr Macdonald of 9 years and 6 months, comprising a non-parole period of 5 years and 3 months and a balance of term of 4 years and 3 months. The sentence commenced on 21 October 2021, so the earliest possible release date under it was 20 January 2027. Edward Obeid was sentenced to 7 years' imprisonment commencing on 21 October 2021, consisting of a non-parole period of 3 years and 10 months with a balance of term of 3 years and 2 months. His earliest date for eligibility for parole will be 20 August 2025. Moses Obeid was sentenced to 5 years' imprisonment, commencing on 21 October 2021, consisting of 3 years' non-parole period and a balance of term of 2 years. His earliest date for eligibility for parole will be 20 October 2024.

As her Honour recorded:

> It was accepted by counsel for each of the offenders that the offence of conspiracy for which they are to be sentenced is objectively serious and that in sentencing each of them for that offence the need to deter those in public office from contemplating actions that damage or undermine the institution of government, and to denounce those who are convicted of doing so, are the sentencing principles which will be of predominant weight in this sentencing exercise.[36]

The judgment contains in Annexure 2 a useful table of comparable cases and the sentences imposed in them. It underlines the seriousness with which the courts regard the crime of misconduct in public office when committed by a minister, parliamentarian or senior public servant.

34 NSW Government, *Grants and Funding* (Website) <https://www.nsw.gov.au/grants-and-funding>.
35 (2021) 394 ALR 125.
36 Ibid at [20].

R v Macdonald (No 10 — verdict)[37] is a decision of Dhanji J given on 20 December 2022, which found Mr Macdonald guilty of two separate offences of misconduct in public office concerning the granting of a mining licence at Doyle's Creek. One of the counts related to Mr Macdonald, in his role as Minister for Mineral Resources, granting consent to apply for an exploration licence under the *Mining Act 1992* (NSW), and the other related to his actually granting the exploration licence. These were a retrial of the same charges concerning which he had been convicted in 2017, that on appeal he succeeded in having the Court of Criminal Appeal set aside the convictions and order a retrial. That decision also found Mr Maitland not guilty of being an accessory to those crimes.

R v Macdonald[38] is a further decision of Dhanji J on 24 March 2023, sentencing Mr Macdonald for those crimes and giving reasons for the sentences imposed. That sentence was of 8 years, on the first count, to commence on 21 January 2020, consisting of a non-parole period of 5 years and 6 months and a balance of term of 2 years and 6 months. The sentence on the second count was 6 years and 6 months, comprising a non-parole period of 4 years and 6 months and a balance of term of 2 years. The bottom line was that the earliest date on which Mr Macdonald would be eligible for release on parole would be 20 January 2027, pursuant to the sentence imposed on him by Fullerton J in October 2021.

The matters of principle emerging

None of these cases involved any allegation of pork barrelling — the allegation, upheld by the judge in each case, was that the reason Mr Macdonald misused his public office was to benefit the Obeids in one case and Mr Maitland in the other, not for any political party to gain an advantage. However, there is an added element of seriousness in pork barrelling by comparison with the offences Mr Macdonald committed. It is that the purpose of the pork barrelling is to distort a process of high public importance, the operation of the electoral processes through which a Parliament is elected, rather than just to cause someone to make a private profit.[39]

The sentences imposed on Mr Obeid and Mr Macdonald reflect a general principle that offences of abuse of high public office are objectively serious and call for severe punishment to mark the public denunciation of such offences in an unambiguous way and to serve as a deterrent to others who might be tempted to abuse high office.[40] Such offences have an added degree of seriousness when committed by a minister:

> Grave though it is, corrupt behaviour on the part of a servant of the Crown does not have as great a potential to erode public respect for, and confidence in, institutions critical to the good order of government and society as does the conduct of a corrupt Minister of the Crown. If corruption takes hold at the centre of government, its permeation of lower echelons is assured and the ability to eradicate it gravely compromised. The respondent abused his position as Minister of the Crown, an office at the pinnacle of the structure of government in this state. Ministers have responsibility for the affairs of the departments over which they preside.[41]

37 [2022] NSWSC 1765.
38 [2023] NSWSC 270.
39 There is also a difference in that Mr Macdonald misused public power and the public resource of the right to exploit coal reserves, while pork barrelling usually misuses public funds, but it is hard to say that one of these is more serious than the other.
40 *R v Nuttall; Ex parte A-G (Qld)* [2011] 2 Qd R 328, [73], [80], [81]; *R v Macdonald (No 18)* (n 35) [20].
41 *R v Nuttall* (n 40) [52], endorsed in *R v Macdonald (No 18)* (n 35) [179]. To similar effect in *Retsos v The*

Some other matters of principle concerning the crime of misfeasance in public office that emerge from these judgments are:

- "[T]he essence of the offence concerns a breach of trust in the form of a deliberate or reckless breach of a duty owed by a public official to the public".[42]

- The element of the crime consisting of being a "public official" "encapsulates a range of potential offenders, from lowly officials to those, here, at the upper echelons of the State".[43]

- That the NSW Ministerial Code of Conduct had been breached was a relevant matter to take into account in sentencing, as a matter that increases the seriousness of the offence.[44]

- That the person who misused their office obtained no personal benefit from doing so does not mitigate the seriousness of their conduct.[45]

- If a person in a position of high office breaches the public trust that has been placed in them, previous good character will be much less help in reducing the sentence than would be the case if the person convicted had been an ordinary citizen: the public is entitled to expect that those who are placed in high office will necessarily be persons whose character makes them fit to hold that office.[46]

- That the person convicted was a Member of Parliament or a minister, and thus had especially important public duties that they had previously performed diligently, is not a reason for reducing the sentence.[47]

- That the person convicted will suffer adverse publicity and public humiliation can be a factor tending to reduce the sentence only when it has a physical or psychological effect on the offender.[48]

Queen [2006] NSWCCA 85 at [31], Sully J (Howie and Simpson JJ agreeing) said: "Any offence of, or ancillary to, corrupt conduct on the part of any public official should be denounced plainly and punished condignly."

