

# IMPROVING THE FUTURE FOR COMMONWEALTH MINISTERIAL RESPONSIBILITY AND RESPONSIBLE GOVERNMENT? : THE BELL INQUIRY<sup>1</sup> AND BEYOND

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*Prime Minister Morrison’s secret appointment to five government ministries was a remarkable legal-political revelation, departing from and contesting the doctrine of responsible government. The core issues and implications of the appointments turned upon both a tension and disjuncture between a minimalist political conception of the doctrine and broader characteristics of a traditional, conventional institutional doctrine.*

*This disjuncture created various identifiable risks to Commonwealth ministerial and parliamentary practice and government accountability standards. The Bell Inquiry exposed these risks, emerging from a bare legality of the appointments and a weakness in shared commitment to the broader institutional rationales of the responsible government convention. Several themes provide insights into and the implications of this minimalist conception of ministerial responsibility.*

*Australian and international political and electoral studies around confidence in and contestation of Parliamentary democracy also afford perspective and context highlighting the gravity of the Bell Inquiry findings. Effective remedial responses require implementation of Inquiry recommendations and various supplementary measures, reconceptualised as part of a broader government restorative integrity project. Comprehensively understanding the characteristics of this incident will help inform responses to close a disjuncture in the conception and application of the ministerial responsibility doctrine, important through the strong Australian preference for parliamentary accountability mechanisms.*

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<sup>1</sup> Hon Virginia Bell AC Report of the Inquiry into the Appointment of the Former Prime Minister to Administer Multiple Departments (25 November 2022). Subsequently, ‘the Report’ in the text and ‘Bell Report’ in the footnotes.

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## I INTRODUCTION

The appointment circumstances of Prime Minister Scott Morrison in 2020 and 2021 to five additional ministries, are a remarkable legal and political revelation, even within the context of Australia’s Covid-19 pandemic response.

Such practices substantially departed from and contested the doctrines of responsible government and ministerial responsibility. These ministerial appointments

fundamentally undermined the doctrines, providing a pathway to concentrated executive power and Prime Ministerial discretion. The doctrinal principle of individual and collective Cabinet ministerial responsibility to the Parliament and the electorate was contested by the contemporaneous secrecy.

The *central thesis or research issue* of this article is that the revelation of the Morrison ministerial appointments, subsequent Inquiry, public and parliamentary deliberation and administrative and legislative actions, reflect the realities of and responses within a minimalist *political* conception of a ministerial responsibility doctrine, in tension with broader characteristics of a traditional *institutional* doctrine of ministerial responsibility.

A minimalist *political* conception of ministerial responsibility is identifiable with a nominal public maintenance of the responsible government convention, but effectively neutralising or frustrating, through adopted practices, any substantively meaningful accountability function. It is strongly individualistic and party political in orientation, eschewing in practical terms an institutional parliamentary accountability role. A minimalist political conception of ministerial responsibility is often reflected in practices or attitudes undermining the institutional features of the doctrine, such as secrecy or technical legality, without practiced and principled commitment to overarching general propriety and accountability objectives of the convention.

In contrast, a traditional *institutional* doctrine of ministerial responsibility has a range of common characteristics, grounded in the convention, albeit articulated with some flexibility<sup>2</sup> but qualified by a necessary assumption of the workability and effectiveness (if needs be by improvement) of the embedded accountability assumption of ministerial responsibility and responsible government. Practices contrary to that assumption are likely reflective of a minimalist political conception of the doctrine.

Similarly, institutional doctrine assumptions transcend party political interests, subordinated as they are to shared acceptances, values and practices in the Parliamentary role as a critical accountability forum. Bare legality of ministerial practice and a testing of limits is not synonymous with institutional ministerial responsibility, which assumes political restraint and consensual acceptance of higher democratic institutional ideals and accountability. This differentiation of the *political* conception of ministerial responsibility against the *institutional* doctrine of ministerial responsibility provides an analytical lens for assessing the Morrison ministerial appointments. Interestingly, other Morrison government ministerial practices raised similarly disconcerting integrity concerns, orientating ministerial activities towards political opportunism<sup>3</sup> in contrast to the propriety and integrity foundations of the institutional doctrine of ministerial responsibility.

