Accountability for cross-jurisdictional bodies

Cheryl Saunders*

Introduction

When I was first invited to deliver a Senate lecture on accountability for cross-jurisdictional bodies I accepted readily. I have a long-standing interest in accountability for intergovernmental arrangements generally, in Australia and elsewhere.[1] Accountability for cross-jurisdictional bodies is, of course, only a subset of the wider subject of intergovernmental relations, but it is important in its own right and complex enough to deserve discrete attention. A renewed focus on these issues also is timely. The responses to the pandemic have given us new insights into the different contributions that different jurisdictions usefully bring to intergovernmental decision-making, which is a consideration that bears on accountability for cross-jurisdictional bodies.[2]

The lecture begins by briefly sketching the arrangements for accountability of intra-jurisdictional bodies. These represent the norm, notwithstanding the federal structure of government, which in Australia divides executive power thematically and assumes that each level of government administers its own legislation.[3] For present purposes, intra-jurisdictional bodies also offer a useful contrast to bodies with cross-jurisdictional elements. The focus in this part of the lecture is on the Commonwealth level of government and on political, rather than legal accountability, in particular to parliament. The principles and practices of political accountability are broadly similar in other Australian jurisdictions, however, all of which have parliamentary systems influenced by Westminster, and most of which are bicameral.[4]

The second part of the lecture canvasses the range of bodies that might be described as cross-jurisdictional for present purposes. They are grouped loosely into 3 categories—regulatory, advisory, and political. I use case studies to illustrate each, examining their constitutions, their functions, and the accountability arrangements presently in place. I do not claim that these categories are either exhaustive or watertight, so complex is the intergovernmental terrain, but they cover a sufficiently broad range of cross-jurisdictional structures to demonstrate the issues and options for accountability that arise.

---

* This paper was presented as part of the Senate Lecture Series on 20 May 2022.

1 For a relatively recent comparative account of intergovernmental relations across 12 federations, including Australia, see Johanne Poirier, Cheryl Saunders and John Kincaid (eds), *Intergovernmental Relations in Federal Systems*, McGill-Queen's University Press, 2015.

2 Cheryl Saunders, 'Grappling with the Pandemic: Rich Insights into Intergovernmental Relations', in Nico Steytler (ed), *Comparative Federalism and Covid-19',* Routledge, London, 2021.

3 For the comparative significance of this arrangement, see Francisco Palermo and Karl Kossler, *Comparative Federalism: Constitutional Arrangements and Case Law,* Hart Publishing, 2017, p. 156.

4 Queensland, the Northern Territory, and the Australian Capital Territory are the exceptions.

The final part of the lecture builds on the second, by considering how the cross-jurisdictional character of any of these types of bodies affects, and should affect, the forms and objects of political accountability.

Accountability for intra-jurisdictional bodies

Accountability arrangements in Australia and elsewhere typically are designed to operate within single jurisdictions as, in effect, unitary systems of government. Arrangements for political accountability to parliament are no exception.

All bodies that exercise public power or spend public moneys are or should be accountable to the institution of parliament in some way. While the mechanisms for accountability are diverse, in Australia they revolve around the principles and practices of parliamentary responsible government. At their core, these are relatively straightforward. The executive government for the time being derives its legitimacy from the support of the parliament. The government is responsible to the parliament, collectively and individually. Responsibility includes accountability, at least in the sense of answerability, for the exercise of public power and the expenditure of public moneys. The ultimate, but by no means the only, sanction is loss of public office.

The actual picture inevitably is more nuanced in at least 3 ways that deserve mention. The first is that upper houses including, in the Commonwealth sphere, the Senate, affect the roles that parliaments play. Upper houses do not contribute to making (or, usually, unmaking) governments. Nevertheless, where they exist, they are an integral part of the system of responsible government, through which they contribute to the possibilities for accountability.[5] A by-product of the Australian penchant for bicameralism is that parliaments have a variety of mechanisms through which to pursue forms of accountability and, at least sometimes, the will to use them.[6] Such mechanisms reach well beyond the activities of the plenary in holding ministers to account, directly or indirectly or enacting substantive and financial legislation. They include the roles of committees in scrutinising public expenditure aided by the Auditor-General, examining estimates, reporting on delegated legislation, scrutinising bills, reviewing reports that are now required by law to be prepared annually, and overseeing integrity institutions.[7]

Second, and less positively, there has been some erosion of ministerial accountability. In part this appears to be attributable to a decline in voluntary compliance with standards, without which parliamentary government cannot operate as it should. It is facilitated, however, by a raft of other developments. These range from reliance on ministerial advisers rather than public service officers, to the contracting out of myriad public services, to increasing reliance

---

5 *Egan v Willis* (1998) 195 CLR 424.