42 *R v Obeid (No 12)* [2016] NSWSC 1815, [79] (Beech-Jones J), quoted in *R v Macdonald* (n 38) [27].

43 *R v Macdonald* (n 38) [28].

44 *R v Macdonald (No 18)* (n 35) [64]–[77].

45 Ibid [81].

46 *R v Jackson* (1988) 33 A Crim R 413 at 436–7, quoted in *R v Macdonald* (n 38) [71].

47 Ibid.

48 *R v Macdonald (No 18)* (n 35) [103], citing *R v Obeid (No 12)* (n 42) [102].

Appendix 2 — NSW grant administration guidelines

The relevant requirements of the NSW *Grants Administration Guide* dated September 2022 include the following (all emphasis in the original).

Officials **must** prepare clear and consistent grant guidelines that contain the following minimum information:

- the purpose and objectives of the grant
- selection criteria (comprising eligibility and assessment criteria) and assessment process
- grant value
- opening and closing dates
- application outcome date
- source agency or agencies
- the decision-maker.[49]

In undertaking the assessment process, officials **must** ensure that all decisions in the selection process are documented, including (where relevant):

- the outcomes of a cull of applications against eligibility criteria (including where an ineligible application has proceeded to assessment and the reasons for waiving the eligibility criteria. See below for approval required for the waiver of eligibility criteria)
- the recommendations made by the assessment team, including reasons for those
- recommendations
- the decisions made by the designated decisionmaker, including any departure from the
- assessment team's recommendation and reasons for that.

Where a Minister is the decision-maker, Ministerial staff **must** ensure that the decision is recorded in writing and the records are managed in accordance with the requirements of the SR Act [*State Records Act 1998* (NSW)].[50]

Where the decision-maker is a Minister, officials **must** provide written advice which, at a minimum:

- outlines the application and selection process, including the eligibility and assessment
- criteria used to select the recommended grantees
- includes the merits of the proposed grant or grants having regard to the grant guidelines
- and the key principle of achieving value for money
- identifies the recommended grantees
- identifies proposed funding amounts for each recommended grantee
- includes relevant input from key stakeholders (such as MPs, the responsible Minister, Ministerial staff and other Ministers) and the consideration given to that input in the assessment process.

(See exceptions below for non-competitive grants.)[51]

49 *Grants Administration Guide* (n 30) 29 [6.1.7].
50 Ibid 30–1 [6.3].
51 Ibid 31 [6.3.1].

A Minister **must not** approve or decline a grant without first receiving written advice from officials on the merits of the proposed grant or group of grants (see exceptions below for non- competitive grants).

A Minister or an official who approves or declines a grant **must** record the decision in writing, including the reasons for the decision (and any departure from the recommendation of officials), having regard to the grant guidelines and the key principle of achieving value for money, and manage these records in accordance with the requirements of the SR Act (see exceptions below for non-competitive grants).

Decision-makers may approve or decline grants in variance from the recommendation of officials. If a decision-maker has decided to approve or decline a particular grant where this would depart from the recommendation of the assessment team, the decision maker **must** declare this in the relevant documentation, including the reasons for the departure.[52]

Where it is anticipated that a grant opportunity will involve input from MPs or other stakeholders (such as other levels of government or industry representatives), officials **must** ensure that the grant guidelines clearly outline the role of stakeholders; there are processes in place to manage this interaction (including equitable opportunity for MPs); and all stakeholder input is documented as part of the assessment process, where relevant. Where such input is received outside of the process set out in the grant guidelines, this must be documented.[53]

In the case of one-off, ad hoc grants, the Minister is generally the decision-maker. The principles of this Guide relevant to decision-makers apply equally for these types of grants (and the exceptions for non-competitive grants are not applicable), including:

- A Minister **must not** approve or decline a grant without first receiving written advice from officials on the merits of the proposed grant or group of grants.
- A Minister who approves or declines a grant **must** record the decision in writing, including the basis for the approval having regard to the grant guidelines and the key principle of achieving value for money.[54]

Appendix 3 — Section 9 of the *ICAC Act*

9 Limitation on nature of corrupt conduct

(1) Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve —

(a) a criminal offence, or

(b) a disciplinary offence, or

(c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or

(d) in the case of conduct of a Minister of the Crown or Parliamentary Secretary or a member of a House of Parliament—a substantial breach of an applicable code of conduct.

(2) It does not matter that proceedings or action for such an offence can no longer be brought or continued, or that action for such dismissal, dispensing or other termination can no longer be taken.

(3) For the purposes of this section —

applicable code of conduct means, in relation to —

(a) a Minister of the Crown or Parliamentary Secretary — a ministerial code of conduct prescribed or adopted for the purposes of this section by the regulations, or

52 Ibid [6.3.2].
53 Ibid [6.3.3].
54 Ibid 32 [6.3.5].

(b) a member of the Legislative Council or of the Legislative Assembly (including a Minister of the Crown or Parliamentary Secretary) — a code of conduct adopted for the purposes of this section by resolution of the House concerned.

criminal offence means a criminal offence under the law of the State or under any other law relevant to the conduct in question.

disciplinary offence includes any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law.