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<sup>2</sup> Characteristic features of the institutional doctrine of ministerial responsibility are set out under III The Doctrine of Ministerial Responsibility and Responsible Government – A Ministerial or Political Primer?

<sup>3</sup> For example, Federal Court observations regarding Hon P Dutton, then Minister for Home Affairs, of possible non-compliance with legal obligations: *AFX17 v Minister for Home Affairs [No 4]* (2020) 279 FCR 170, 173 [9] per Flick J; Three Morrison Ministers – Health Minister Hunt, Human Services Minister Tudge and Assistant Minister to the Treasurer Sukar had earlier faced possible contempt charges for comments regarding judicial sentencing of convicted terrorism offenders

This disjuncture between a political conception of ministerial responsibility and a traditional institutional doctrine of ministerial responsibility risks a diminution of ministerial and parliamentary practice and government accountability standards. Such phenomena include a weakening of political commitment to conventions and practices for essential functioning of Commonwealth parliamentary governance, dangerously indulging Executive power accretions within an international context of democracy contestation, and possible miscalculation that Commonwealth legislative and administrative changes regarding ministerial appointments alone offer adequate remediation.

Exposure of this disjuncture offers insights into the political and institutional features and influences shaping this minimalist conception, and, as a result, the legal, administrative and policy reforms within and beyond the Report for closer alignment with the traditional *institutional* doctrine of ministerial responsibility. As the responsible government doctrine is a centrepiece of Commonwealth representative and responsible government, such reforms are contextually informed by contemporary confidence in and contestation issues of liberal democratic systems, within Australia

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during a Victorian Court of Appeal matter: *Director of Public Prosecutions v Besim* [2017] VSCA 165 [27] – [32] per Warren CJ, Weinberg and Kaye JJA.; see Anthony Cheshire, ‘Three ministers and a court’ (2017) *Bar News* (Summer) 13, 14 and Lorraine Finlay and Joshua Forrester ‘Explainer: why three government ministers might face contempt of court charges’ *The Conversation* 15 June 2017; ‘Ministers escape contempt charges after ‘unconditional apology’ to Supreme Court’, *Sydney Morning Herald* (online 23 June 2017) < <https://www.smh.com.au/politics/federal/ministers-make-unconditional-apology-for-criticism-of-victorias-supreme-court-20170623-gwx1zq.html> > ; The Royal Commission into the Robodebt Scheme revealed significant ministerial responsibility matters for four ministers. For *Hon Alan Tudge* see: ‘Justice For Robodebt’ (2023) 29 *James Cook University Law Review* 27, 34, 36; Alan Tudge denies he was responsible for department’s failure to check legality of robodebt, royal commission hears’ *The Guardian* (online 1 February 2023) < <https://www.theguardian.com/australia-news/2023/feb/01/robodebt-royal-commission-alan-tudge-evidence-centrelink-scheme> > ; ‘Alan Tudge tells Robodebt royal commission he was not responsible for department’s failures to ensure scheme was lawful’ *ABC News* (Online 1 February 2023) < <https://www.abc.net.au/news/2023-02-01/qld-robodebt-scheme-government-royal-commission-fraud/101910062> > ; *Royal Commission Into the Robodebt Scheme* Transcript of Proceedings Wednesday 1 February 2023 P-2878 to P-3003 and Thursday 2 February 2023 P-3005 to P-3049 (Alan Tudge); For *Hon Stuart Robert* see: ‘Ex-minister Stuart Robert ‘takes responsibility’ for Robodebt implementation, admits defending it despite knowing it could be unlawful’ *ABC News* (online 2 March 2023) < <https://www.abc.net.au/news/2023-03-02/qld-robodebt-scheme-government-royal-commission-stuart-robert/102034796> > ; *Royal Commission Into the Robodebt Scheme* Transcript of Proceedings Thursday 2 March 2023 P-4205 to 4239 (Stuart Robert) ; for *Hon Christian Porter*: ‘Former social services minister Christian Porter takes responsibility for Robodebt failures at royal commission’ *ABC News* (online 2 February 2023) < <https://www.abc.net.au/news/2023-02-02/robodebt-scheme-government-royal-commission-christian-porter/101922706> > ; *Royal Commission into the Robodebt Scheme* Transcript of Proceedings Thursday 2 February 2023 P-3049 to P-3111 (Christian Porter). For commentary on Mr Morrison’s Minister of Social Services 2014–2015 ministerial knowledge of the legality of the Robodebt scheme, see Commonwealth of Australia *Royal Commission into the Robodebt Scheme Report* (Catherine Holmes AC SC Royal Commissioner) (*Robodebt Royal Commission Report*) Volumes 1, 7 July 2023, 100–107, which contrasts information in an Executive Minute with that of a New Policy Proposal; and Volume 2 7 July 2023, 658: ‘...one Minister, Mr Morrison, took the proposal to Cabinet, knowing that it involved income averaging and that his own Department had indicated that it would require legislative change, but on the basis of the contrary indication in the NPP checklist, proceeded without enquiring as to how change had come about’.