6 The result has been characterised as a new system of 'semi-parliamentary government'; an interesting insight, whether the characterisation is accepted or not: Steffen Ganghof, 'A new political system model: Semi-parliamentary government', *European Journal of Political Research,* vol. 57, issue 2, 2018, p. 261.

7 There is a useful account of these in Gareth Griffith, *Parliament and Accountability: The Role of Parliamentary Oversight Committees, Briefing Paper No. 12/05*, NSW Parliamentary Library Research Service, 2005.

on artificial intelligence. All of these 'hollow out' the public sector and offer bases on which ministers can evade accountability to parliament, if they are minded to do so.[8]

A third set of developments concerns public bodies themselves. There has been a shift in expectations about the performance of public bodies, from a focus on compliance to a focus on, at least formally, results, to which traditional accountability procedures have had to adapt.[9] More relevantly still for present purposes, the types of public bodies also have diversified in ways that have had a bearing on accountability to parliament, on the part of both the bodies themselves and the relevant portfolio ministers.

The current range of public bodies is usefully captured in various formats, one of the most useful of which is the Australian Government Organisations Register (the Register) prepared by the Department of Finance.[10] Exclusions from the Register include the Commonwealth Cabinet, without explanation, and the High Court of Australia, 'due to its status under its enabling legislation'.[11] The wide variety of bodies covered by the Register are organised across 12 categories. Two deal explicitly with cross-jurisdictional bodies and can be set aside for the moment.[12] Several others include a smattering of cross-jurisdictional bodies, either in the category description,[13] or as examples of the genre.[14] I hold these over for the time being also. I note in passing, however, that this treatment of cross-jurisdictional bodies suggests that there is no clear conceptualisation of them as a distinct category that might raise distinct considerations.

The remaining bodies in the Register are intra-governmental. They are divided between principal, secondary and 'other' Australian government entities. A series of intersecting criteria guide the allocation, both between these broad categories and within them. All the bodies in the first category are covered in one way or another by the *Public Governance, Performance and Accountability Act 2013* (Cth) (PGPA Act), and subject to the political accountability regimes that the Act prescribes.[15] The typology also draws distinctions by reference to legal form, between non-statutory and statutory entities, registered corporations, joint ventures, and bodies linked through contract. A third criterion for allocation is function and purpose justifying, for example, a discrete sub-category for some advisory bodies. Proximity to the Australian government is another basis for distinction drawing on, for example, considerations of 'separate branding'. Even for intra-jurisdictional bodies, the typology in the Register is by no means neat, further underscoring the complexity of the field.

Four observations might be made about these bodies, on which the next parts of the lecture can build.

---

[8] Gareth Griffith, *Parliament and Accountability: The Role of Parliamentary Oversight Committees, Briefing Paper No. 12/05*, NSW Parliamentary Library Research Service, 2005.

[9] The shift is traced in Andrew Podger, 'How independent should administration be from politics', in Andrew Podger, Tsai-tsu Su and John Wanna (eds), *Designing Governance Structures for Performance and Accountability,* ANU Press, Canberra, 2000.

[10] Department of Finance, *Australian Government Organisations Register*, 10 May 2023, (accessed 11 May 2023).

[11] Apart from the Constitution itself, the enabling legislation for the High Court is the *High Court of Australia Act 1979* (Cth). It is not entirely clear to what aspect of 'status' the Register refers.

[12] These are Ministerial Councils and related bodies, which is one of 5 sub-categories described as 'Secondary Australian Government Entities and National Law Bodies', which is a sub-category under an 'Other Entities' listing.

[13] Interjurisdictional and international bodies, another listing under Secondary Australian Government Entities.

[14] For example the Gene Technology Regulator, in the sub-category Statutory Office Holders, Offices and Committees, one of the Secondary Australian Government Entities.

[15] *Public Governance, Performance and Accountability Act 2013* (Cth) sub-s 10(1), paras 11(a)–(b), s 89.