(4) Subject to subsection (5), conduct of a Minister of the Crown or Parliamentary Secretary or a member of a House of Parliament which falls within the description of corrupt conduct in section 8 is not excluded by this section if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.

(5) Without otherwise limiting the matters that it can under section 74A(1) include in a report under section 74, the Commission is not authorised to include a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection (4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct constitutes a breach of a law (apart from this Act) and the Commission identifies that law in the report.

(6) A reference to a disciplinary offence in this section and sections 74A and 74B includes a reference to a substantial breach of an applicable requirement of a code of conduct required to be complied with under section 440(5) of the *Local Government Act 1993*, but does not include a reference to any other breach of such a requirement.

Implementing royal commission recommendations

*Dominique Hogan-Doran**

Introduction

This year's conference theme is "difficult conversations". Discussions about royal commissions, in any political climate, can be tricky. In a legal environment, hopefully less so. Perhaps one can be a little more frank, even outspoken.

Royal commissions can serve mixed purposes, not all of which may be bona fide. Will they be a means to an end, or are they just a waste of time? As English legal commentator and honorary King's Counsel, Joshua Rozenberg, has warned, "royal commissions can give the government political cover for radical change. But they can also be used to kick problems into the most elegant and luxuriant species of long grass."[1]

Royal commissions have become a well-entrenched feature of Australian public life. Since federation, there have been 140 of them, and countless more at state level. Their output has been prodigious, although their journey expensive.[2] My preferred inquiry model is short and sharp. Yet many run over several years, at the risk of policy drift and continued inaction.

Whatever the political motive behind their establishment, their qualities of independence, neutrality and transparency, and their delivery of a reasoned report, make royal commissions attractive tools to government. Like their standing cousins created to tackle public sector corruption, royal commissions will likely remain a continuing feature of our lives.[3]

Yet their record of implementation has been mixed. Consider those from recent years: the Banking Royal Commission made 76 recommendations, the Natural Disasters Royal Commission made 80 recommendations, the Aged Care Royal Commission made 148 recommendations, and the Robodebt Royal Commission made (at least) 56 recommendations for reform. Many recommendations are yet to be fully realised. Some were put on hold because of unforeseen events — chiefly, the COVID-19 pandemic. Some were immediately rejected or ultimately abandoned. For others, government may purport to have implemented them, but on any close analysis, they have not.

So, what of the future? In the spirit of making "difficult conversations" easier, the task for this

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1 J Rozenberg, "A royal commission? Means to an end or a waste of time?", *A Lawyer Writes* (Blog post, 11 June 2024) <https://rozenberg.substack.com/p/a-royal-commission>.

2 The Australian Law Reform Commission (ALRC) gave weight to cost concerns when it recommended an alternative, stripped-down, inquiry process: see ALRC, *Making Inquiries: A New Statutory Framework* (Report No 111, October 2009). The recommendation has not, to date, been adopted.

3 This paper is a companion piece to two other papers: Dominique Hogan-Doran, "Lessons for government from recent royal commissions and public inquiries" (Conference paper, Law Society of NSW Government Solicitors Conference, September 2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4160229>; and "Assisting royal commissions — reflections from counsel" (2024) 54 *Australian Bar Review* 293.

brief paper is fourfold. *First*, to locate the role of royal commissions within executive authority. *Second*, to expose the factors influencing the implementation of recommendations. *Third*, to canvass tools for developing implementable recommendations. *Finally*, to propose a greater role for scrutiny and accountability mechanisms, which have regard to core values of public administration and the rule of law.

Instrument of executive power

The authority to conduct public inquiries is an intrinsic element of executive power. In royal commissions they are rooted in the ancient prerogatives of the Crown.[4] They are "an essential part of the equipment of all executive inquiry".[5] At the Commonwealth level, the topics of commissions have varied widely, encompassing issues such as an automated welfare debt collection program; natural disaster management; defence and veteran suicide; aged care quality and safety; misconduct in the banking, superannuation, and financial services industry; misconduct impacting individuals with disabilities; trade union governance and corruption; and the collapse of Australia's second-largest insurer. State-based commissions and similar special commissions of inquiry have covered an equally diverse range of topics, including regulating water access in the Murray–Darling Basin; governance of the greyhound racing industry; and funding for compensation related to asbestos injuries.

Royal commissions are invariably convened by government to inquire into a matter of public concern. Despite being ad hoc and time limited, the work of a royal commission, when done well, can be consequential. In Australia, over a long period of time, these inquiries have had far-reaching systemic effects and impacts, including on political institutions, political processes, and government actions and bodies. Whilst the intensity of these effects has varied, some have also had profound impact on political events, including contributing to the fall of elected governments[6] and the continuing leadership of various state premiers.[7]

It follows that the principal challenge is to appreciate that royal commissions are part of the political process. The establishment of a royal commission is itself an inherently political act, the grant of letters patent involving the exercise of the prerogative power.[8] As an act of the executive arm of government independent of an authority conferred by legislation,[9] royal

4 *McGuinness v A-G (Vic)* (1940) 63 CLR 73, 93–4 (Dixon J); *Lockwood v Commonwealth* (1954) 90 CLR 177, 185–6 (Fullagar J), *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 85, 88 (Mason J), 139 (Wilson J), 155–6 (Brennan J).

