The Duty to Govern and the Pursuit of Accountable Government in Australia and the United Kingdom

DAVID KINLEY*

The format of this article is an analysis of the nature of the notion of Responsible Government as it operates within the modern schemes of government in Australia and the United Kingdom. The broad purpose of this endeavour is to provide a critique of the orthodox or classical liberalist justification for its existence as a fundamental element of both constitutional systems and, specifically, to examine how the notion of 'public trust' might assist in reconstructing a framework of accountability within the newly characterised notion of Responsible Government. I am principally concerned, therefore, with establishing and evaluating the objects of Responsible Government in theory and their pursuit in practice, as perceived, not only by constitutional theorists and governmental commentators, but also, importantly — as their views are not necessarily the same as the above — by those within the institutions germane to the implementation of Responsible Government. That is, those who are in the Government (both its executive and administrative arms) and Parliament.

That there is some doubt over the exact meaning of the term Responsible Government is, generally speaking, the impetus for the object of this study. More specifically, however, the incentive has come from two sources. First, the immediate impression that this largely United Kingdom educated constitutional lawyer has obtained from Australian constitutional theory that there exists within it an apparently well defined and *discrete* notion of Responsible Government. That is in contrast to its much less distinct form (though, of course, not denying its existence) within the United Kingdom's constitutional discourse. Second, and partly as a consequence of the foregoing, it is argued that there is a patent need to deconstruct the notion of Responsible Government with the same rigour as has been applied to the analyses of the Diceyan notion of the Rule of Law, and even the Separation of Powers doctrine, over the last two decades.

* BA (Hons), MA (Sheff), PhD (Camb). Senior Lecturer in Law, The Australian National University. In the construction of this article I benefited greatly from discussions with John Uhr, Paul Finn, Robert Goodin, Jonathon Boston, Leslie Zines, Roger Wettenhall and Dawn Oliver. Some of the ideas and arguments in the article were previously presented to forbearing audiences in the Universities of Bristol and Edinburgh, the Australian National University and the 1993 Australasian Law Teachers' Conference in Christchurch, New Zealand.

TWO RESPONSIBILITIES

A key to the issue outlined in the introductory paragraph is supplied in an astute observation made by Anthony Birch in 1964. He was, no doubt, reflecting on the changes in the process of government in general during the 20 odd years since World War II, but his observation which is at least as apposite to the developments since then:

> Th[e] usage of the term 'responsibility' involves something like a reversal of the traditional meaning, for in the new usage a government is acting 'responsibly' not when it submits to Parliamentary control but when it takes effective measures to dominate Parliament. Perhaps this reversal of meaning indicates as well as any description the gap between the doctrine of collective responsibility and the practice of contemporary politics.[1]

Though Birch supplies, in broad terms, a distinction between the 'traditional' and 'new' forms of Responsible Government, it is a less simple task to attach any more specific definitions to either. Birch detects 'a certain amount of confusion about the proper role of the Parliament in relation to the Executive',[2] which is largely the result of an inherent conflict between what he identifies as the 'two languages of the constitution'. In relation to the above mentioned relationship between the Parliament and the Executive, there exists, on the one hand, the classical liberal view of the Executive's responsibility, or accountability, to Parliament as prescribed by Parliamentary Sovereignty. This is the more familiar view, and is espoused by nearly all non-governmental party members of Parliament, and many academic commentators. On the other hand, there exists the 'Executive view' which considers it the responsibility of the Executive to govern. That is an obligation born *either* of the appointment of ministers and, of course, employment of civil and public servants comprising Government precisely to undertake the administration of the country,[3] or, more commonly today, of the fact of the

[1] A H Birch, *Representative and Responsible Government* (1964) 138. The same and more has been said of the Australian situation: 'it is more accurate to say that the legislative and executive powers have been combined in the same body of persons, the majority party in the lower house of parliament, while the remainder of the legislature, the opposition, hopes not to overthrow that combination of powers but to inherit it . . . This development has gone further in Australia than in Britain or elsewhere, because Australian political parties are much more disciplined than their counterparts in other parliamentary countries': Harry Evans, 'Parliamentary Reform: New Directions and Possibilities for Reform of Parliamentary Processes' in *Parliamentary Perspectives 1991*, Parliamentary Papers No 14 (Feb 1992), 48–9. On Australia see further, C Kukathas, D Lovell & W Maley *Democracy, Parliament and Responsible Government* Papers on Parliament (No 8, June 1990).

[2] Id 165.

[3] Viz Harold Macmillan's admonition in respect of the Law Officers, that their order of loyalties is 'first to the Crown, second to Parliament, and only thirdly, almost incidentally, to the administration: Lord Rawlinson, *A Price Too High*, reproduced in R Brazier *Constitutional Texts* (1990) 308. Sir Douglas Wass, as a former senior civil servant has had no difficulty in declaring that the Civil Service is obliged 'to give unqualified loyalty to its departmental ministers and to seek to the best of its ability to put the government's policies into execution: *Government and the Governed* (1983) 46. Nevil Johnson, in his study of 'the Leviathan at the Centre', whilst acknowledging the demise of that part of Responsible Government (or as he prefers to characterise it, 'ministerial responsibility')

government, or, more correctly, the party in government, having been elected with a mandate to implement its advertised policies.[4]

Despite the fact that the examples cited (at fn 4) in support of the 'Executive view' of Responsible Government emanate largely from the political practitioners (especially those in government), there can be little doubt that the prevailing view, in both the United Kingdom and Australia (though apparently less vigorously maintained in the latter), of the function of Responsible Government held by those who might be loosely called legal or constitutional commentators[5] is that of the Executive's accountability to Parliament as dictated by liberal orthodoxy.[6] The former view, it is submitted, more certainly

which demands accountability, lays great emphasis on that part which allocates responsibility *for* government: *In Search of the Constitution* (1977) 83–4.