The first and most obvious is that, because all these entities are public bodies, exercising Commonwealth executive power within the Commonwealth constitutional framework, accountability for them must lie to the Australian Government and, through the government, to the parliament in some way.

The second point is that the manner of accountability to parliament clearly differs. Primary non-corporate entities, comprising the departments of state, are accountable through the traditional mechanisms of ministerial responsibility, whatever they may be, embellished by more recent practice and elaborated by the PGPA Act. Statutory bodies or entities incorporated by registration are accountable through whatever mechanisms their legal form provides in addition, in the case of primary entities, to the requirements of the PGPA Act. The accountability of other bodies including, for example, secondary non-statutory entities, is more attenuated and may lie through other entities or directly through a minister.

Third, the public purposes that each body is intended to serve drives the features that shape the manner of its accountability to parliament. Purposes identified include the need for a degree of independence from government policy and ministerial direction, purposes that require a less bureaucratic and more entrepreneurial orientation, and policy advising on matters that requires a particular range of expertise.

Fourth, the accountability of the body itself to parliament is only one part of the equation. In every case, ministers also are accountable, at least in principle, for whatever role that they play and whatever functions they exercise in relation to the body, whether these functions are statutory or not. Ministerial functions in relation to intra-jurisdictional bodies may range from appointments, to participation, to receipt of advice, to funding, and to the overall responsibility of ministers for matters within their portfolios.

Cross-jurisdictional bodies

Cross-jurisdictional bodies present additional considerations from the standpoint of accountability. To begin to consider these, some definitions are in order, to identify at least loose parameters for the types of bodies with which the lecture is concerned.

For the purposes of the lecture, I define cross-jurisdictional bodies by reference to 3 considerations, which can apply independently or be cumulative—whether a body draws on the constitutional powers of multiple jurisdictions, whether it involves membership from multiple jurisdictions, and whether it relies on multiple jurisdictions to accept its decisions before they are given effect.

I exclude from the definition bodies that play a significant role in making the federation work but rely entirely on the Commonwealth for constitutional power, membership, and implementation. The Commonwealth Grants Commission is one such body.[16] It is formally an intra-jurisdictional body, notwithstanding some intergovernmental characteristics in practice.

I also exclude, although with greater hesitation, arrangements under which an official of one jurisdiction, who may be a minister or public service officer, exercises functions conferred by the legislation of another, with the agreement of both. These are not strictly 'bodies' in the

[16] *Commonwealth Grants Commission Act 1973* (Cth).

sense in which the term is used in the lecture. More importantly, perhaps, the person on whom the power is conferred already has an established place within the accountability framework of the recipient jurisdiction, as an elected or appointed official. All sorts of difficulties may arise from this 'bifurcation' unless sufficient allowance for it is made, some of which were explored by the Special Commission of Inquiry into the Ruby Princess.[17] It seems obvious, nevertheless, that the usual lines of accountability for the official exercising the power should be preserved, but within a suitably transparent co-operative framework of principle and practice.

In the next section of the lecture, I divide cross-jurisdictional bodies into 3 categories, regulatory, advisory, and political, to assist analysis of the issues and options for accountability. I explore each of these with case studies that are characteristic, but not necessarily paradigmatic.

a) Regulatory bodies

The first category of cross-jurisdictional bodies comprises entities with a regulatory function that rely on the constitutional power of 2 or more jurisdictions. Participation always is voluntary and constitutional support could be withdrawn by any jurisdiction, at least in principle. In many, and perhaps most or even all cases, there is also an underlying intergovernmental agreement and a supporting intergovernmental ministerial council with authority of some kind in relation to the body under the agreement, the constituting statute or both. All of these features have implications for the ways in which the body exercises its powers and carries out its functions.

Bodies of this kind typically result from arrangements that are designed to achieve uniformity of administration, as well as law, on matters for which constitutional responsibility is divided between Australian jurisdictions. This may be a device that is unique to the Australian federation as, for that matter, may be the insistence on uniform administration itself. In any event, the creation of such bodies has evolved as an art form in Australia over time.

