

# Administrative process, practice and law in a pandemic — how much is enough?

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*Frances Adamson AC\**

For 34 years now the Institute has championed the study and greater understanding of administrative law.

I suspect, with the greatest of respect, that this is not a topic that might immediately excite the passions of the average person one might stop on Rundle Mall. But ask them instead whether they have an interest in government actions, decisions, processes and accountability; in social security, taxation, the regulation of health, education and media providers; or in the environment and development, privacy, fairness and human rights, and it is almost certain, I think, that every passerby will have both an opinion and a personal example.

The Institute, and you its members, are to be warmly commended for elevating and deepening the study of the body of law which affects so profoundly the functioning of our society, from the operation of the local council to the most complex aspects of constitutional law.

Your conference theme, of 'Building Trust and Confidence', is also timely, though I wonder, if the convenors were to sit down today to settle on a theme, whether they might not prefer 'rebuilding trust and confidence'. I venture that there have been few times in the recent past when the need for building public trust and confidence in our institutions has been so pronounced, or the challenge so complex.

While there have always been those who doubt and challenge the integrity of our public processes and institutions, it is undeniable that the COVID pandemic has given fertile ground to views such as those held by the sovereign citizens movement. While these may be marginal views in the grand scheme of things, I think their prominence and growth are nonetheless indicative of a stress in the fabric of our social discourse and our social compacts. And it is perhaps commonplace, but nonetheless true, to note also that social media, and the narrow casting of news through curated feeds, means that opinions are more often reinforced and normalised than challenged and subjected to the rigour of debate.

While the role of Governor may not be well understood by the public at large, it is apparent from many of the people I meet and the letters I receive that the office is seen as a repository of trust in public life, and that there is a thirst for integrity and trust. This is something to be encouraged and welcomed, and I view the maintenance and strengthening of that perception as a key part of my role.

A reductionist view might hold that the essential role of the Governor is purely constitutional, but experience has shown me that it is the interplay between what we call the three Cs — the constitutional, the ceremonial and the community roles — that gives strength to the office and, I am also of the view, to our democracy.

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\* Her Excellency the Hon Frances Adamson AC is the Governor of South Australia. This article is an edited version of her opening address to the Australian Institute of Administrative Law 2023 National Conference in Adelaide on 27 July 2023.

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Within proper bounds, I want the role of Governor to be seen as integral to the public life of the State and to strengthen the sense of transparency and probity in public institutional life. To this end I meet regularly with the Premier and have met individually with every Member of both Houses of the State Parliament and Members of the House of Representatives and Senators representing South Australia.

My regional visits program will enable me to engage, during my five-year term, at local government level across the State's 69 local council areas. The weekly convocation of Executive Council is of course the most regular manifestation of the constitutional authority of the role. Whilst preserving the confidentiality of those meetings, I can nonetheless say that I do view them as an opportunity to exercise Bagehot's prescriptions.<sup>1</sup>

At the other end of the scale of confidentiality, it is a matter of State pride that the passage of the South Australian *First Nations Voice Act 2023* was conducted, including the Executive Council, in public on the steps of the Parliament House, just up the road. Content aside, all my engagements are on the public record so that the people of South Australia can have visibility of what their Governor is up to.

At a more personal level, my husband Rod and I want to make Government House and grounds a place for *all* South Australians. We were encouraged that 60,000 members of the public visited as part of the Illuminate Festival, still running in other parts of the city.

Somewhat unfortunately, the perception of trust in my office can also lead people to ask me to do things I cannot, but I believe these occasional misapprehensions are more than offset by the benefits of imparting visibility and leadership to the role. In this audience I do not need to defend the centrality of the role, at least in its conceptual sense, to law and governance, insofar as the Crown is the *fons et origo* [source and origin] of state power.

Over the centuries there has been an inverse correlation between the decline in the personal power of the sovereign and the necessary growth of administrative and constitutional law to regulate the exercise of that power by the body politic. Administrative law's gain has been the sovereign's loss, although not the Crown's.