and internationally. That perspective further confirms the potential of serious damage to Australian democracy institutions and practices which the Morrison appointments would have occasioned, had they remained undiscovered, been further activated, or normatively assimilated.

Successful re-assertion of the traditional institutional ministerial responsibility doctrine – reducing the gap between political attitudes and practice as against its identifiable doctrinal and practice features, is an important objective of implementing the Report. Remediation however requires measures extending beyond the Report.

The article commences by surveying the circumstances of Prime Minister Morrison's appointment to five additional ministries. The appointment circumstances display aspects of the central thesis, with a minimalised, managed political conception of the ministerial responsibility doctrine – such as the cultivated practice of non-disclosure, the real rationales for the appointments, a lack of observed core principles, and creation of a knowledge deficit inimical to responsible government public accountability assumptions.

The article then delineates, from High Court cases and academic writing, institutional ministerial responsibility and responsible government characteristics, providing a baseline to illustrate and comprehend the Morrison ministerial practice departures. The Report draws its standards from these institutional ministerial responsibility features, highlighting the disjunctive central thesis dimensions of political practice within a *nominal* responsible government framework.

The Report's exposure of responsible government exceptionality is then engaged in the form of its fundamental findings and further significant observations. The Report's acute criticisms differentially show that the Executive and Ministerial accountability rationale of responsible government was sidelined, doctrinal commitment contested, leaving a nominal public semblance of the responsible government doctrine, attuned for political advantage. Characteristics in and around the Report content show the institutional ministerial responsibility doctrine rendered largely unworkable through secrecy.

Consistent with the central thesis, the article further engages with broader, more complex democracy and accountability questions, prompted by Report findings. The Report's acceptance of the Solicitor-General's opinion of the *constitutional legality* of the appointment to administer the Department of Industry, Science, Energy and Resources,<sup>4</sup> critically contrasts with acceptance of the Solicitor-General's conclusions

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<sup>4</sup> It is noteworthy that the constitutional or legal validity of the appointments was not within the terms of reference of the Bell Inquiry: 'The validity of the appointments is not within my Terms of Reference. I am instructed to have regard to the Solicitor-General's Opinion. The Solicitor-General's analysis of the validity of Mr Morrison's appointment to administer DISER applies with equal force to each of the appointments. I approach my task upon acceptance of the Solicitor-General's analysis and conclusions': Bell Report, n 1, 19. See also Mark Dreyfus, 'Establishment of Inquiry into the appointment of The Hon Scott Morrison MP to multiple departments' (Attorney General Media Release 26 August 2022); and *Inquiry into the appointment of the Hon Scott Morrison MP to administer various portfolios and related matters* Terms of Reference <<https://www.ag.gov.au/system/files/2022-08/terms-reference-ministries-inquiry.pdf>>; Commonwealth, Solicitor General's Opinion *In the Matter of The Validity Of the Appointment Of Mr*

relating to *inconsistencies with the convention* of responsible government.<sup>5</sup> Rejection of the view that mere legality exhausted important convention based institutional ministerial responsibility questions (with a broader appreciation of the totality of constitutionalism of the measures) again highlights the disjuncture between the minimalist political conception, in contradistinction to the traditional institutional doctrine, of ministerial responsibility.