5 *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 377 (O'Connor J); *McGuiness* (n 4) 94, 99 (Dixon J).

6 See Janet Ransley, "Public inquiries into political wrongdoing" in S Prasser and H Tracey (eds), *Royal Commissions and Public Inquiries: Practice and Potential* (Connor Court, 2014) 58 (referring to the contribution of the *Costigan Royal Commission on the Activities of the Federated Ship Painters and Dockers Union* on the electoral loss of the Fraser Coalition Government in 1983; the Fitzgerald Commission into police corruption and the fall of the National Party government in Queensland in 1989; and the WA Inc Royal Commission to the Labor Government losing office in 1992).

7 Ibid 59 (referring to Tasmanian Premier Robin Gray's resignation in 1991 because of investigations into his personal conduct by the *Royal Commission into the Edmund Rouse Bribery Affair*, the standing aside of NSW Premier Neville Wran during the *Street Royal Commission into Certain Committal Proceedings Against KE Humphreys* in 1983 and the resignation of South Australian Premier John Bannon following the 1991 *Royal Commission into the State Bank of South Australia*).

8 See, eg, *Royal Commissions Act 1902* (Cth) s 1A.

9 The "executive, as distinct from the legislative branch of government, represented by the Ministry and

commissions may be initiated in any circumstance of a government's choosing, subject to any constitutional and other legal limitations. The report will ultimately be delivered to the Governor-General (or state Governor) and subsequently laid before parliament.

Generally, only in exceptional cases will a government's decision to establish a royal commission be subject to judicial review[10] and disclosure.[11] The *actual* motive for establishing any particular royal commission may remain elusive, as commissions reflect the deliberations of Cabinet, which are seldom made public.[12] It may well have been a cynical desire to deflect public interest; perhaps, in light of public criticism and media pressure, the appointment acknowledges (however reluctantly) the need for independent, transparent, review.[13]

The key strength of a royal commission is its ability to investigate thoroughly the core of a crisis, be it a major accident, disaster, corruption, or cases of death or wrongful treatment. In those situations, commissions aim to uncover the truth, establish facts, and assign blame and responsibility. Through "truth-telling", they can promote accountability and a process of catharsis or reconciliation, helping to heal communities and resolve widespread injustices. They can also identify preventative measures to avoid future recurrences, ensuring that lessons are learned and applied to improved governance and decision-making going forward.

A royal commission can also help open up difficult public policy issues requiring broad-based public support. They have the capacity to "cut through" a confronting, complex problem, and assist better policy development. Their transparency from beginning to end can promote confidence in a process of inquiry and policy development that the fractured and fragmented processes of modern government may struggle to deliver. They can provide a forum for

the administrative bureaucracy which attends to its business": *Sue v Hill* (1999) 199 CLR 462, 499 [87] (Gleeson CJ, Gummow and Hayne JJ).

10 See *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 619 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ), 631 (Toohey J); *South Australia v O'Shea* (1987) 163 CLR 378, 387–8 (Mason CJ), 412 (Brennan J), 419–20 (Deane J).

11 *Commonwealth v Northern Land Council* (n 10) 614–19 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ), 629–31 (Toohey J); *Sankey v Whitlam* (1978) 142 CLR 1, 40–8 (Gibbs ACJ), 52–71 (Stephen J), 93–102 (Mason J), 107–10 (Aickin J). As to disclosure of Cabinet documents see: *Harbours Corporation of Queensland v Vessey Chemicals Pty Ltd* (1986) 67 ALR 100; *NT Power Generation Pty Ltd v Power and Water Authority* [1999] FCA 1185; *New South Wales v Public Transport Ticketing Corporation* [2011] NSWCA 60; *Kamasaee v Commonwealth (No 5)* [2016] VSC 595 (upholding the Commonwealth's objection to production of certain documents concerning Manus Island and offshore processing).

12 Although no class of document (including Cabinet documents) is entitled to absolute immunity from disclosure, the question is to be determined by balancing competing aspects of the public interest: *Sankey v Whitlam* (n 11) 38–9 (Gibbs ACJ); see also 49 (Stephen J), 95–6 (Mason J). The deliberations of Cabinet (and associated materials) usually remain confidential because of a public interest in Cabinet members exchanging different views while maintaining the principle of collective responsibility: see *Commonwealth v Northern Land Council* (n 10) 614–19 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ), 629–31 (Toohey J); *Sankey v Whitlam* 40–8 (Gibbs ACJ), 52–71 (Stephen J), 93–102 (Mason J), 107–10 (Aickin J).

13 Professor Scott Prasser identified ten "basic reasons" in his early paper "Royal commissions and public inquiries: scope and uses" in P Weller (ed), *Royal Commissions and the Making of Public Policy* (Macmillan Education Australia,1994) 6–8. For other critiques see LA Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (Thomson Reuters, 1982); A Pross, I Christie and JA Yogis (eds), *Commissions of Inquiry* (Carswell,1990); S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (LexisNexis Butterworths, 2001); S Prasser, *Royal Commissions and Public Inquiries in Australia* (LexisNexis Butterworths, 2nd ed, 2021); S Prasser (ed), *New Directions in Royal Commissions and Public Inquiries: Do We Need Them?* (Connor Court, 2023).

vulnerable or disenfranchised members of the public to contribute in a secure and supported manner. They can also provide a forum for industry associations, think tanks and lobby groups to bring their advocacy, their research and their ideas to the policy development process, but in a transparent and accountable way.