[4] The notion of political legitimacy obtained by mandate is usually (though perhaps improperly) presented as a licence to implement the elected party's manifesto. Unsurprisingly, one finds this case being argued by those in government — both the politically appointed ministers in the Executive and those employed in the civil or public service. In respect of the former, see, for example, the recent exasperated claims of the Australian Prime Minister, Paul Keating, that as Parliament's scrutiny of the Executive exists only at the tolerance of the Executive it is quite within its authority to suspend the sitting of the Lower House (though this could not be indefinitely; see s 6 of the Constitution) should it view the behaviour of the Opposition to be unacceptable (*The Australian* 20 August 1993, 1); see also the revealing remarks of the Leader of the House, Kim Beazley, *Parliamentary Debates*, House of Representatives (Cth), 19 August 1993, 364–5. And in respect of the latter, see, for example, the Management Advisory Board's *Accountability in the Commonwealth Public Sector, An Exposure Draft* (June 1991) 2, where although a Minister's accountability to Parliament is recognised, it is made clear that the primary responsibility of Ministers is 'for the overall management of their portfolios'.

In the United Kingdom the same imperative is found in the infamous Sir Robert Armstrong Memorandum on the Duties and Responsibilities of Civil Servants in relation to Ministers (HC Deb Vol 74, cols 130–2 (*w*) (26 February 1985), where it is stated that 'the civil service as such has no constitutional personality or responsibility separate from the duly elected government of the day.' Less obviously, however, it may also find support from those on Opposition front benches. In 1980 in the United Kingdom Gerald Kaufman MP, then a shadow minister, illustrated this point strikingly when he maintained that the Conservative Government was elected by a very large majority last year and I believe it has the right to carry [its policies] out — however misguided and indeed evil I believe these policies to be, and I do not believe that Parliament should create trip wires for these policies because I would not like it if Parliament created similar trip wires for a Labour Government in whose policies I thoroughly believed': BBC 'Analysis' programme 1980; quoted by A Davies, *Reformed Select Committees: The First Years*, (1980) 62–3.

Note the interesting statistics collected in the aftermath of the United Kingdom's Conservative party 1979 general election victory, that whilst an overwhelming majority of voters who allied themselves with either the Labour or Conservative parties approved of the policy options that they were informed were associated with the appropriate party, a very significant proportion in both camps approved of the policies adopted by the rival party when the voters were *not* informed as to which party backed which policy: Dawn Oliver, 'The Parties and Parliament: Representative or Intra-Party Democracy?' in J Jowell & D Oliver (eds), *The Changing Constitution*, (2nd ed, 1989) 127. In the face of this evidence, it might be argued that there exists little ground for a party to claim any sort of an electoral mandate.

[5] The contingent of backbench MPs (largely from the opposition parties) that support the classical liberal view, admittedly, does not fit neatly within this categorisation.

[6] The *First Report of the Senate Select Committee on Matters Arising From Pay Television Tendering Processes* (September 1993) made it clear that the model of responsible government assumed by that Committee was that of liberal orthodoxy — see paras 2.40–2.45. See further the joint MAB/MIAC publication *Legal Issues — A Guide for Policy Development and Administration* (MAB/MIAC Paper 14), October 1994.

represents how the art of government is prosecuted. Yet, the extensive literature that now exists charting the demise of parliamentary control or supervision of the Executive is almost invariably premised on the presumption that within our constitutional system it is incumbent on the Executive to be amenable to the scrutiny of Parliament. The fact of the varying claims as to the present institutional weakness of Parliament's ability to exact this demand of the Executive might be explained as being based on a view that such a responsibility to Parliament is how the relationship between the two organs *ought* to be.

Still, this dissonance between the actual practice of government and how, apparently, it is characterised in British constitutional theory is not easy to understand, let alone explain. There is, as Nevil Johnson has pointed out, an ongoing 'reformulation of the executive function in government.'[7] It is, perhaps, due in part to the peculiarity in the United Kingdom that Responsible Government (the principle) *qua* responsible government (the practised art) is not — in contrast to its place within the constitutional language of Australia, for example — a term of art in ready use. In Sir Ivor Jennings' seminal text, *Cabinet Government*, which constitutes one of the first comprehensive studies of modern executive practice, there appears no entry 'Responsible Government' in the Index, let alone as a chapter heading. What is more, where the term is adopted it is usually considered to convey *only* the Executive's responsibility to Parliament.[8]

It might be supposed that this is a distinction without substance; that it is merely a semantic dispute in that the doctrine of Ministerial Responsibility, which *is* common currency in the United Kingdom, is simply Responsible Government by another name. Indeed, broadly speaking this is correct, though perplexingly seldom, if ever, acknowledged. Both concepts, at least, are capable of enshrining the notions outlined above. The difference between the two is more in emphasis than nature — though the difference is crucial. In particular, it is fair to say that recent discussion in the United Kingdom of Ministerial Responsibility has centred on the balance between the collective responsibility to Parliament of ministers for all actions of the Government and the responsibility to Parliament of individual ministers for the actions of their departments,[9] whereas the concentration of dialogue on Responsible Government in Australia has, at least since federation, been on the balance of a government's responsibility to Parliament as a whole or merely to its lower

[7] (1985) 63 *Public Administration* 427.

[8] See, for example, Michael Rush, *Parliamentary Government in Britain* (1981)1, 3, where he refers to 'responsibility' in its 'strictly constitutional sense,' which excludes any *necessarily* additional connotations, and John Grigg, 'Making Government Responsible to Parliament' in R Holme & M Elliot (eds) *1688–1988, Time for a New Constitution* (1988) 167–80.

[9] See, for example, Oonagh McDonald, *The Future of Whitehall* (1991) 136–7, and Colin Turpin 'Ministerial Responsibility: Myth or Reality?', in Jowell and Oliver, op cit (fn 4) 53–85.

house.[10] It is clear, of course, that certain historical circumstances[11] and constitutional features[12] peculiar to the two countries have influenced these differences. Whilst I am not laying claim to any necessarily fundamental distinction between the two countries, it is nevertheless reasonable to construe some greater affinity in Australia with the wider constitutional role of either Responsible Government (or Ministerial Responsibility) than is apparent in British debate. And indeed such a conclusion is based primarily on the former's concern with the constitutional responsibility of the Government *as a whole,* rather than (as in the latter) the *form* in which the Government is to meet that responsibility. The 'broader' context of the Australian use of Responsible Government is further enhanced when it is recognized that the original intended use of the notion, whilst ill-defined, was nevertheless clearly considerably wider than the term would ever be understood to mean today.That is, the original intended use referred to the attainment of independence, and with it the colony being responsible for its own government.[13] Yet despite these peculiarities of actual practice the basis for the *theoretical* development of the notion of responsibility remained rooted in British experience and discourse, leading one interlocutor to conclude that '[a] misunderstanding of British politics was therefore elevated into a fixed constitutional principle for the guidance of Australian politics.'[14]

[10] See, for example, analyses of the bicameral complications of Responsible Government in Australia in: C A Hughes 'Conventions: Dicey Revisited' in P Weller & D Jaensch (eds), *Responsible Government in Australia* (1980) 48; C J G Sampford, 'Reconciling Responsible Government and Federalism' in M P Ellinghaus, A J Bradbrook & A J Duggan (eds), *The Emergence of Australian Law* (1989) 356–61, P J Hanks, *Constitutional Law in Australia* (1991) 154–66.