A single regulatory body exercising public power conferred by multiple jurisdictions may be achieved in different ways. In some cases the body is established by one jurisdiction, often the Commonwealth, and invested with power by others. The Gene Technology Regulator[18] and the Australian Crime Commission (ACC)[19] are examples. In other cases, one 'host' jurisdiction enacts a 'national law' that includes provision for a regulatory authority and that law then is 'adopted' by legislation of other participating jurisdictions so as to create a 'single national entity'. The National Heavy Vehicle Regulator[20] and the Australian Children's Education and Care Quality Authority (ACECQA)[21] are examples. Occasionally, also, participating states may refer power to the Commonwealth, as envisaged by section 51(xxxvii) of the Australian Constitution, to enable it to establish a body with a broader power

[17] Special Commission of Inquiry into the Ruby Princess, *Report*, August 2020, p. 34, pp. 205–222. The conferral of authority on New South Wales officers occurred under the *Biosecurity Act 2015* (Cth) ss 562, 564.

[18] *Gene Technology Act 2000* (Cth).

[19] *Australian Crime Commission Act 2002* (Cth).

[20] *Heavy Vehicle National Law Act 2012* (Queensland).

[21] *Education and Care Services National Law Act 2010* (Vic).

base, diminishing the need for additional conferrals of power. The Australian Securities and Investment Commission (ASIC) is one body of this kind.[22]

Cross-jurisdictional bodies in this category are diverse in form, institutional structure, and intergovernmental characteristics. Reasons for difference include the extent of the respective powers of the Commonwealth and the states. There may also be an element of evolving intergovernmental fashion.

At one end of the spectrum of the examples given earlier is ASIC, based on the broad but incomplete corporations power of the Commonwealth (under section 51(xx) of the Constitution) augmented by references from the states. ASIC is established by Commonwealth legislation on the face of which it appears almost, if not quite, an intra-jurisdictional body. It nevertheless is the latest iteration in a series of intergovernmental projects that have progressively deepened the harmonisation of the law and practice of the regulation of corporations in Australia—signs of which remain in the Act itself[23] and in the underlying agreement.[24] Amongst other things, the latter restricts the use to which referred powers may be put, requires consultation with the states on appointments to the Commission and requires the establishment of regional offices around the country.

At the other end of the spectrum are national law bodies created by legislation enacted by a host state and given authority elsewhere through adoption by participating jurisdictions. Of the 2 examples given earlier, Queensland is the host for the National Heavy Vehicle Regulator and Victoria for ACECQA. Both deal with the regulation of areas in which there is limited secure Commonwealth constitutional power and significant state power, intertwined with other areas of state regulatory responsibility. Both schemes are underpinned by an intergovernmental agreement[25] and the cross-jurisdictional character of each scheme infuses its design. Relevantly, in each case, a ministerial council has statutory power to direct the regulator in stipulated ways, is involved in appointments to the board and approves draft regulations before promulgation.

Both of these schemes are relatively inventive in the ways in which they go about establishing an 'independent' regulator as a 'single entity' surrounded by all the usual trappings of a public body. Thus, for example, regulations made under both national laws are published on the New South Wales (NSW) legislation website. The Commonwealth's privacy and freedom of information legislation and the NSW State Records legislation are applied to ACECQA by the laws of the participating jurisdictions.[26]

In between these 2 poles are cross-jurisdictional regulatory bodies in which the power balance between the Commonwealth and the states is, at least arguably, more equal. To illustrate the point, both the Gene Technology Regulator and the ACC rely on a range of Commonwealth powers but their functions are extended by legislation of participating states. The *Australian Crime Commission Act 2002* (Cth) establishes an 'Inter-Governmental Committee' with power to monitor and oversee the strategic direction of the body and its

---

[22] *Australian Securities and Investment Commission Act* 2001 (Cth).

[23] As in, for example, section 4, dealing with the application of the Act.

[24] Department of Prime Minister and Cabinet, *Corporations Agreement 2002*, 6 December 2002.

[25] Department of Prime Minister and Cabinet, *Intergovernmental Agreement on Heavy Vehicle Regulatory Reform 2011*, 19 August 2011; Federal Financial Relations, *National Partnership Agreement on Early Childhood Education 2009–2012*, 2009.

[26] *Education and Care Services National Law Act 2010* (Vic), ss 263–265.

board.[27] Under the *Gene Technology Act 2000* (Cth) a Ministerial Council, recognised by the Gene Technology Agreement, is required to be consulted on specified appointments, including that of the regulator, and can trigger a review of the Act.[28]

Provision for political accountability was a factor in designing the statutory and policy framework for each of these cross-jurisdictional bodies. The forms of accountability vary with the nature of the body and, specifically, with the extent of its intergovernmental character.