Royal commissions have the potential to be effective at producing "instrumental learning" (such as policy tools, which lead to enhancements in, for example, forecasting, warnings, surveillance and inspections) and "cognitive-organisational" learning (which promotes better appreciation of the larger policy space and how it can be better connected to reduce vulnerability).[14]

But royal commissions also do important moral work in Australia, particularly in the absence of a constitutionally mandated or legislated human rights regime. They represent an attempt to reckon with systemic failures in leadership and, as an exercise in moral authority, they say something forceful about what is *right*.[15]

All commissions must reach conclusions about the truth of the matter which constitutes the subject of their inquiry. They must then set out what changes must be implemented: "having identified a problem, the task for the commission is to say what must be done to resolve it".[16] It follows that, from its inception, a commission should be oriented towards ensuring that its recommendations are implemented. Peta Sherriff posits that "the success of a royal commission should not be measured solely by the intrinsic or absolute value of its recommendations, but also by the degree to which its proposed changes are enacted".[17]

There is no single accepted definition of "implementation". We can begin by stating what implementation is *not*.[18] Implementation is not a mere "tick and flick" response, which represents a half-hearted effort at policy change. It is not attempts that fail due to poor design or administrative incompetence. Implementation is also more than a government stating its "in principle intention" to action recommendations *sometime in the future*.

Factors influencing implementation

Governments plan, decide, do, deliver, adjust, reverse and terminate many things, all the time.[19] Royal commissions are curious creatures that sit uneasily within our Westminster system. In the standard Westminster model, all final authority resides in Cabinet where,

14 See further Alastair Stark, *Public Inquiries, Policy Learning, and the Threat of Future Crises* (Oxford University Press, 2018).

15 Ann Deslandes, "Responsibility for royal commissions' effectiveness lies with us" (2016) 26(20) *Eureka Street* 50 (writing in the context of the *Royal Commission into the Protection and Detention of Children in the Northern Territory*).

16 Chad Jacobi and Sarah Newman, *Royal Commissions: Law and Practice* (2022, Thomson Reuters) 225–6.

17 Peta Sheriff, "Factors affecting the impact of the Fulton Report" (1970) 36(2) *International Review of Administrative Sciences* 215.

18 Prasser, *Royal Commissions and Public Inquiries in Australia* (n 13) 184–5. For further reading on the topics of implementation and policy analysis, see JL Pressman and W Wildavsky, *Implementation* (University of California, 1973) xiii; BW Hogwood and LA Gunn, *Policy Analysis for the Real World* (Oxford University Press, 1984) 196–9.

19 See Mark Bovens and Paul 't Hart, "Revisiting the study of policy failures" (2016) 23(5) *Journal of European Public Policy* 653.

in theory, decisions are to be made collectively.[20] Yet the executive is a complex web — of institutions, networks and practices. Royal commissions inevitably work in areas where traditional government methods are, or should be, involved but where such methods have fallen short.[21]

Of course, political inaction is frequently due to the complexity, challenge and often traumatic nature of the issues requiring attention. Reflecting on the *Royal Commission into Aboriginal Deaths in Custody*, Hal Wootten wrote:

> There are no magic ointments or silver bullets for complex social problems … The National Report was not a revelation from on high, not a font of perennial wisdom, not the end of history, but a passing moment in it. It was a response to the problems of the time, by people of the time, using the tools of the time. Take what you can from it and move on. It is now your thinking, your imagination, your dedication and your professional commitment that is needed.[22]

The terms of reference are within the control of the executive of the day; indeed, they can be so broad as to encompass the activities of previous executive governments.[23] Consultation on the drafting of the terms of reference begins the process of engaging stakeholders in the success of the outcomes of a royal commission's work. But once letters patent are issued, it is for commissioners to interpret their terms of reference, which will ultimately direct the course of their inquiries. They may choose to interpret them narrowly or broadly, or even to disregard them. Ultimately, the approach taken will depend on the interpretive preferences of the chair.

Where there is more than one commissioner, this might prompt some "difficult conversations". A difference in approach and experience may well presage a division in the recommendations they ultimately propose — and diminish the prospect of their ultimate implementation. A recent example is salutary. Across 148 recommendations, there were 43 points of disagreement between the two commissioners who delivered the report of the *Royal Commission into Aged Care Quality and Safety*. Commissioner Briggs made 29 independent recommendations or sub-recommendations, and Commissioner Pagone made 14. Much of the division in their approach reflected their differences: Lynelle Briggs AO was a former chief executive of Medicare and public service commissioner, and the Hon Tony Pagone AM KC was a former Federal Court judge. That is not to say appointing more than one commissioner invites dissent; the *Royal Commission into Natural Disaster Arrangements* successfully combined the expertise of the military, the judiciary and academia in its three commissioners. Nonetheless, it is a timely reminder that selection of a commissioner can be both controversial and consequential.[24]

20 Robert J Jackson, "Westminster futures: Australia, Canada, New Zealand and the United Kingdom in comparative perspective" in Glyn Davis and RAW Rhodes (eds), *The Craft of Governing* (Routledge, 214) 227.

21 Patrick Weller, "Royal commissions and the governmental system in Australia" in Weller (ed) (n 13) 260–1.

22 Hal Wootten AC QC, "Reflections on the 20th anniversary of the Royal Commission into Aboriginal Deaths in Custody" (2011) 7(27) *Indigenous Law Bulletin* 3.

23 For example, the Commonwealth *Royal Commission into the Home Insulation Program* (2013) and the *Royal Commission into the Robodebt Scheme* (2022–23).