[11] In respect of Australia, quite apart from the question of Federation (on which see the following text and footnote), the impact of the constitutional upheaval of the Whitlam dismissal in 1975 was largely responsible for the intensifying of the debate over the respective responsibilities owed to either House of Parliament by the Executive. For the conflicting opinions of the two principal actors in the saga on this point see Sir John Kerr, *Matters for Judgement: an Autobiography* (1978) chapter 19, and E G Whitlam, *The Truth of the Matter* (1979), 2. See also, L J M Cooray, *Conventions in the Australian Constitution* (1979) 120–3. Cf Gordon Reid's ribald remark that 'it seems that considerations of Christmas took priority over allowing the parliamentary political conflict between our elected personnel to run its course': in 'The Changing Political Framework' (1980) (Jan–Feb) *Quadrant* 10.

[12] The Constitutional Debates in the decade preceding Federation were marked by the overarching concern of how best to marry the British notion of parliamentary democracy, prominent within which was the concept of Responsible Government, with the demands of federalism. For an overview of the discussion and analysis of this proposed marriage, see B Galligan, 'The Founders' Design and Intentions Regarding Responsible Government' in Weller & Jaensch op cit (fn 10) 1–10; see also E Thompson, 'The "Washminster Mutation" in Weller & Jansen, op cit (fn 10) 32–40, C J G Sampford, 'Responsible Government and the Logic of Federalism: an Australian Paradox?' [1990] PL 90.

[13] For discussion of this issue see W G McMinn, *A Constitutional History of Australia* (1979), chs 3 & 4.

[14] J R Archer, 'The Theory of Responsible Government in Britain and Australia' in Weller & Jaensch, op cit (fn 10) 27; see further M Crommelin, *The Commonwealth Executive: A Deliberate Enigma* (Victorian) Papers on Parliament No 9 (1986) 19.

RESPONSIBLE GOVERNMENT IN AUSTRALIA

During the nineteenth century in Australia, the emergence of new constitutional entities (the six colonies), and their acquisition of steadily increasing autonomy,[15] imposed upon the framers of the indigenous constitutions the task of defining, amongst other issues, Responsible Government as it might operate within the Australian context.[16] Any attempt to install a facsimile of the British system of government in these fledgling colonies was never likely to be an easy exercise, but it was one, from a constitutional viewpoint, that was made more difficult by the fact that legislation was the means by which it was to be installed. Not only then was the notion of Responsible Government comprised of a number of constitutional conventions, there existed no unanimous agreement as to the exact nature of these practices beyond an acceptance that they were (and are) flexible. As a result, the incorporation by direct statutory codification of any recognizable elements of Responsible Government was, and continues to be, limited.[17] It remained largely the case, therefore, that a variety of interpretations could be legitimately claimed of Responsible Government. Thus in *Toy* v *Musgrove*,[18] a late nineteenth century case which is considered to have provided a uniquely extensive examination of the Responsible Government ideal in respect of the executive powers of a colonial government (in this case Victoria), the innate imprecision or abstruseness of the concept was recognised from the outset. In the words of Holroyd J,

> no such thing as responsible government has been bestowed upon the colony by name; and it could not be so bestowed. There is no cut-and-dried institution called responsible government, identical in all countries where it exists.[19]

The task was made no easier when the question of the necessary constitutional

[15] The *New South Wales Constitution Act* 1855 (Imp) was, in the words of its preamble, 'an Act to enable Her Majesty to assent to a Bill, as amended, of the Legislature of New South Wales to confer a Constitution on New South Wales . . .' In the result the *Constitution Act* 1855 (NSW) was passed immediately thereafter. By 1867 the legislatures of all the colonies, except Western Australia, had enacted their own Constitution Acts; Western Australia followed in 1889. For a review of the development of the state constitutions, see R D Lumb, *The Constitutions of the Australian States* (5th ed, 1991).

[16] The then recent experiences of the Canadian provinces in their attainment of Responsible Government (as effected through the implementation of the principal recommendations of Lord Durham's *Report on the Affairs of British North America* (1839)) clearly provided considerable guidance for the initiatives in Australia. For a commentary on the Report, see Chester New, *Lord Durham's Mission to Canada* (1963) ch 7.

[17] That is, primarily, in respect of provisions for the position of a Governor and the insistence that he be advised by ministers. Indeed, in respect of New South Wales, there was and is no stipulation in the Constitution that ministers be members of the legislature — see the *Constitution Act* 1855 (NSW & Tas) and the current *Constitution Act* 1902 (NSW) (esp ss 35–8A). It must be conceded, however, that in respect both of South Australia and Victoria such stipulations were made in their respective, original constitutions (see J Quick & R R Garran, *The Annotated Constitution of the Australian Commonwealth* (1902) 711) and remain today (s 66 of the Constitution Act 1934 (SA) and s 51 of the *Constitution Act* 1975 (Vic)).

[18] (1888) 14 VLR 349.