Intersections of the Morrison ministerial appointments with responsible government are examined under themes of a clash of judicial-like and political cultures, contradictions with traditional political conservatism, an enabling public service culture focused on legality, and for the Parliamentary censure motion, a deficit of contrition and an unwillingness to acknowledge serious implications for Parliament. Each is a further lens on distinctive manifestations of the minimalist political conception of ministerial responsibility, eroding executive accountability through weakened attitudinal and applied commitment to the institutional ministerial responsibility doctrine.

Locating the Morrison ministerial appointments within the stressed context of Australian and international confidence in and contestation of democratic systems, positions the gravity of Report findings within a contemporary world context. The article engages both Australian political studies and electoral surveys, as well as key internationally focused studies. They highlight that effective remedial responses to the Report's identified responsible government issues, fully implementing its recommendations, but further extending supplementary measures, are important. Several supplementary measures are canvassed to reduce the gap between applications of the minimalist political conception of responsible government and the traditional institutional doctrine of ministerial responsibility.

Successfully re-asserting the ministerial responsibility doctrine needs conceptualisation as part of a broader government restorative integrity project, including both Report recommendations and separate supplementary measures, collectively intended to improve Parliamentary and other executive government accountability. This offers a deeper renewal of democratic accountability measures. Comprehensively understanding the integers of this Australian ministerial responsibility issue, within the international context of contested liberal democratic systems, enhances an informed response to close the disjuncture in the conception and application of ministerial responsibility. This response is made more important given the strong preference at Commonwealth level for parliamentary accountability

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*Morrison To Administer The Department Of Industry, Science, Energy and Resources* SG No 12 of 2022 (22 August 2022) (*Solicitor-General's Opinion, 2022*), 3, [8].

<sup>5</sup> Bell Report, n 1, 10. *Solicitor-General's Opinion, 2022*, Ibid, 14, [29] and 4 [8] : 'the fact that the Parliament, the public and the other Ministers who thereafter administered DISER concurrently with Mr Morrison were not informed of Mr Morrison's appointment was inconsistent with the conventions and practices that form an essential part of the system of responsible government prescribed by Ch II of the Constitution'.

mechanisms over the adoption of a statutory or constitutional rights charter with its enhanced judicial role.<sup>6</sup>

## II PRIME MINISTERIAL UNDISCLOSED<sup>7</sup> MINISTERIAL APPOINTMENTS

Prime Minister Morrison was appointed to five additional ministries. A sixth ministerial appointment – Agriculture, Water and Environment – did not proceed.<sup>8</sup> The first two ministries were substantively and temporally linked to outbreak of the Covid 19 pandemic.<sup>9</sup> No link to the Covid 19 pandemic is apparent for the three later ministries.

### *A Health and Finance – the initial appointments in March 2020*

The initial enabling framework for Morrison ministerial duplicated appointments was the March 2020 audit of Commonwealth health emergency powers.<sup>10</sup> It confirmed

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<sup>6</sup> This is reflected in the rejection by the Rudd Government of a Commonwealth statutory Charter of Rights recommended by the Brennan Committee: see Commonwealth of Australia, *Human Rights Consultation Committee Report* (2009); Robert McClelland, ‘The Protection and Promotion of Human Rights in Australia’ (Attorney General Speech, Melbourne, 8 October 2009); Robert McClelland, ‘Australia’s Human Rights Framework’ (Attorney General Media Release 21 April 2010); Robert McClelland, ‘Enhancing Parliamentary Scrutiny of Human Rights’ (Attorney General Media Release 2 June 2010); Refer also to the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). See also David Erdos, ‘The Rudd Government’s Rejection of an Australian Bill of Rights: A Stunted Case of Aversive Constitutionalism?’ (2012) 65 (2) *Parliamentary Affairs* 359; George Williams and Daniel Reynolds, ‘The Operation and Impact of Australia’s Parliamentary Scrutiny Regime for Human Rights’ (2018) 41 (2) *Monash University Law Review* 469; George Williams and Lisa Burton, ‘Australia’s Exclusive Parliamentary Model of Rights Protection’ (2013) 34 (1) *Statute Law Review* 58. However, on 15 March 2023, pursuant to s.7 (c) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) the Attorney General referred to the Parliamentary Joint Committee on Human Rights (PJCHR) a range of human rights matters for Inquiry and report. See Commonwealth Parliament, Parliamentary Joint Committee on Human Rights *Inquiry into Australia’s Human Rights Framework* (PJCHR Report, May 2024), which, inter alia, recommended ‘the government introduce legislation to establish a Human Rights Act...the bill should broadly reflect the model proposed by the Australian Human Rights Commission’ (being a statutory Charter of Rights) (PJCHR Report, May 2024, xxi, Recommendation 2).

