

An International Conference to explore approaches to the preservation of urban built heritage, with a focus on Melbourne

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The Hon Tim Smith, QC

[Synopsis --Government Secrecy and Urban Planning –The Forgotten Trust and Reform](#)

The [Accountability Round Table](#) (ART) is a non-partisan group of citizens dedicated to improving standards of accountability, probity, transparency and democratic practice in all governments and parliaments in Australia.

Open and accountable government is critical for good government, the functioning of our parliamentary democracies and for addressing the risk of corruption; for corruption thrives on secrecy. It is also now recognised as critical for domestic and international [economic growth](#).

But in our Australian democracy, the prevailing culture among public servants and our elected representatives favours government secrecy. In Victoria, consider that

- the present government, in its first year of office, abandoned its commitment to provide Victoria with its own Independent Commission Against Corruption;
- having led the way in the 1980s in establishing freedom of information laws, governments, by creative use of statutory exemptions, have used those laws to increase government secrecy rather than reduce it and have failed to adopt the best practice Right to Know model of Queensland; and
- we continue to lack best practice systems for regulating, and securing transparency of, political donations, ignoring the significant improvements made in New South Wales.

The lessons of the last 30 years in Australia are that given secrecy, corruption will thrive and that there will always be people who will pursue their objectives corruptly. At the same time we have significantly increased the opportunities and temptations for corruption through

- expansion of the privatisation and outsourcing of services by and to government;
- development of a lobbying industry with a revolving door between government and lobbying;
- the [pursuit of private donations by political parties](#) including an accepted fundraising practice of charging for access to ministers, shadow ministers and MPs.

These all lack transparency.

The high level of secrecy attaching to urban planning and major projects has resulted in a lack of openness and accountability. We [lack information](#) from governments and Ministers about planning objectives and decision-making processes, including in that new phenomenon “[flipping](#)”. The secrecy extends to the details of contracts for very large sums of public money, whether a Desalination Plant or an East West Link. Governments use substantial media units to control the supply of information and inject spin. In this governments are aided by the 24-hour news cycle and the lack of resources of the fourth estate. In combination these factors appear to be causing secrecy to increase. Indeed, the [Hon Malcolm Turnbull](#) has commented that it has never been easier for parliamentarians to lie and that they treat us with contempt.

How have we reached this point? Different forces have been at work, including the pursuit of power and its retention, adoption of the business model for the public sector and the increasing dominance in major parties of career politicians.

At the same time something unnoticed has occurred. We, the people, and our elected representatives and public servants appear to have forgotten what is the true ethical and legal nature of our relationship and our

responsibilities - in particular that relationship which exists between the people and those they elect to Parliament. When speaking at the presentation of the ART Commonwealth Parliamentary Integrity Awards in 2013, Sir Gerard Brennan, former Chief Justice of the High Court, [explained](#):

It has long been an established legal principle that a member of Parliament holds “a fiduciary relation towards the public” and “undertakes and has imposed upon him a public duty and a public trust” ... The duties of a public trustee are not identical with the duties of a private trustee but there is an analogous limitation imposed on the conduct of the trustee in both categories. The limitation demands that all decisions and exercises of power be taken in the interests of the beneficiaries and that duty cannot be subordinated to, or qualified by the interests of the trustee.

But what we see now is our elected public trustees driven by their political needs rather than by what is in the interests of the people.

About 100 years ago, the public office public trust principle was well known and part of political commentary. Today it is absent from that commentary and [forgotten](#) by the people and those in public office.

The legal principle is, however, still part of the law and [applied in a number of areas of the law](#) including legality of contracts, a number of common law offences, sentencing and common law rules for the interpretation of legislation, for example, the interpretation of broad discretionary statutory powers such as those held by Planning Ministers in determining whether to intervene in planning applications and what decisions to make when they do. Where that occurs, the courts have held that such powers are “[conferred as it were upon trusts](#)” and they are to be interpreted as requiring that they be exercised in the public interest to promote and not defeat or frustrate the objects of the legislation. The result is that actions can be brought before the courts to challenge the exercise of such powers relying, inter alia, upon the legal principle that public office is a public trust.

In the pending Victorian election much could be done to reduce government secrecy and its risks and dangers, if the major parties committed to give the Independent Broad-based Anti-corruption Commission (IBAC) the ability of NSW’s ICAC to investigate corruption, adopted best practice (New South Wales) to reduce the risk of political funding of parties leading to anti-democratic and corrupt outcomes, and implemented the Queensland and Tasmanian approach to freedom of information based on the proposition that the beneficiaries of the public trust, the people, have a Right to Know - [issues put to the parties by the ART in this election](#).

But how to ensure that commitments, if made, will be honoured and preserved? This will require the Public Trustees’ culture to change to one that accepts and gives primacy to the public trust principle. That requires that the principle at least

- becomes part of community discussion and expectation, aided by the Fourth Estate; and
- is restored to secondary and tertiary studies wherever that it is relevant be it ethics, government, law, philosophy, politics, urban planning, architecture and any related fields. On that, we need the Universities to take the lead.

But where does the responsibility for the Public Trust lie? The short answer is - with everyone. And where does the buck stop? Under the Public Trust principle, it stops with us the people. Our ultimate responsibility, and our ultimate sanction, is to dismiss our elected public trustees.

To disengage from our democracy because we have lost faith in it, as so many people are understandably doing, is to deny our responsibilities. And, if we continue our disengagement, we must accept the ultimate responsibility for the future failures of our democracy.

But I suggest that concern is growing within the community. A few months ago I can – the [Independent Community Accountability Network](#) – came into existence. Its purpose is to give concerned people an opportunity to work for change. In its first three months it was joined by 53 people.

Are these ideas whose time has come? There is only one way to find out.