[19] Id 428.

arrangements for Federation came to dominate Australian political debate. Three years after the *Toy* case, during the first of the Constitutional Conventions, one delegate was moved to pronounce that 'Responsible Government is a phrase which I would defy anyone in this assembly to define'.[20] Another (who was a decade later to become the first Chief Justice of the High Court) considered that Responsible Government was merely a term 'used in common conversation,' it is 'really an epithet', and as such was inappropriate for statutory provision.[21]

Even on the sole ground of this inherent ambiguity in the notion of Responsible Government it was likely that its development in Australia would yield a working principle distinct from that established in Great Britain. When the peculiar social and geographical, as well as political circumstances of early government in Australia are added, then such a likelihood becomes a certainty. Gordon Reid is of the view that from the outset,

> the propensity of Australia's small population to impose heavy responsibilities upon officials of state in a vast and inhospitable land was bound to produce variations in those norms of responsible government which were in the process of evolution in nineteenth century industrial Britain.[22]

It is clear, what is more, that the rudimentary colonial legislatures in existence before the *Australian Constitutions Act* 1842 (Imp) (and even, effectively, 13 years thereafter until the *Constitution Act* 1855 (NSW)) were comprised wholly of the principal government officers.[23] Such government officers were not in general subject to any form of *domestic* parliamentary accountability, and only indirectly — through the Governor of the colony and the Secretary of State for the Colonies who appointed them — were they accountable to the Imperial Parliament. The responsibilities owed by these nominee officials, therefore, were effectively to their *Executive* masters alone. The early Governors possessed enormous power. The Governors of the colonies of New South Wales and Van Diemen's Land, for example, were, by section 21 of the *Australian Courts Act* 1828 (Imp), and with the advice of their Legislative Councils, granted 'Power and Authority to make Laws and Ordinances for the Peace, Welfare and good Government of the said Colonies respectively.' Before that (1823–8), it is worth noting, the Government had been able to 'make laws' irrespective of the views of the then nascent Legislative Councils.

[20] J Winthrop Hackett, as quoted by G S Reid, 'Responsible Government and Ministerial Responsibility' (1980) 39 *Australian Journal of Public Administration* 301.

[21] Sir Samuel Griffith, *Official Record of the Debates of the Australasian Federal Convention, Sydney 1891* Vol 1 (1986) 767.

[22] G S Reid, supra, (fn 20) 303.

[23] See J Quick & R R Garran *The Annotated Constitution of the Australian Commonwealth*, (1901, reprint 1976) 35–51. Of the 1842 Act which introduced a semblance of a representative character to the Legislative Councils, the authors said that it 'did not grant to New South Wales the system known as Responsible Government. The Governor was still his own prime minister, and the heads of the Departments and other public officers still continued to receive and hold their appointments from the Crown; their tenure of office depended, not on their possession of the confidence of the Legislative Council, but on the pleasure of the Crown represented by the Governor': id 39. See also Lumb, op cit (fn 15) ch 4.

Given this historical basis, therefore, it is an unsurprising tendency of observers of the modern system of government in Australia *not* to ignore that aspect of the Responsible Government doctrine which recognises the government's responsibility to govern (as earlier outlined). Robert Parker, for example, identifies what he terms a tradition of 'strong executive', that is, where there is a 'strong *monarchical* government' (though that might soon change) whose purpose is to govern.[24] Interestingly, however, Parker does not see this tradition as comprising part of what he understands to be the meaning of Responsible Government. Rather, he sees it as a description of the actual practice of government in Westminster-style systems which he recognises as running contrary to what necessarily lies implicit in the theory of Responsible Government, namely, 'that the executive government is accountable to parliament or to the electors.'[25] Dick Spann, on the other hand, goes a step further by stating explicitly that 'responsibility is in fact a broader and vaguer notion than accountability.'[26] Drawing upon the Hartian characterization and distinction of '*liability*-responsibility' and '*role*-responsibility', Spann separates the notion into 'responsibility to' (which he equates with the requirement of accountability) and 'responsibility for', which, he sees, as simply a commitment to 'getting things done.'[27] Spann is able to discern a clear and ongoing commitment to the latter form of responsibility within Australian governmental practice. With reference to the emergence of an indigenous system of quasi-autonomous government from formal imperial subjugation, he claims that peculiarities of the 'old system' were retained:

> The existing structure of departments was only imperfectly assimilated to the new ministries .... The practice of giving public officials their own statutory powers, common before self-government, continued after it, and it was not an established convention that official heads of departments were subject in all matters to a minister.[28]

In apparent response to Spann's final statement in the above quotation, Reid maintains that facility for the continuation of this emphasis on the government's power to govern is expressly provided in the Commonwealth Constitution itself. The essential legitimacy of the 'responsibility for' notion of federal ministers is to be found expressly provided in section 64 of the Constitution where it states that 'the Governor-General may appoint officers to administer such departments of state of the Commonwealth as the Governor-General may establish.' What is more (and in spite of my disagreeing with the scope of Reid's further claim that the Constitution prescribes *no* means by which to ensure a minister's 'responsibility to' (Parliament)),[29] it is fair to say that 'there is no overt constitutional declaration of parliamentary

[24] R S Parker 'The Meaning of Responsible Government' (1976) 11(2) *Politics* 178, 183.
[25] Ibid.
[26] R N Spann *Government Administration in Australia* (1979) 494.
[27] Ibid.
[28] Id 34.
[29] In fact a number of requirements exist that at least *imply* such a requirement; s 64 itself provides, in a distinct subsection, that Ministers must be, or, within three months of appointment become, Members of Parliament.

authority over a minister', and rather that the exercise of such authority is left to convention (or the 'normative assertions of participants in government' as Reid puts it).[30] 'As a result,' Reid continues:

> claims that a minister has a formal liability to be responsible 'to' parliament, or through parliament 'to' an electorate, frequently find rebuttal in a minister's firm assertion that his constitutional responsibility is 'for' his department and 'for' the exercise of the authority that his ministerial office vests in him.[31]

RESPONSIBLE GOVERNMENT IN THE HANDS OF POLITICAL PARTIES

The evolution of Responsible Government into its modern 'Executive' form — whether instigated by historical circumstance, or, in the case of the United Kingdom, a less obvious development of the culture 'to govern' — would not have been possible were it not for the fundamental influence of one factor. The emergence, around the turn of the century, and gathering influence of modern political parties in both the United Kingdom[32] and Australia[33] has played a crucial role in effectively granting to governments the power to be able to assert their right to govern, over the requirements made of them by Parliament.