<sup>7</sup> The word ‘undisclosed’ is used in this heading, though ‘secrecy’ appears three times and ‘secret’ appears once in the early pages of the Bell Report as a description of the appointments: Bell Report, n 1, 4-5.

<sup>8</sup> Bell Report, n 1, 59, ‘The appointment to administer DAWE was omitted’. ‘Morrison eyed off sixth ministry portfolio’ *The Canberra Times* (online 25 November 2022).

<sup>9</sup> Accounts of the contextual circumstances of the initial Prime Ministerial self-appointments are given by: Niki Savva, *Bulldozed Scott Morrison’s Fall and Anthony Albanese’s rise* (Scribe, 2022), 1-4, 8-15 and Simon Benson and Geoff Chambers, *Plagued Australia’s two years of hell – the inside story* (Pantera Press, 2022), 89-90. Pre-additional ministerial appointment behavioural observations of Mr Morrison are made by Wayne Errington and Peter van Onselen, *How Good is Scott Morrison?* (Hatchette, 2021).

<sup>10</sup> ‘Scott Morrison’s power grab was set up by a handful of senior Coalition MP’s – but none of them knew what would come next’ *ABC News* (online, 23 August 2022) <<https://www.abc.net.au/news/2022-08-23/behind-the-scenes-of-scott-morrison-s-power-grab/101358232>> The audit was arranged by then Attorney General Hon Christian Porter. See also News Corporation *The Australian* reportage: ‘Morrison’s secret Covid moves to protect power’, *The Australian* 15 August 2022 <[https://www.theaustralian.com.au/subscribe/news/1/?sourceCode=TAWEB\\_WRE170\\_a\\_G](https://www.theaustralian.com.au/subscribe/news/1/?sourceCode=TAWEB_WRE170_a_G)

*Biosecurity Act 2015* (Cth) extraordinary powers, indicating the need for ‘a broader framework of responsibility and oversight around them’.<sup>11</sup> A protocol was therefore ‘designed to ensure that the Health Minister would engage in a process of consultation with the Prime Minister and other senior ministers on the need for, and the terms of, a human biosecurity emergency declaration, emergency requirement or direction under the *Biosecurity Act*.’<sup>12</sup> The Attorney General ‘proposed that Mr Morrison be appointed to administer the Department of Health as an *added* check on the exercise of the human biosecurity emergency powers’.<sup>13</sup> On 14 March 2020, the Governor General signed an s.64 Constitution instrument appointing Scott Morrison to administer the Department of Health.

Health Minister Hunt declared a human biosecurity emergency under the *Biosecurity Act 2015* (Cth) on 18 March 2020.<sup>14</sup> Protocol steps prior to such a declaration,<sup>15</sup> required, *inter alia*, ‘consultation by the Minister for Health with *either* the National Security Committee of Cabinet, or the Prime Minister, Attorney General, Minister for Home Affairs and Minister for Defence’.<sup>16</sup> The National Security Committee of Cabinet<sup>17</sup> and the Governor General knew of the 14 March 2020 ministerial appointment,<sup>18</sup> though not made public. The rationale for not making it public was opaque and not consistent,<sup>19</sup> although its timing and the ministerial

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GL&dest=https%3A%2F%2Fwww.theaustralian.com.au%2Fnation%2Fpolitics%2Fscott-morrison-secret-covid-moves-to-protect-power> ;

‘Morrison’s secret moves: I’m swearing myself in as health minister, too’ *The Australian* 15 August 2022

