Accountability and Separation of Powers

Accountability

There is no universal definition of accountability, as it is very dependent upon who is accountable, to whom are they accountable, for what actions are they accountable, and what are the accountability standards.

- However, a definition could be: There is some relationship between A and B, which requires A to account to B and uphold certain standards, and A must accept sanctions/provide remedies if s/he doesn’t do what s/he said would do, or if s/he breaches those standards.

With the growth of government and the bureaucracy, there is an increased demand for greater accountability.

- It should be noted that our present society differs from that in which the Constitution was drafted – a time where ministers were actively involved in their departments and statutory authorities were limited.
- Political accountability, specifically the accountability of Ministers to Parliament, is no longer sufficient as the sole method of accountability.

Forms of Accountability

The textbook refers to four different forms of accountability:

1. Political accountability – implemented through the parliamentary system (parliamentary committees and question time).
2. Financial accountability – through constitutional/statutory controls on finance (monitored by Auditor General and key parliamentary committees).
3. Administrative law mechanisms/accountability – courts, tribunals, oversight bodies (Ombudsman) and legislation that confers rights on members of the public to access government docs and be provided with reasons for decisions.
4. Ethical responsibility and integrity of govt employees (accountability through ethics and integrity) - codes of conduct, ethics advisory services, policies on conflicts of interest, training and charters.

Political Accountability

This is achieved through the parliamentary system in accordance with the doctrines of responsible government, representative democracy, and government as a public trust (this is an analogy - the government is like a trust in that it should use power for the benefit of the people as a whole).

Political accountability refers to both accountability of Parliament to the people and accountability of the government to Parliament. Specific methods used are:
- **Individual and Collective Ministerial responsibility.**

- **Individual**: Ministers are responsible for actions of government departments. Ministers can be held accountable by being forced to resign.

- **Collective**: once a decision is made by the cabinet it is backed collectively – confidentiality of Cabinet discussions

- Disciplinary sanctions – ministers can be sacked from the cabinet/public service or may be censured for misconduct.

- Public sanctions – eg, people called before Royal Commissions, possible criminal penalties. However, this doesn’t translate for an individual citizen who wants to hold the government to account.

- Representative democracy - the people would not re-elect a bad executive government.

- Question time.

- Parliamentary debates.

- Parliamentary committee inquiries.

- Tabling of annual reports & program performance statements to the parliament.

- **Separation of powers**

**Limitations**

However, political accountability has its limitations, particularly in current times.

- First of all, most of the mechanisms of political accountability are still mostly available to other persons within the government itself - members outside the government are very limited in the way they can review government members.

- There is also an issue of practical effectiveness - it is often very hard even for ministers or heads of departments to effectively control matters in their departments due to the increase in more independent statutory authorities and government business enterprises.

- **Mason**: Ministers are more concerned about “big picture” policy issues, rather than the detailed, day-to-day administration of their departments, especially as departments & their functions are enormous. Also, it is an overstatement to claim that citizens can simply vote out the ministers that they don’t like.

- The system is not a ‘complete democracy’ - the actual prime minister is not directly elected by the people completely - people vote for their members.

- Political accountability often clashes with other forms of accountability.

**Financial accountability**

Financial accountability refers to the verification of the official use of money drawn from the public account (ie, the Auditor-General ensures that appropriations of public moneys are consistent with the
Constitution by requiring government to justify spending). The Senate has an estimate committee which does a similar thing in house.

- **Barratt**: the Auditor General contributes a unique blend of independence, objectivity and professionalism.
- The Auditor-General is established under the *Auditor-General Act 1997 (Cth)*, who is independent of the Parliament, and who has 2 functions:
  1. **Quantitative**: Audit of the financial statements of government agencies.
  2. **Qualitative**: Performance audit, looking at the efficiency, effectiveness and regularity of government programs.

Other specific methods used are (in addition to the Auditor General):

- Legislative approval is required for taxation and expenditure.
- **Parliamentary estimate committees** examine executive activity & government programs on a recurrent basis (eg, by questioning ministers and public servants before committees).
- **A parliamentary public accounts** committee keeps a long-term gaze on the financial system generally.
- **Annual reports** to parliament of financial statements from all government agencies.

**Limitations**

Since financial accountability focuses upon financial probity and not on administrative justice issues, it provides only partial coverage:

- The type and relevance of the benchmarks used in both the quantitative and qualitative aspects of performance audits must be questioned.
- Eg, Olympic team, School Chaplains, Local Courts etc.

- The independent appointments can be an issue - those chosen are so highly experienced that they undoubtedly have friends in Parliament.

**Administrative law accountability (legal accountability)**

The purpose of legal accountability is to safeguard the rights and interests of people and corporations in their dealings with government agencies. Administrative law does this in 3 ways:

1. **Review of Decision-Making**: Admin law confers a right to challenge a government decision by which a person feels aggrieved. This can be done through judicial review, merits review (through a tribunal), complaining to an ombudsman or anti-discrimination agency, or seeking internal review within an agency.
2. **Protection of Information Rights:** By Freedom of Information (which confers a right of public access to government documents), privacy legislation (regulates the handling of personal info within government), administrative review legislation (confers a right to a written statements of the reasons for a decision), whistleblower protection legislation (which protects employees esp for disclosing info about activity that might otherwise attract disciplinary, criminal or civil law sanctions).