The classic characteristic of a political party has remained true to that which Burke identified in 1770, that is, 'a body united, for promoting by their joint endeavours the national interest, upon some particular principle in which they are all agreed'.[34] In pursuit of this end political parties are organized precisely to gain power through the election of their members to the appropriate legislatures.[35] When, therefore, the system of government is one where the membership of the Executive is drawn from the legislature, and its existence is dependent on the continuation of the legislature's confidence in it, the *potential* for self-perpetuation of a party's interests (within, of course, the bounds of periodic elections) is clear to see. Thus, as the political parties have grown and their identities sharpened, so the demands of party solidarity have dismantled the notion of non-aligned governments. Instead, it has come to be that the *party* whose members are returned to Parliament in the greatest number is now the exclusive source from which the Prime Minister choses her

[30] Reid, op cit (fn 20) 305.
[31] Ibid. See further, H V Emy's submission to the Royal Commission on Australian Government Administration 1976, Appendix, Vol 1, 31–2.
[32] See Alan R Ball, *British Political Parties: The Emergence of a Modern Party System* (1981) chs 1–3.
[33] See J Jupp, *Australian Party Politics* (1964) ch 1 (esp 1–12).
[34] Edmund Burke, *Thoughts on the Cause of the Present Discontents* (1770) in *Burke's Works* (Bohn's British Classics, 1872) Vol 1, 375.
[35] See S H Beer, *Modern British Politics* (1982) 352–4.

or his government. The party, therefore, in this position, has achieved its object and has become 'the *party* in power'.[36]

It is often made clear how accurately this handy phrase reflects the reality of lines of authority existing in any government. The organization of the party *within* Parliament, in particular, illustrates this point. Party meetings, through which the 'party line' is disseminated (for example the British Conservative Party's 1922 Committee (comprising backbench MPs) and the Australian Labor Party's powerful caucus),[37] the party whips, and, of course, the institutionalized hierarchy of the Cabinet and Shadow Cabinet, all serve to maintain party cohesion. Politicians, whether in government or not, are now effectively unionised.[38] As a result,

> members of Parliament regard themselves not primarily as legislators or as controllers of the executive but as representatives of parties which are either in or out of power. The distinction between executive and legislative powers has entirely disappeared; both functions are exercised by one body, the majority party.[39]

This constitutional interpolation by political parties has occurred almost without any formal statutory recognition,[40] let alone endorsement, of the role they have come to play.[41] Similarly, at the level of constitutional principle (upon which so much of our system of government is based), the position of power now occupied by parties has not been adequately assimilated. The orthodox, liberal notion, therefore, that through the doctrine of Responsible Government *governments* would be made responsible to Parliament has been hijacked somewhat by the fact that governments are usually now wholly directed by party machines. As a result, where the party from which the

[36] Lord Hewart likened this consequence of the 'new despotism' to that of the 'old despotism's' (unsuccessful) attempt to subvert Parliament in the seventeenth century: 'the old despotism, which was defeated, offered Parliament a challenge. The new despotism, which is not yet defeated, gives Parliament an anaesthetic. The strategy is different, but the goal is the same. It is to subordinate Parliament, to evade the courts, and to render the will, or the caprice of the Executive unfettered and supreme': *The New Despotism* (1929) 17.

[37] Not only does caucus (comprising all members of the Australian Parliamentary Labor Party) reserve the right to discuss and approve all Cabinet decisions and initiatives, the Prime Minister and the membership of the Cabinet (or Shadow Cabinet) are chosen by caucus, it being left to the Prime Minister merely to allocate ministerial portfolios. The 1922 Committee, though influential, does not possess such formal and direct power over the Cabinet and Prime Minister: see S Ingle, *The British Party System* (1987) 56–7.

[38] It is conceded, however, that the presence of a substantial number of cross-bench members in the House of Lords serves, as Donald Shell has pointed out, 'to muffle party politics' in that Upper House: *House of Lords* (2nd ed, 1992), p 65.

[39] H Evans, 'Party Government versus Constitutional Government' 56 (1984) *The Australian Quarterly* 265–6. For a discussion of the 'threat to liberal democracy' posed by 'party government', see C Kukathas, D W Lovell & W Maley, *The Theory of Politics* (1990) ch 5.

[40] The notable exception in this regard is, of course, s 17 of the Constitution which recognises the role of political parties in relation to the filling of casual vacancies in the Senate.

[41] Indeed, if anything, it is possible to interpret the involvement of the political parties in the constitutional process as a violation (in both countries) of the prohibition in Art 9 of the 1688 Bill of Rights against any interference whatsoever in parliamentary proceedings.

members of the Executive are drawn possesses anything approaching a majority of the total number of MPs in the lower house, it is able, by means of party solidarity, to command Parliament. The idea of Responsible Government that Parliament ensures that the Executive is made accountable, in this event, is irreconcilable with the practice; that aspect of Responsible Government withers, whilst the part which stresses the right to govern (ie 'responsibility for') becomes predominant. In consequence, as has been observed in respect of Australia, 'Parliament seems to have become regarded as a nuisance: necessary for certain purposes, but to be avoided if possible.'[42] The impact of 'independent' MPs (common creatures in the Australian legislatures)[43] or minority parties (as is more commonly the case in the United Kingdom)[44] may mitigate the dominance of party-government (or at least *single* party-government) where the leading party has a slim majority or perhaps no majority at all. Equally, the governing party's power may be blunted where, as increasingly has been the position in the Australian Commonwealth Parliament since 1949,[45] it does not control the upper house. In such situations, the potential power of leverage in the hands of the marginal parties or independent MPs is considerable. Although in reality, it may often be limited by their reaching agreements or understandings with the principal party on how and when this power will be exercised.[46]

[42] C Saunders, 'Governments, Legislatures and Courts: Striking a Balance' in Ellinghaus, Bradbrook & Duggan (eds) op cit (fn 10) 301.

[43] Due largely to the combination of a smaller number of parliamentarians in both the state and Commonwealth legislatures and the absence of distinct regionalised parties (though the Western Australia Greens might just qualify as such), those who do not belong to the Labor, Liberal or National parties or the Democrats commonly operate on individual mandates.

[44] In addition to the Liberal Democrats, there are also, in the present Parliament, representatives of the Ulster Unionist Party, the Democratic Unionist Party, the Social and Liberal Democratic Party, the Scottish National Party, Plaid Cymru and the Ulster Popular Unionists.