Bodies that are deemed to be supported by significant Commonwealth power, including ASIC, the Gene Technology Regulator, and the ACC, are covered by the accountability requirements of the PGPA Act, albeit on various bases. Even in these cases, however, there are intergovernmental elements of the accountability regime that applies. To take only one example, the Gene Technology Regulator is required, by legislation, to give copies of the body's annual and other reports to the ministers of participating states.[29]

By contrast, other cross-jurisdictional regulatory bodies that are more dependent on state and territory authority have relatively comprehensive accountability regimes of their own, adapted to suit the context. These necessarily deal with, for example, reporting to parliament and the scrutiny of delegated legislation. In both the examples, considered earlier, the Heavy Vehicle Regulator and the ACECQA, the respective bodies are required to report to the ministers of all participating jurisdictions and the Commonwealth, individually or collectively. The reports are required to be tabled in all the parliaments, and a scheme is devised to enable each parliament to scrutinise the delegated legislation, without unduly disrupting the smooth operation of the regulatory arrangements.

b) Advisory bodies

A second category of cross-jurisdictional bodies is advisory, in the sense that these bodies have no significant regulatory functions but rely on the acceptance of multiple jurisdictions to give their decisions effect. As with regulatory bodies, advisory bodies may have other cross-jurisdictional features as well. In particular, they may have multi-jurisdictional representation, or a relationship with an intergovernmental ministerial body. The defining feature of this category, however, is function.

Cross-jurisdictional advisory bodies typically are established to assist with the co-ordination or other form of streamlining of a particular government activity across Australia, while leaving each participating jurisdiction with its own decision-making authority. Two quite different examples illustrate what is a diverse genre—Infrastructure Australia[30] and the Australian Curriculum and Reporting Authority (ACARA).[31] The former audits and develops plans for 'nationally significant' infrastructure across Australia. The latter plays a co-ordinating role in relation to curriculum and assessment in the course of which, amongst other things, it develops a 'national curriculum'.

---

[27] *Australian Crime Commission Act 2002* (Cth) ss 8–9.
[28] *Gene Technology Act 2000* (Cth) ss 21, 23, 24, 100, 108, 118.
[29] *Gene Technology Act 2000* (Cth) ss 136, 137.
[30] *Infrastructure Australia Act 2008* (Cth).
[31] *Australian Curriculum Assessment and Reporting Authority Act 2008* (Cth).

Both bodies are constituted by Commonwealth legislation without any cross-jurisdictional contribution. Presumably this reflects an assumption that Commonwealth power is adequate to support essentially advisory functions of these kinds, which also are emphasised to have 'national' significance.[32] The effectiveness of both bodies in practice, nevertheless, depends significantly on take-up of their advice by others with operative authority. In each case the Commonwealth has some substantive role to play, either financially through the grants power (section 96 of the Constitution) and, in the case of Infrastructure Australia, direct responsibility for some national infrastructure. In each case, also, there is some involvement of non-state parties—owners of and investors in relevant infrastructure in the case of one, and private education providers in the case of the other. Nevertheless, in each case, the preponderance of operative authority is held by the states and territories, including local government. This is a rational allocation of power in the Australian federal context, which accords with the principle of subsidiarity in both principle and practice. The need for states and territories to act on decisions of bodies of this kind, if they choose to do so, give bodies in this category their cross-jurisdictional character.

This character is reflected in the legal framework for the bodies, albeit in different degrees, again reflecting considerations of the balance of intergovernmental power. ACARA has a board with members nominated by the states and territories (amongst others), complies with a Charter approved by an intergovernmental Ministerial Council, is subject to directions from the Council, and reports to the Council.[33] The intergovernmental constitution of Infrastructure Australia is less pronounced but nonetheless evident. The states and territories nominate 3 of the 12 members of the board, the body advises all governments, the Commonwealth Minister must have regard to Council of Australian Governments (COAG) decisions in giving directions, and the body is obliged to consult all relevant governments, amongst others, in reaching its conclusions.