Most direct powers have long been exercised by the executive, but that is not to say there are not powers still left to Governors, and I should here acknowledge the virtual presence at the conference of Professor Anne Twomey, whose *Veiled Sceptre*<sup>2</sup> has become required reading for Governors. Some powers have disappeared more recently, and I have to say that the demise of the arbitral function of the University Visitor, once held by my office, is not something I have had cause to repine.

One power I might mention briefly because it is called upon with some regularity, although exercised infrequently, is that of pardon. I mention it here not least because of the tension between decision-making power and transparency, which is a theme of your conference.

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1 [Editor: Walter Bagehot famously attributed three rights to the sovereign — to be consulted, to encourage and to warn.]

2 Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge University Press, 2018).

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I can speak about it, to some degree at least, because of an article that appeared in *The Australian* of 19 September last year entitled 'Tell us why: pardon refused for "innocent" killer John Bailey'.<sup>3</sup>

The matter can be summarised by two quotes from that article. The first: 'A petition seeking a posthumous pardon for a man hanged for a triple murder in the late 1950s has been rejected without explanation by South Australian Governor Frances Adamson.' And the second quotes the petitioner as saying 'in the interests of transparency, the South Australian governor needed to release the reasons for the rejection'.

I am unfortunately unable to tell you how this tale ends, not because of confidentiality but because insofar as it raised a significant policy issue — the disclosure of reasons for the rejection of requests for pardon — it was referred to the AttorneyGeneral and remains active.

The Solicitor-General had asked me to reflect on my transition from senior public federal servant to State Governor and whether, and if so how, my perspectives differed, in the context of the themes of this conference. Unsurprisingly, there are some significant differences between being Governor and being the head of a large — 6,000 staff — department of state with direct administrative responsibilities and attendant challenges.

My colleagues heading domestic departments would have more harrowing tales to tell in terms of engagement with administrative law in its various guises, but the Department of Foreign Affairs and Trade was by no means immune.

As a metric, in 2021–22, the most recent year for which data is available, 9 claims were commenced in the Administrative Appeals Tribunal and 377 freedom of information requests finalised. The department also managed a range of legal matters before courts and tribunals, including some high-profile cases with which you would be familiar from the media. But also perhaps unsurprisingly, there is an important similarity in the perspective to be gained from both positions.

In both, for all the challenges and for all the failings that might occur, I saw and see, almost without exception, dedicated public servants, officials, legislators, legal practitioners, animated by sound principles, genuinely striving to pursue the public interest, to follow due process, to maximise fairness and transparency and to deliver good outcomes. In both, I saw and see that they do so in policy, administrative and legal environments with robust mechanisms of scrutiny and accountability.

As I say, this system is not perfect, but it is open to continuing evolution, as we can see with, for example, the remaking of the Administrative Appeals Tribunal or the recent creation of a National Anti-Corruption Commission.

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3 'Tell us why: pardon refused for "innocent" killer John Bailey', *The Australian* (online, 19 September 2022) <<https://www.theaustralian.com.au/nation/tell-us-why-pardon-refused-for-innocent-killer-john-bailey/news-story/5e78645cb01e64808667a2cec2a7d437>>.

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It is also a system that has just had administered to it a very serious critique in the report of the Holmes Royal Commission into the Robodebt Scheme.<sup>4</sup> I will not comment on the substance of the report, only note that it is a report that will require the most sober consideration. Without, in light of the report, being glib, I nonetheless believe that the path of public administration still tends to the better, and your work over the past 34 years and into the future, is an important contributor to its continuing improvement.

I note the call for papers for this conference spoke of the opportunity to discuss contemporary issues, of which there is clearly a plethora; to share practical experiences, which I am sure you will do enthusiastically; and to consider future developments. It is on this last that I encourage you to focus your attention. The success of the trust-building project may well depend on it.

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<sup>4</sup> *Royal Commission into the Robodebt Scheme* (Report, July 2023).