24 The constitutionality of judges acting as Commonwealth royal commissioners is not doubted: see *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ). A lively debate continues as to whether serving judges should conduct royal commissions and special commissions of inquiry: see *Wainohu v New South Wales* (2011) 243 CLR 181, 198–9 [23] (French CJ and Kiefel J) discussing service by Australian judges as royal commissioners generally.

Even where there is disagreement between commissioners, there is no "appeal" from a report of a royal commission, but there is scope for judicial review, since the royal commission is an executive action which can be restrained from excess of power or function.[25] The courts retain jurisdiction to determine whether a commissioner is acting within the law, for example, by declaring the report was made without jurisdiction or in excess of jurisdiction and was a nullity, or that on the facts as found in the report, the determinations or findings were wrong in law.[26]

That said, the legal and political reality confronting every royal commissioner is that there is no obligation on the government that appointed them to accept the findings or recommendations they may make. They have become mere *tools* of executive authority, *they do not command it*. There are no formal requirements for governments to implement recommendations, and there few accountability mechanisms available to remedy government inaction.

In my experience, most recommendations aim to reform either laws or institutions. Generally, those advocating for policy changes are — or at least should be — easier to implement than those calling for further investigations or enforcement actions. The apparent "dead end" reached by the Robodebt Royal Commission's referral to the National Anti-Corruption Commission can be seen as a stark reminder of that fact.

But even with policy changes, a royal commission clearly enters political territory when it issues its recommendations, if not beforehand. The implementation of recommendations could be a heated topic for political analysis and partisan debate. Political considerations within Parliament, media coverage and civil society advocacy will have greater influence on any decision to implement recommendations than could any formal duty.

Ensuring that recommendations are at least feasible and, under most executive governments, also politically palatable, will be crucial for successful implementation. A United Kingdom study has shown that recommendations able to be integrated into existing policy frameworks are more likely to be acted upon, as they require fewer changes to current practices and are less disruptive.[27]

A substantial research work was commissioned by the *Royal Commission into Institutional Responses to Child Sexual Abuse* to review the extent to which 288 recommendations arising from 67 previous inquiries had been implemented, and the possible factors that determined, contributed to, or were barriers to successful implementation.[28]

25 As Brennan CJ explained in *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 70: "Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly."

26 Relief of this nature was pursued (unsuccessfully) in *Kazal v Independent Commission Against Corruption* (2013) 224 A Crim R 510, following delivery of the report in Operation Vesta, an investigation into the undisclosed conflict of interest of a senior executive of the Sydney Harbour Foreshore Authority.

27 Emma Norris and Marcus Shepherd, *How Public Inquiries Can Lead to Change* (Report, Institute for Government, December 2017) <https://www.instituteforgovernment.org.uk/publications/how-public-inquiries-can-lead-change>.

28 Parenting Research Centre, *Implementation of Recommendations Arising from Previous Inquiries of Relevance to the Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, May 2015).

The major factors seen to contribute to implementation were:

- establishing processes and structures to facilitate implementation;
- strong leadership and stakeholder engagement; and
- an accountability framework and monitoring process.

By contrast, the major factors seen as barriers to implementation were:

- practical constraints;
- organisational culture;
- structural constraints;
- narrow or prescriptive recommendations.

Other factors included:

- difficulty implementing whole-of-government recommendations;
- an inability to implement reforms across or outside jurisdictions;
- challenges in implementing multiple reforms;
- conflicting legislation;
- resource limitations; and
- political resistance to long-term/preventative/early intervention strategies.

To this can be added the ever-present drag of inertia, exacerbated by political and bureaucratic "amnesia". This variable is largely beyond the scope of a commission's influence, but there are measures it can take to anticipate it. Political amnesia results from political instability, including shorter election cycles, brief ministerial careers and rapidly changing agendas. Bureaucratic amnesia occurs due to staff turnover and movement within government offices. As employees leave, the institutional memory fades, causing the origins of established lessons and their connection to commission recommendations to be forgotten.

One factor affecting the strength of institutional memory is the nature of the identified risk recurring again. Thus, in the natural disasters area, hazards that appear regularly demand recommendations be framed differently to "big ticket items" or less frequent but more severe incidents.

Another factor is the extent to which the commission has itself encouraged or "shepherded" the quick institutionalisation of its lessons. Commissions could create and publish their own monitoring mechanisms during the course of their work. If the lessons learned by a commission are to be properly institutionalised and not subject to temporal erosion by political and bureaucratic elements, it will be important that recommendations are crafted to respect the reality of the public sector in which those who will either implement or be affected by the recommendations operate.[29] The first report of the *UK Covid-19 Inquiry*, published on 18 July 2024, advised that implementation of its recommendations would be actively monitored during the course of the inquiry.[30]

Developing implementable recommendations

Based on my own experience as counsel assisting and as counsel representing various governments and their agencies, actively engaging with those who have the experience of the reality of public policy–making and public-sector management, and couching recommendations in language of practitioners where relevant, will enhance the credibility and workability of recommendations to be proposed. Policy ideas can be developed and tested through discussions with interested parties and through issuing research papers and eliciting responses to issues papers and interim reports. Counsel assisting needs to be mindful to gather a wide range of perspectives, and to be wary of relying upon a single "expert".

Importantly, this includes securing evidence as to the resource implications of proposals, so that they can be balanced against other competing demands for public funding. This acknowledges the reality that any priority given to implementation of a recommendation may have to be balanced against other competing demands for expenditure from the public purse. Giving guidance as to what the fiscal impact will be, and the value in making the proposed financial commitments, will be important.