3. **Public Accountability of Government Processes:** Through Anti-corruption agencies (ICAC), human rights commissions (eg, HREOC), specialist government inquiries, law reform commissions (eg, ALRC & NSWLRC).

The Administrative Law System is Underpinned by 3 Main Principles:

1. **Administrative justice:** The rights and interests of individuals should be safeguarded in administrative decision-making.

2. **Executive accountability:** Those who exercise executive powers can be called onto explain & justify the way they have gone about this task.

3. **Good administration:** Administrative decision-making should conform to universally accepted standards, such as **rationality, fairness, consistency and transparency.**

**Limitations**

As with other forms of accountability, there are limitations to legal accountability:

- Technical limitations – courts can't substitute new decision, tribunals can only review selected decisions, ombudsman can only make recommendations.
- Judicial review is time consuming. It is divorced from morality and determines only whether the decision is actually legal (**Al-kateb v Godwin**).
- Access issues regarding courts (only works for very poor or very rich)
- **Mason:** Increasing complexity of social and economic life - administrative action began to replace legislative enactment and judicial adjudication in creating legal rule and also in resolving disputes.

**Accountability through Ethics & Integrity**

Accountability can also be achieved through the imposition of ethical standards. The ethical responsibilities of public servants have been made more explicit by:

1. Public Service Acts & Codes of Conduct (eg, APS Code of Conduct (federal))
2. Redefinitions of those values and ethics – emphasis on responsibility of public officials to serve the public and to observe principles that are recognisable as core public law values

- See p. 19 of the Textbook for extract of the APS Codes of Conduct.
- Preston: Ethics/integrity are controversial, as ethics are subjective & value-laden. Nothing is more dangerous to the well-being of the body politic than a public official who is technically competent or strategically astute but ethically illiterate or unfit.

- McMillan:

  Growth of Non-judicial bodies has not been constrained by the separation of powers, but it does not easily fit in that doctrine. A national integrity system with a 'bird's nest' idea (also called a redundancy model) should be adopted: where there are many strands that all support one another such that if one strand fails the others can pick it up.

  Tasmania has created the Integrity Commission Act 2009 to educated public officers and investigate misconduct. VIC looks like they are going in the same path.

  Another adaptation of this national integrity system was supported by Spigelman, who argued that there is a 4th branch of govt - the integrity branch:

  Consists of all the overwatch type positions/bodies of the administrative law mechanisms, which promote fairness, impartiality, justice, responsibility. (eg, the Ombudsman, the Auditor-General, Human Rights bodies, etc... However, not the administrative courts and tribunals.)

  The integrity branch uses the three established branches to perform integrity functions.

  Prevent corruption and ensure govt observes proper practice. Uses power in proper manner for which it was conferred and no other purpose.

  Merits - concerned with the 'best' decision, not the 'just' decision which is legally correct (judicial review). Judiciary can't do this because it has to follow precedent. That is the limitation on the judiciary.

  The judiciary's integrity issue is two-sided. It must maintain its own integrity in order to monitor integrity of other branches, which means it cannot comprise its traditional judicial integrity by assessing merits etc.

### Separation of Judicial Power

The separation of judicial power from the executive is treated as more 'sacred' or important than the separation of legislative power from the executive. The main principles that arise out of this idea are discussed in *R v Kirby; Ex parte Boilermakers' Society of Australia (Boilermakers’ Case)*:

- Judicial power can only be vested in a court which is established as per under Chapter 3 of the Constitution (under s 71) (known as a "Chapter 3 Court").

- This means that administrative tribunals cannot be invested with judicial power.

- A Chapter 3 can only be invested with judicial power (as in, it cannot be invested with non-judicial powers).

- This means Chapter 3 courts cannot be exercise administrative or any non-judicial powers.
- This is except for those additional powers which are strictly incidental to its functioning as a court.

**What is a Chapter 3 Court?**

The defining features of a Chapter 3 court is that it is:

- Called a 'court' (not a tribunal).
- Members appointed as per s 72 of the Constitution (giving them 'tenure' meaning they cannot be removed, only mandatory retirement with age).
- The primary function of the court is a **judicial** function.

Chapter 3 courts include all of the federal courts (including the High Court and the Family Court) and the Supreme Courts of the states.

The operation of a Chapter 3 court was discussed in *Kable v Director of Public Prosecutions (NSW)*,[8] where a NSW statute was **invalidated** since it purported to confer **not-judicial functions to a chapter 3 court**.

It was also discussed in *Kirk v Industrial Relations Commission*:[9]

- **Facts:** the act which created the Industrial court in NSW purported to make its decisions final and not subject to appeal by, among others, the Supreme Court of NSW. The appellant argued that the this is unconstitutional.
- **Held:** the state legislatures do not have the capacity to deprive a Chapter 3 court from its capacity of reviewing inferior courts with regards to jurisdictional error - to do so would be to alter the character of the Chapter 3 courts in such a way so that it ceases to meet its constitutional description (thus being unconstitutional).

**Controlling the Executive**

**The Principle of Legality**

[1] The principle of legality means that **all government action requires an identifiable source of legal authority**. Consequently, if a government agency exceeds its legal authority, it is acting *ultra vires* (beyond its power).

- The principle of legality is easily reflected in the Australian system since the parliament is created by the constitution, which is the "supreme law" and gives it all its power.
- This underlies principle of legality since **parliament needs legal authority for acting** - this authority is sourced from: The Constitution, Statute, the Common Law, or executive power.

**Unauthorised Decision Making**