<https://www.theaustralian.com.au/subscribe/news/1/?sourceCode=TAWEB\_WRE170\_a\_G  
GL&dest=https%3A%2F%2Fwww.theaustralian.com.au%2Finquirer%2Fim-swearing-myself-in-as-health-minister-too-scott-morrison-secret-plan.>; See also Nine Network reportage: ‘Morrison secret appointment ‘absolutely unprecedented’: McKenzie’, *Australian Financial Review* 15 August 2022, quoting National Party Senate Leader and Morrison Government Minister, Hon Bridget McKenzie <https://www.afr.com/politics/federal/wealth-adviser-education-reforms-were-botched-coalition-mp-20220815-p5b9t1>

<sup>11</sup> *ABC News* (online, 23 August 2022) *Ibid*.

<sup>12</sup> Bell Report n1, 32.

<sup>13</sup> *Ibid*, 33 (emphasis added). This measure was separate from, and additional to, the protocol, ‘which was designed to ensure that the Health Minister would engage in a process of consultation with the Prime Minister’: *Ibid*, 32.

<sup>14</sup> *Ibid*, 38; *ABC News* (online 23 August 2022) n 10.

<sup>15</sup> Bell Report, n 1, 38.

<sup>16</sup> *Ibid*.

<sup>17</sup> Comprising the Prime Minister, the Deputy Prime Minister, the Health Minister, the Home Affairs Minister, the Finance Minister, the Foreign Affairs Minister, the Defence Minister and the Treasurer. See also ‘The god complex: When Scott Morrison ended cabinet government’ *Australian Financial Review* 19 August 2022.

<sup>18</sup> *ABC News* (online 23 August 2022) n 10. The appointment as Health Minister was advised by a senior official of PMC to the PMO on Saturday 14 March 2020 after the Governor General had signed the instrument of appointment, with the PMC sending an electronic copy of the instrument to the PMO on Monday 16 March 2020. Neither the Department of Health, nor its Secretary, was notified: Bell Report, n 1, 36-37.

<sup>19</sup> Bell Report, n 1, 39-40. Different accounts by different actors exist as to the rationale for this appointment and its lack of public disclosure.

portfolio content display, of the five appointments, the most proximate link to the onset of the Covid 19 pandemic.

Appointment as Finance Minister on 30 March 2022 was the second Morrison ministerial appointment. The Parliament enacted *additional* financial responses to the Covid 19 pandemic.<sup>20</sup> The prospect of a second Finance portfolio ministerial appointment is raised in a review by Department of Prime Minister and Cabinet (PMD) of ministerial portfolio responsibilities.<sup>21</sup> Finance was one of only two departments with a single minister administering the department.<sup>22</sup> A request was made from the Prime Minister's office (PMO) on 30 March 2020 to Prime Minister and Cabinet (PMC) to prepare documentation enabling Mr Morrison's appointment to administer the Department of Finance (DOF). On 30 March 2020, the Governor General signed the s.64 Constitution instrument of appointment for the Finance portfolio.<sup>23</sup> The appointment was not made public, and successive Finance Ministers Cormann and Birmingham, and the DOF Secretary, were not informed.<sup>24</sup> 'Apart from advisors in the PMD and a small group of senior officers in the Government Division of PM and C, the Prime Minister's appointment to administer the Department of Finance remained secret'.<sup>25</sup>

### B Industry, Science, Energy and Resources – appointments in 2021

On 15 April 2021, Prime Minister Morrison by the Governor General's instrument, was appointed and directed under sections 64 and 65 of the Constitution to administer the Department of Industry, Science, Energy and Resources (DISER).<sup>26</sup>

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<sup>20</sup> These measures were in *addition to the ordinary advance to the Finance Minister* (in annual Appropriation and Supply Bills) enabling expenditure of moneys that the Finance Minister is satisfied is urgently required and was unforeseen, or was erroneously omitted from or understated in the Appropriation and Supply Acts. On 24 March 2020 these measures consisted of the *Appropriation Coronavirus Economic Response Package Act No 1 2019-2020* (Cth) s.3 and the *Appropriation Coronavirus Economic Response Package Act* (No 2) 2019-2020 (Cth) s.3, respectively providing advances to the Finance Minister of \$800 million and of \$1200 million.