The likelihood of implementation can be maximised by ensuring the development of recommendations is transparent. This involves creating conceptual frameworks backed by empirical data and lived experiences. These will enhance the credibility and feasibility of the recommendations. By grounding recommendations in solid data, royal commissions can make compelling arguments for the necessity and benefits of the proposed changes.

The expertise of commissioners in dealing with government agencies or entities under investigation must align with the objective of formulating practical and implementable recommendations. In this sense, the choice of commissioner and counsel team will be critical, as well as of commission staff and policy advisers. To achieve this, involving subject-matter experts and individuals with firsthand experience is essential. This strategy adds credibility to the recommendations and ensures they are attuned to the practical realities and subtleties of the issues being addressed.[31]

29 See Stark (n 14) 105, 106.

30 Rt Hon Baroness Hallett DBE, *Module 1: The Resilience and Preparedness of the United Kingdom* (UK Covid-19 Inquiry Report, July 2024) <https://covid19.public-inquiry.uk/wp-content/uploads/2024/07/18095012/UK-Covid-19-Inquiry-Module-1-Full-Report.pdf>.

31 Michael Mintrom, Deirdre O'Neill and Ruby O'Connor, "Royal commissions and policy influence" (2020) 80(1) *Australian Journal of Public Administration* 80.

Final reports are often extensive, spanning multiple volumes. Issuing interim reports and summaries can help maintain momentum and expedite the implementation of immediate and short-term recommendations before the final report is tabled, without needing to include the extensive record of information the commission has received and considered. Of course, in publishing an interim report, a royal commission must be careful not to express concluded opinions about matters not yet properly tested, although provisional views are unobjectionable.[32]

For example, the Victorian royal commissions on domestic violence (2016) and mental health (2021) effectively used interim reports to draw public attention and concern, thereby stimulating public interest in the successful implementation of their respective recommendations. The Banking Royal Commission (2018) issued an interim report which set out the critical thinking and approach of the inquiry, which helped focus organisations and agencies on the task of constructively engaging with the commission in its final phase.

For executive government, staggered or interim implementation before the final report provides the opportunity for a series of "quick wins", showing respect for the commission process and reducing the "implementation load" typically encountered when a large set of recommendations is presented simultaneously.

As regards the presentation, tone, style and content of recommendations in reports, Dr Sean Brady, the author of *Review of all Fatal Accidents in Queensland Mines and Quarries from 2000 to 2019*, suggests that while recommendations are typically couched in policy terminology, using a carefully calibrated balance of industry-specific jargon and plain language in an engaging and accessible manner may have a greater impact than a verbose or lengthy report.[33]

Interim reporting complements the next point: "road-testing". Road-testing allows the subject of a recommendation to test its implementation and verify its practicality. Additionally, the road-testing of recommendations provides an opportunity to refine and improve them before full-scale implementation. This process also allows the entity to engage in dialogue with the commission to make necessary refinements.

Recommendations, particularly those of a long-term or continuing nature, will need to pass through a range of public sector organisations, each with their own distinct bureaucratic personalities. Recommendations that distance themselves from public sector infrastructure and administration or, worse, display contempt for them, are unlikely to be implemented effectively.[34]

Embedding clear timelines and delivery guides within recommendations ensures a structured implementation plan, enhancing accountability and resource focus. Specific time limits create a sense of urgency and prevent recommendations from being delayed indefinitely.

32 *Ferguson v Cole* (2002) 121 FCR 402, [61].
33 Sean Brady, *Review of all Fatal Accidents in Queensland Mines and Quarries from 2000 to 2019* (Report for the Department of Natural Resources, Mines and Energy (Qld), December 2019) <https://documents.parliament.qld.gov.au/tableOffice/TabledPapers/2020/5620T197.pdf>.
34 Jacobi and Newman (n 16) 238.

Recommendations of a long-term or continuing nature are more likely to encounter a variety of extenuating circumstances that affect their implementation compared to those that can be executed immediately or in the short term. Therefore, it may be more effective for long-term or continuing recommendations to be framed primarily as the desired outcome or goal. This can be accompanied by a clear statement of the underlying objective, followed by a series of policy changes that could facilitate implementation.[35]

The role of scrutiny and accountability

My final comments reflect key administrative law values. Successful implementation requires continuous oversight. Without ongoing monitoring, there is a risk that any momentum gained during the royal commission will be lost, that the vast public money expended will be wasted. Recommendations will be halted, deprioritised, or altered by vested interests. In the worst case, they may be forgotten altogether.

The Australian Law Reform Commission recommended legislation requiring government to publish an update on implementation of recommendations that it accepts one year after the tabling of the final report, and periodically thereafter to reflect any ongoing implementation activity.

Australia is not alone in having no formal accountability procedure. In the United Kingdom, the government increasingly relies on public inquiries to examine major incidents and tragedies (the latest being the Grenfell Tower disaster and the COVID-19 pandemic). A 2017 report by the Institute for Government found that of the 68 public inquiries that have taken place since 1990, only six were fully followed up by select committees to see what government did as a result of the inquiry.[36]

That is not to say that it is for the commissioner to take on a continuing role. After a commission tables its final report, it concludes. A commissioner is not obliged to discuss the report or its implementation, but some do. This "repositions the commissioner in relation to the government tasked with the report's implementation, from advisor to commentator or critic".[37]

Sir Robert Owen addressed a commissioner's inevitable relinquishing of responsibility in a report by the organisation JUSTICE, quoting Lord Gill's statement that "once the inquiry chairman has reported, that is the end of it as far as the chairman goes … The implementation of recommendations is an entirely different exercise. That is for the politicians and the Executive to do".[38]

The absence of a routine procedure for holding the government accountable for promises made following inquiries complicates this issue, and makes it unsurprising that inquiries often fail to bring about change.