[45] Under the *Commonwealth Electoral Act* 1948 (Cth), Senators are elected by way of proportional representation. Furthermore, it seems that since the number of Senators from each state was increased from 10 to 12 (by the *Representation Act* 1983 (Cth)) that the prospects of a government majority in the Senate are even slimmer. Since 1949, except for two brief periods in the 1950s, the party or coalition of parties in government has not been in 'control' of the Senate; see G S Reid & M Forrest, *Australia's Commonwealth Parliament 1901–1988: Ten Perspectives* (1989), 124.

[46] See, for example, the elaborate (28 page) *Memorandum of Understanding* drawn up in 1991 between Mr Nick Greiner, the former Premier of the then beleaguered New South Wales Liberal/National Party Government, and a triumvirate of independent members; the text of the accord was reproduced in the *Parliamentary Debates*, Legislative Assembly (NSW), 31 October cols 4004–41. The essential nature of the accord was the establishment of 'a commitment by non-aligned Independents not to support a no confidence motion in exchange for a commitment to parliamentary reforms'; this was the description of Mr Bob Carr (leader of the Opposition) provided during the parliamentary debate that ensued following the publication of the accord (id col 4033).

More recently, less intricate (but no less crucial) 'understandings' have been established between the Commonwealth's (Labor Party) Government, the Democrats and two Senators from the Western Australian Greens in an effort by the latter to secure the

THE NEED FOR NEW MEASURES OF ACCOUNTABILITY

We are able to conclude, therefore, not only that the orthodox view of Responsible Government is utterly undescriptive, but that its (re-)imposition is severely restricted, largely because of the overwhelming power of the party political machines which today support and control the government. A direct consequence of accepting, or at least recognizing, the 'Executive view' of Responsible Government is that there has to be a corresponding change in the measures by which *accountability* is secured. For it must be maintained that whilst it may not be accurate to claim that the government's *primary* duty is to be responsible to Parliament, this does not mean that it need no longer be held to account. Certainly that is so if one accepts Tony Prosser's lucid assertion that 'accountability must mean the development and institutionalisation of the means for obtaining and publicly testing information forming reasons for decisions.'[47] Even the basic socialist contention that an elected government has a right to govern contains the necessary rider that whilst it may be desirable 'to broaden the back of Government', so must one also 'strengthen the rod that beats it.'[48] Rather, what must be recognized is that Parliament can no longer be relied upon as the sole or even principal organ to seek justification for its actions from government.

The 'rump' of any *systematic* parliamentary scrutiny of the Executive is today based on the rather amorphous medium of parliamentary questions and debate. Possible exceptions are the 13 year old system of departmentally related select committees in the United Kingdom,[49] and, in Australia principally Senate committees, in particular the Scrutiny of Bills, and Regulations and Ordinances committees.[50] As such it is a generally ineffective method of bringing the government to account, apparently hardly altered by the televising of such proceedings in both countries. In terms of structure and composition, Parliament is ill-suited to the task of exerting a constant and effective check on a government imbued with the opinion that it *primarily* has a responsibility, indeed, a duty, to govern.

It is a reflection of this parlous position of Parliament that such an initiative

necessary support in the Senate for its recent controversial budget legislation; see the *Sydney Morning Herald*, 1 September 1993, 1 & 20 October 1993, 1, 8.

47 'Democratisation, Accountability and Institutional Design: Reflections on Public Law', in P McAuslan & J F McEldowney (eds), *Law, Legitimacy and the Constitution* (1985) 182.

48 F Cripps *et al*, *Manifesto: A Radical Strategy for Britain's Future* (1981) 147–8, quoted in A Wright, 'British Socialists and the British Constitution' *Parliamentary Affairs* 43 (1990) 322, 337.

49 See the *Second Report of the Select Committee on Procedure (1989–90): The Working of the Select Committee System* HC Paper 19–II, especially ixvii; and the government's response to this Report, Cm 1532 (1991).

50 For accounts of their operation and effect, see, respectively, *Ten Years of Scrutiny*, proceedings of a seminar to mark the tenth anniversary of the Standing Committee for the Scrutiny of Bills (Senate Procedure Office, November 1991), and D Hamer, 'Keeping Parliament Responsible' in *Senate Committees and Responsible Government* (Papers on Parliament No 12, September 1991) 41–6.

Note, in particular, that included in the criteria for scrutiny in the terms of reference for both committees is whether or not a provision ought to be in the form of delegated legislation.

as Queensland's Electoral and Administrative Review Council was set up, which though relatively short-lived, had a very broad scope of inquiry.[51] Less directly, the New South Wales Parliament has been assisted in its scrutiny function by the establishment of the Independent Commission Against Corruption which has an indefinite tenure, but has a relatively narrow purview.[52] In the present context the most significant feature of both bodies is that they are required to report to their respective State Parliament (in the former's case to a specific parliamentary committee), thereby providing the Parliaments with information and analysis that they would be incapable of obtaining themselves.[53] Moves to facilitate greater public involvement in policy and legislation-making (ie, through citizens' initiatives or vetos), and the Commonwealth Administrative Review Council's recommendation to expand consultation procedures in the development of regulations,[54] can also be seen as important adjuncts to Parliament's overview of the Executive's role in these activities. But it has been a more traditional, ad hoc form of review — a Royal Commission — that has yielded what is perhaps the Australia's most cathartic exercise of analysing the purposes and practices of government.

ACCOUNTABILITY THROUGH DUTY: THE NOTION OF THE PUBLIC TRUST

The fundamental tenet of accountable government — the design, in the apposite parlance, to 'keep the bastards honest' — most spectacularly failed in Western Australia during the period 1983–9; in consequence a Royal Commission was appointed in January 1991.[55] The facts of the scandal, though

[51] Established in 1989 by the *Electoral and Administrative Review Commission Act* 1989 (Qld), as amended by the *Electoral and Administrative Review Act* 1989 (Qld); the Commission submitted its final report in September 1993. Its terms of reference directed the Commission, *inter alia* 'to investigate and report . . . in relation to (i) the whole or part of the Legislative Assembly electoral system; (ii) the operation of Parliament; (iii) the whole or part of the public administration of the state . . .' (s 2.10(1)(a) of the second mentioned Act).