Consistently with the assumptions on which both bodies are based, the accountability framework for each of them lies almost entirely within the Commonwealth sphere, both under the PGPA Act to which each is subject, and generally. Accountability mechanisms are modified in several respects, perhaps reflecting the intergovernmental roles of the bodies. For example, neither the directions to Infrastructure Australia by the Commonwealth Minister nor the directions to ACARA by the Ministerial Council are legislative instruments for the purposes of the *Legislation Act 2003* (Cth).[34] There also are some minor elements of explicit cross-jurisdictional accountability; for example, the annual report of ACARA is required by legislation to also be given to the Ministerial Council.[35]

c) Political bodies

A third category of cross-jurisdictional bodies comprises those that are political in character. These bodies are constituted by the responsible ministers of participating jurisdictions supported, in many cases, by ancillary bodies of public service officers who prepare the

---

[32] In the case of ACARA, the Act is explicitly based on a familiar smorgasbord of powers, in addition to a claim for support on the basis of nationhood: *Australian Curriculum Assessment and Reporting Authority Act 2008* (Cth) s 4.

[33] *Australian Curriculum Assessment and Reporting Authority Act 2008* (Cth) ss 7, 13, 43.

[34] *Infrastructure Australia Act 2008* (Cth) s 6; *Australian Curriculum Assessment and Reporting Authority Act 2008* (Cth) s. 7.

[35] *Australian Curriculum Assessment and Reporting Authority Act 2008* (Cth) s 43.

ground for the ministerial meeting. Their activities may range from discussions of policy co-ordination, to information exchange, to more formal roles under intergovernmental schemes, of the kind to which reference has been made already.

As the earlier discussion showed, legislation enacted for the purpose of intergovernmental schemes may sometimes create or at least recognise cross-jurisdictional political bodies and confer decision-making power on them. These are the exceptions rather than the rule, however. Typically, cross-jurisdictional political bodies are created by agreement between the participants, in the exercise of their collective executive power with little, if anything, by way of a formal, documented framework. Typically also, their decisions are not legally binding but depend on implementation by the participating jurisdictions, in the exercise of their own powers and responsibilities.

The most high-profile example of such a body in Australia is the forum in which the heads of government of the Commonwealth, states and territories meet. Once called the Premiers' Conference, then COAG, the current iteration of this body is the National Cabinet.[36] The significance of its roles in co-ordination of key aspects of public policy and information exchange was evident throughout the course of the pandemic.

The heads of government forum always is just the tip of a much larger cross-jurisdictional iceberg, the remainder of which comprises meetings of line ministers of various kinds, supported by officials. This intergovernmental 'architecture' was redesigned when the National Cabinet was formed.[37] It then assumed a highly complex structure, with a series of (in effect) ministerial councils operating under the aegis of National Cabinet itself, as 'Reform Committees', one of which was the workhouse meeting of treasurers as the Council on Federal Financial Relations (CFFR). All were comprehended within a loosely overarching National Federation Reform Council (NFRC), with membership that also included a representative of local government. Yet another group of Councils was presented as lying outside both the National Cabinet structure, and the NFRC. There have been some changes to the detail of this structure, following the change of government at the Commonwealth level in May 2022, but the complexity and fragmentation remains.

There have never been formal and specific accountability arrangements for cross-jurisdictional political bodies in Australia. Instead, it is implicitly assumed that the members of such a body are accountable for the stance taken and any follow-up action within their own jurisdictions. This logic has been somewhat muddled by the characterisation of the current forum as a 'cabinet' in which conventions of confidentiality and solidarity apply. The critiques of this characterisation are legion and should, sooner rather than later, bear fruit.

In the meantime, even without this complication, it is fair to say that accountability for cross-jurisdictional political bodies is weak in practice, whatever the theory of federal dualism suggests. Much more could be done within each jurisdiction to make the chain of accountability to parliament and people more effective, without undermining the relationship of trust between members on which such bodies depend. The initiative of the Chief Minister

---

[36] Department of Prime Minister and Cabinet, *National Cabinet*, (accessed 11 May 2023).

[37] The structure is portrayed here: Department of Prime Minister and Cabinet, *Australia's Federal Relations Architecture*, (accessed 11 May 2023).

of the Australian Capital Territory (ACT) in making a public statement about National Cabinet, from the perspective of his jurisdiction, after each meeting is a welcome step forward in this regard.[38] More could be done also to enhance the collective responsibility of such bodies, through public release of their charters and decision-making rules and the provision of information about activities and outcomes that has substantive content.