35 Ibid 238–40.
36 Norris and Shepherd (n 27).
37 Jacobi and Newman (n 16).
38 Sir Robert Owen, *When Things Go Wrong: The Response of the Justice System* (JUSTICE Report, 24 August 2020) 89.

That being so, commissioners increasingly recommend the creation of permanent or semi-permanent bodies as a means of continuing or completing their work.[39] Examples include the Aboriginal and Torres Strait Islander Commission (*Royal Commission into Aboriginal Deaths in Custody*) and the Australian Building and Constructing Commission (*Royal Commission into the Building and Constructing Industry*).

The drama of royal commissions might satisfy the public's democratic urges, but there is a risk that any learning from policy failures will not avoid repetition, if preventing failure is not given the priority it requires.[40] Royal commissions that can support a learning culture rather than a blaming culture are ultimately more successful. It is important to highlight that adversarialism and the apportionment of blame per se do not aid implementation. In my experience, commissions benefit from a forensic reconstruction of events, but do well to manage carefully the adversarial confrontations with vested interests, particularly with individuals who will eventually be involved in the implementation process.[41] The aim should be to conduct a constructive process of inquiry and consultation, which will empower those individuals to advocate for and lead the recommended changes after conclusion of the commission's work. The notion of an inverse relationship between seeking accountability and pursuing policy learning is false.[42] It is of course desirable to pursue an acceptance of shortcomings. But identifying ways that leaders and their organisations can participate constructively in a changed culture and set about committing to a process of continuous improvement, will be more likely to secure meaningful change.

Rigidly adhering to recommendations without considering evolving circumstances can cement problematic interpretations. Similarly, a large list of recommendations implemented separately increases vulnerability to appropriation by vested interests. This challenge is exacerbated by the pressure to implement quickly but can be mitigated to some extent by independent monitoring. In their recent article on exploring early implementation of the recommendations of the Victorian *Royal Commission into Family Violence*, Rebecca Buys and Kate Fitz-Gibbon note that effective implementation of recommendations, particularly for multi-faceted social issues like family violence, requires framing recommendations that can rapidly evolve to changing contexts and maintaining a strong overarching vision to protect against policy refinement or appropriation by vested interests.[43]

Legislatures can, and indeed should, play a more active role in monitoring the implementation of recommendations. There are several ways to achieve this, such as integrating the scrutiny of commission findings as a core task for select committees, or establishing new bodies dedicated solely to monitoring the implementation of relevant commissions or inquiries.

39 Justice Ronald Sackville, "Law reform agencies and royal commissions: toiling in the same field" [2005] *Federal Judicial Scholarship* 10.

40 See Bovens and 't Hart (n 19); see also interview with Paul 't Hart published in David Donaldson, "Paul 't Hart on why royal commissions fall short on policy learning", *The Mandarin* (online 5 April 2016) <https://www.themandarin.com.au/62301-paul-t-hart-royal-commissions/>.

41 See further Stark (n 14) 168–9.

42 Ibid 153.

43 Rebecca Buys and Kate Fitz-Gibbon, " 'We assumed it would all be fairly straightforward': Exploring early implementation of the recommendations of the Victorian Royal Commission into Family Violence", *Australian Journal of Public Administration* (online, 20 April 2024) <https://doi.org/10.1111/1467-8500.12638>.

Developments in the United Kingdom also offer a useful reference. Prior to the recent election, a House of Lords select committee had begun actively reviewing[44] the *Inquiries Act 2005*,[45] a decade after its 2014 report had recommended a permanent inquiries unit. Creating a permanent public inquiries unit within the executive government would provide ongoing support and guidance, ensuring that lessons from previous inquiries are preserved and applied. The 2014 government had accepted 19 of the committee's 33 recommendations, improving support for inquiry establishment, though it declined to establish a unit of the kind suggested.[46] Nonetheless, a small inquiries unit was set up in the Cabinet Office, which holds quarterly meetings to share best practices and learning among inquiry secretaries and to sponsor teams.

In Australia, establishing a permanent commissions and inquiries unit within executive governments would serve as a repository for best practices, enhancing the efficiency and effectiveness of future inquiries, allowing them to benefit from and build on the knowledge and experiences of past inquiries. It would also provide an accountable authority for the implementation of royal commission recommendations over time.

Finally, embracing continuous improvement and refinement of policies based on royal commission outcomes can more effectively address systemic issues, ensuring recommendations lead to meaningful change. Regular review and adaptation of policies can then prevent recurring issues and help integrate new insights and developments as they arise.

44 See Statutory Inquiries Committee, UK Parliament, *Oral Evidence Transcripts* (Online database) <https://committees.parliament.uk/committee/702/statutory-inquiries-committee/publications/oral-evidence/>.

45 See Select Committee on the *Inquiries Act 2005*, House of Lords, *The Inquiries Act 2005: Post-legislative Scrutiny* (Report, February 2014) <https://publications.parliament.uk/pa/ld201314/ldselect/ldinquiries/143/14302.htm>.

46 See *Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005* (Policy Paper, Ministry of Justice, 30 June 2014) <https://www.gov.uk/government/publications/government-response-to-select-committee-post-legislative-scrutiny-of-the-inquiries-act-2005>.