[52] Established in 1988 by the *Independent Commission Against Corruption Act* 1988 (NSW). Under its terms of reference the Commission is instructed to have as its 'paramount concerns' the 'protection of the public interest and the prevention of breaches of public trust' (s 12) in its 'investigat[ions] [of] any allegation or complaint that, or any circumstances which in the Commission's opinion imply that: (i) corrupt conduct; or (ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct; or (iii) conduct connected with corrupt conduct, may have occurred, may be occurring or may be about to occur' (s 13(1)).

[53] In respect of the United Kingdom, see the Institute of Public Policy Research's suggestions for a Constitutional Commission (a largely parliamentary membership) and an Integrity Committee (a wholly parliamentary membership), in *The Constitution of the United Kingdom* (1991) arts 76, 77.

[54] Recommendation 11 of *Rule Making by Commonwealth Agencies*, Report No 35 (1992). The Government did not in fact accept this recommendation and so such a provision does not appear in the *Legislative Instruments Bill* currently before Parliament.

[55] Though entitled 'Royal Commission into Commercial Activities of Government and other Matters', the commissioners clearly interpreted (as indeed was necessary) their mandate in terms broad enough to encompass the very foundations of government in the State. For the full terms of reference, as amended by the Royal Commission into

captivating (and comprising no less than six lengthy volumes)[56], are not relevant for the present purpose. It suffices to quote the words of one advisor, whose views the Royal Commission drew upon in compiling its final Report,[57] that the,

> saga revealed many things — how a system of government could be undermined and debilitated, indeed, how vulnerable it was, how over 1 billion [AU$] of public money could be wantonly lost and impropriety practised on some scale; how the institutions of government failed the public and in this parliamentary system in particular. What to many it called into question was the continued viability of representative democracy and responsible government. And this in turn raised the issues we in this country so assiduously avoid — the purpose of the governmental system itself, its fundamental values and means (the institutional arrangements) which will best put these into effect.[58]

Though it is true that administrations in other Australian states, and those of the Australian Commonwealth and the United Kingdom may not court corruption, scandal and maladministration to quite the same degree than was the case in Western Australia. But the lessons learnt and the pre-conceptions challenged as a result of the intense investigation of governmental practice in that state provide salutary guidance for all governments in the Westminster style, and, in particular, in respect of the notion of Responsible Government.

In their return to fundamentals, the commissioners considered that there exist 'two complementary principles [that] express the values underlying our constitutional arrangements.'[59] The first — the so-called 'democratic principle' — is that 'it is for the people . . . to determine by whom they are to be represented and governed'; and the second — the so-called 'trust principle' — is that 'the institutions of government and the officials and agencies of government exist for the public, to serve the interests of the public.' Though the first principle is of undoubted importance, in the present context it is the identification of the latter which warrants special attention.

The nature of the trust principle is amplified in the Report:

> It provides the 'architectural principle' of our institutions and a measure of judgment of their practices and procedures. It informs the standards of conduct to be expected of our public officials. And because it represents an ideal which fallible people will not, and perhaps cannot, fully meet, it

Commercial Activities of Government Act 1992, see Part II of the Commission's Report, infra (fn 57) xvi.

[56] The Interim Report (Part I) of the Royal Commission, dated 19 October 1992.

[57] That is Part II of the Report of the Royal Commission, dated 12 November 1992; which responded specifically to the term of reference 'to report whether . . . changes in the law of the State, or in administrative or decision making procedures, are necessary or desirable in the public interest.'

[58] P Finn, 'Public Law and WA Inc', seminar paper delivered at the Australian National University Law School, 5 March 1993. It is not without some irony that the manner in which the extent of Finn's advice influenced the writing of the Report and the fact that this was publicly discussed at all were both matters of public controversy.

[59] Report, Part II, op cit (fn 57) para 1.2.3.

> justifies the imposition of safeguards against the misuse and abuse of official power and position.[60]

The importation of this notion of public trust (borrowed from, and a development of, the equitable concept of a 'higher trust')[61] is perhaps especially apt within the Australian form of Responsible Government to the extent that it has, as established earlier, a tradition of 'strong' government. The imputation of a trust relationship between citizen and public official (whether elected or appointed) might be interpreted as the necessary *quid pro quo* for the latter's position of wielding such public power — it might be characterised as a kind of 'legitimate expectation' on the part of the public.[62] The reason notwithstanding, the consequence of placing upon those who hold public office a 'fiduciary duty' to act in the public interest (by which is meant a duty *beyond* that held in England to be owed by local authorities to their ratepayers in respect of their management of 'public' finances)[63] is the availability of an alternative structural means by which governmental actors might be made accountable that must be considered now to be a pressing need in both Australia and the United Kingdom.[64] The prospect of offering such an alternative was, indeed, at the forefront of the Royal Commission's thinking:

> The accountability of government and of the administrative arms of government are at the heart of the matter. Our inherited system of representative democracy has traditionally given the Parliament the central role in securing the executive's accountability to the public. Yet, as we have seen, in its present form the Parliament does not adequately perform that role. The Commission's recommendations are designed to give Parliament an enhanced role in representing the public, and a greater capacity to discharge its constitutional responsibility to scrutinise and review the executive.[65]

[60] Id para 1.2.6.

[61] That is as opposed to a 'lower' or 'true' trust which is enforceable by the courts. The 'higher trust' (which on account of its essentially political nature is — according to the courts — non-justiciable) has been defined variously. In a narrow sense it has been said to constitute 'relationships such as the discharge, under the direction of the Crown, of the duties or functions belonging to the prerogative and authority of the Crown': *Tito* v *Waddell (No 2)* [1977] 1 Ch 106, 216. More broadly it has been understood to entail any 'governmental obligation' (id 219), which although less distinct, accords more closley with the sense of 'trust' that I am here seeking to convey.

There is some history behind the use of this trust notion in respect of the demands made of colonial and post-colonial governments by aboriginal people in Canada and the USA and, to a lesser degree, Australia: see for example, J Behrendt, 'Fiduciary Obligations and Native Title' *Aboriginal Law Bulletin* Vol 3, No 63 (August 1993) 7.

[62] For further discussion of this point, see, id para 3.1.7; see also, P Finn, 'Integrity in Government' (1992) 3 PLR 243.

[63] On which see the House of Lords' controversial decision against the former GLC's 'Fares Fair' policy in *R* v *Greater London Council, ex parte Bromley London Borough Council* [1983] 1 AC 768. For a critical review of their Lordships' reasoning in this case, see D Kinley, 'The House of Lords' Farewell to the Greater London Council: A Comment on the "Post-Abolition Grants' Case" (1987) 38 NILQ 67.