Reflections on accountability

The paper so far has sketched a range of cross-jurisdictional bodies in Australia. To assist analysis, it has grouped them in 3 categories, regulatory, advisory, and political, giving examples of each. In relation to all of these bodies, it has shown that some arrangements for political accountability are in place. These vary with the composition and functions of the body and with what might loosely be described as the depth of its intergovernmental character.

In some respects, the challenge of designing mechanisms for political accountability for cross-jurisdictional bodies are similar to those for intra-jurisdictional bodies. The tools potentially are much the same—ministerial responsibility, including answerability to parliament, regular reports and other forms of transparency, scrutiny by parliamentary committees and by parliamentary chambers as a whole. There can be no one-size-fit-all approach. On the contrary, accountability systems necessarily are tailored to key characteristics of public bodies including, for example, considerations of independence, expertise, and confidentiality. Effective accountability also depends on more than design. Critically, it also is shaped by implementation in practice. This, in turn, relies on the willingness of parliaments to transcend political self-interest and on the willingness of governments to comply. Both of these key aspects of the political accountability chain have been under stress in Australia for some time.

Cross-jurisdictional bodies also differ from their intra-jurisdictional counterparts in at least 2 important ways.

The first is that the lines of political accountability inevitably run to more than one democratically elected parliament, government, and electorate. To ignore this is to undermine democracy at the sub-national level of government, to the detriment of both federalism and democracy, individually and in the compound form of federal democracy.

Secondly, any cross-jurisdictional element affects the goals, responsibilities, and modus operandi of a public body. This is not necessarily a negative; indeed, not a negative at all. As with federalism itself, at least when in co-operative mode, a body with cross-jurisdictional characteristics has the opportunity to draw on insights into conditions and preferences around the country, to respond to difference, and to ensure buy-in, in a way that an intra-jurisdictional body may not.

Intergovernmental relations theory and practice in Australia has not grappled adequately with the implications of cross-jurisdictional characteristics for the operations of public bodies and the accountability regimes that apply to them. There is a tendency to assume that, to be

[38] Andrew Barr MLA, 'Statement on National Cabinet', *Media Release*, 15 March 2022.

effective, accountability regimes must be confined within a single jurisdiction; usually the Commonwealth.[39] A converse assumption typically is explicitly in play—that accountability regimes that operate within a single jurisdiction are, and can be, effective.

There is no doubt that organising an accountability regime within a single jurisdiction is more straightforward, at one level. But to do so reflects the habits of mind developed in and for unitary states. To the extent that such regimes underestimate the significance of the defining, cross-jurisdictional characteristics of these bodies and the need for accountability of and to other participating jurisdiction, they are unsatisfactory. There is a need for greater creativity in thinking about arrangements for the accountability of cross-jurisdictional bodies that fit the conditions of federal democracy in Australia.

Three steps might be useful towards this end. The first is to ensure that the arrangements already in place are actually followed through, in spirit as well as in form, at both levels of government. The second is to develop and publicise practices and procedures for ministerial accountability for intergovernmental action, again at both levels of government, which balance the need for confidentiality and the importance of public accountability and transparency. A third is to acknowledge the cross-jurisdictional character of a body as an element as important as independence and specialisation in designing accountability arrangements for it and putting them into effect. This would mean, for example, that even where a body is primarily accountable to Commonwealth institutions, its cross-jurisdictional character should be understood, protected, and respected in the manner in which accountability occurs.

These 3 steps might sound mundane but they would be challenging in practice, requiring significant cultural, as well as some institutional change. It would be appropriate for some leadership to come from the Senate, in this regard. The historical reality that the Senate has evolved as a house of review rather than as a specifically federal chamber should not be allowed to obscure either the significance of its composition or its potential to play some federal role. One such role, which speaks to the Senate's interests and strengths, is accountability for intergovernmental arrangements, in a form that serves the needs of both democracy and federalism.

[39] The statement is explicit in the Department of Finance explanation of its category of 'inter-jurisdictional bodies':

> Some significant governance challenges can arise when bodies are formed that are accountable to more than one government. Clarity of arrangements and responsibilities are normally contained within the framework of a single jurisdiction, and it is crucial to consider this when establishing any inter-jurisdictional body. Different types or levels of accountability to different jurisdictions may ultimately lead to a lack of accountability.

Department of Finance, *Types of Australian Government Bodies*, 11 February 2021 (accessed 11 May 2023).