[64] 'The demands of accountability', as John Uhr has noted, 'remind officials of the duties of public trust to comply with community standards which underpin discretionary powers and responsibilities': 'Redesigning Accountability' *Australian Quarterly* (Winter, 1993) 4.

[65] Id para 1.3.2.

The recommendations of the Commission centred on a set of five independent scrutiny agencies,[66] all of which are formally responsible to Parliament — a relationship, the Report claims, which 'recognises that their powers are exercised for the public within the framework of representative democracy.'[67] The actual mechanics of these agencies need not detain us presently,[68] rather what is important is that the recasting of the operation of government as a *public duty* be recognised.[69] It can be argued that to do so is to provide a basis for reinterpreting the notion of the government's 'responsibility for' governing. Crucially, it complements the presently inadequate legitimacy that underpins the use of this notion of Responsible Government of the 'duly elected' principle — that is, the claim that the government has the authority of the electorate. So that beyond its elected status, the government is obliged always to act in the public interest, rather than simply as it sees fit. What constitutes the public interest and how it is to be used as a measurement of the government's compliance are, of course, notoriously difficult questions to answer. But that cannot deter us from *pursuing* the principle of accountable government, in practice and not just in rhetoric. In this case we are faced with the prospect of means other than the procedures of Parliament, or at least the present ones, having to be developed to fill this lacuna in governmental responsibility.

CONCLUSIONS

The dislocation of the practice of Responsible Government from the tenet of accountable government is evident in both Australia and the United Kingdom. It is true that there are differences between the two countries in terms of how this situation is expressed. Whilst these are to some extent the result of the circumstantial factors and the historically strong tradition of a distinct notion of Responsible Government in Australia (from which, at least, a more mature concept of the responsibility for governing has developed), the most significant catalyst has been the opportunities for reflection provided by the recent history of certain corrupt and unworkable state governments in Australia. For it is out of the accumulated catharsis that these debacles have occasioned that a potential conceptual response has been, and will continue to be, fashioned.

Clearly, the orthodox, liberal view that *only* Parliament is to be entrusted with the duty of bringing the Executive to account and that it alone is *capable*

[66] The existing offices of the Auditor-General, the Parliamentary Commissioner for Administrative Investigations (the 'Ombudsman'), and the Electoral Commissioner. And the creation of two new offices: the Commissioner for Public Sector Standards, and a Commissioner for the Investigation of Corrupt and Improper Conduct. See, id para 1.3.8, and for the two new offices see paras 6.2.1–7 and paras 4.9.1–12, respectively.

[67] Id para 1.3.8.

[68] For details of which see id, ch 3.

[69] For a recent account (in respect of Australia) of the basic premise that the apparatus of government exists *for* the people and not 'as the public's master', see P Finn, 'Public Trust and Public Accountability' (Winter 1993) *Australian Quarterly* 50.

of so doing is otiose. Most importantly, perhaps, that is not how those who are in government interpret their responsibilities. Accordingly, it is argued, first, that the construct of 'Responsible Government' is to differing extents in the process of realignment in Australia and the United Kingdom; and second, that the theoretical justification for the extension of accountability measures beyond the institution of Parliament within this realignment can be established through the elevation and articulation of a governmental premise of public trust.[70] It is, of course, accepted that the principle of public trust has yet to be developed fully, during which time its adequacy in sustaining such theoretical justification will doubtlessly be rigorously tested. Precisely how it will accommodate the continuing increase in the impact of the judicial review of administrative action in Australia and the United Kingdom (which as the analogous experience — albeit at a lower level — of the incorporation of private law estoppel into the public law sphere indicates will be problematic),[71] and the rise of managerialism within the bureaucratic arms of governments[72] in both countries, will, I am sure, elicit much argument. Equally, the reinvigorated interest in the scope and effect of scrutiny of public funds expenditure undertaken by Auditors-General will have to be accommodated.[73] What is apparent, however, is that the construction of an argument like that for the incorporation of an overarching public trust notion into the Anglo-Australian model of Responsible Government is imperative if such government is to be made accountable.

[70] On which see P Finn, 'The Abuse of Public Power in Australia: Making our Governors our Servants' (1994) 5 PLR 43.

[71] This initiative might be seen still to be in its infancy, but for an illustration of its use see *Minister for Immigration, Local Government and Ethnic Affairs* v *Kurtovic* (1990) 92 ALR 93, 108–17, per Gummow J. For general discussion, see P Finn & K J Smith, 'The Citizen, the Government and Reasonable Expectations' (1992) 66 ALJ 139, C F Forsyth 'The Provenance and Protection of Legitimate Expectations' (1988) 47 CLJ 238.

[72] As heralded by the 'Next Steps' initiative in the United Kingdom, and, in Australia, the current self-analysis in the Commonwealth's Public Service in search for a more effective and efficient provision of service through the efforts of the Public Service's Management Advisory Board. On which see D Kinley, 'Governmental Accountability in Australia and the United Kingdom: A Conceptual Analysis of the Role of Non-Parliamentary Institutions and Devices' (1995) 18 UNSWLJ (forthcoming).

[73] In respect of the United Kingdom's office of the Comptroller and Auditor-General, see I Harden, 'Money and the Constitution: Financial Control, Reporting and Audit' (1993) 13 *Legal Studies* 16 (especially 22–4). In respect of Australia, see Uhr, op cit (fn 64) 1–2. At the state level specifically, see the Western Australian Royal Commission call for an expansion in the role of the Auditor-General, op cit (fn 66) and accompanying text; and, EARC's *Report on Review of the Public Sector Auditing in Queensland* (September 1991).

An illustration of the potential power of bringing to account that an Auditor-General might more routinely employ is provided by the recent report of the Commonwealth Auditor-General on the Department of the Environment, Sport and Territories' implementation of its community and sports grants program: Australian National Audit Office, Audit Report No 9 (1993–4). The breadth of recommendations made by the Auditor-General (including a number which might be considered to be more managerial than 'financial' — see pp xvii-xxii of the Report) as a consequence of his principal finding that there existed 'some anomalies in the approval of grants' clearly indicates this potential.