<sup>21</sup> Bell Report, n 1, 42, 'to assess the need, if any, for the appointment of additional ministers to administer portfolios against the risk of the portfolio minister becoming incapacitated'.

<sup>22</sup> *Ibid.*, 43. The other department was the Attorney-General's department.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*, 44.

<sup>25</sup> *Ibid.*, 44.

<sup>26</sup> The three 2021 appointments were made pursuant to both section 64 (which was cited in the 2020 appointing instruments) and section 65 of the *Commonwealth Constitution*. Section 65 states 'Until the Parliament otherwise provides, the Ministers of State shall not exceed seven in number, and shall hold such offices as the Parliament prescribes, or in the absence of provision, as the Governor General directs.' The Commonwealth Parliament has otherwise provided: *Ministers of State Act 1952* (Cth) s.4 which allows a maximum of 30 ministers and 12 parliamentary secretaries.

The s.65 Constitution instrument directive citation was held not to be of significance (indeed it was an error) in both the Solicitor-General's opinion<sup>27</sup> and in the Report.<sup>28</sup>

The apparent rationale for conferral of this portfolio was because the Commonwealth Ministerial decision making power regarding permits for petroleum exploration (PEP) and recovery in 'offshore areas' was included in the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth). Decisions about PEPs were made by a Joint Authority, comprising the responsible Commonwealth and State ministers.<sup>29</sup> PEP-11 was a renewed permit (extended to 12 February 2021) off the NSW coast between Sydney and Newcastle. Commonwealth Minister Keith Pitt, was considering an application from the titleholders of the permit to suspend and vary the conditions of the permit and further extend the permit term.<sup>30</sup> On 4 March 2021, Prime Minister Morrison indicated that he did not support the extension application.<sup>31</sup> By 12 April 2021, the PMO requested that PMC prepare documentation for Prime Minister Morrison to be appointed to administer DISER. With that appointment on 15 April 2021, the Secretary of DISER Mr Fredericks, Mr Pitt and the other departmental minister did not receive notice of the appointment at that time.<sup>32</sup>

On 17 February 2022 Mr Morrison announced that he had made a s.59(3) decision under the Act to propose to refuse the PEP-11 application, followed on 26 March 2022 by the making of a determination refusing the application.<sup>33</sup> The PEP-11 applicants were notified of the Joint Authority's decision to refuse the applications on 30 March 2022.<sup>34</sup> Mr Morrison agreed his appointment to administer DISER occurred to enable him to personally decide the PEP-11 applications.<sup>35</sup>

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<sup>27</sup> *Solicitor-General's Opinion, 2022*, n 4, 10, [22]: 'The reference to s.65 of the Constitution in the Instrument of Appointment, and the use of the word 'direct' were inapposite. The instrument did not in fact direct Mr Morrison to hold any office...It therefore did not involve any exercise of power pursuant to s.65'. The Solicitor-General's Opinion was released on the website of the Department of Prime Minister and Cabinet, on the instruction of the Prime Minister: Anthony Albanese, 'Safeguarding Against 'Shadow Government' Appointments and Strengthening Australia's Democracy' (Prime Minister Media Release, 23 August 2022)

<sup>28</sup> Bell Report, n 1, 50.

<sup>29</sup> Where there was disagreement between the ministers of the Joint Authority, 'the responsible Commonwealth Minister's decision is determinative and takes effect as the decision of the Joint Authority': *Ibid.*, 45; *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) s.59 (2)

<sup>30</sup> Bell Report, n 1, 46.

<sup>31</sup> *Ibid.*, 47.

<sup>32</sup> *Ibid.*, 51. It was not until December 2021 that Mr Fredericks became aware that Mr Morrison had been appointed to administer Department of Industry, Science, Energy and Resources, and not only for the purpose of being Resources Minister for the PEP-11 decision: *Ibid.*, 52. However, the application regarding PEP-11 remained with Mr Pitt, who was told, for the purposes of PEP -11 (and not for broader DISER portfolio issues) that Mr Morrison had been sworn into the Resources portfolio: *Ibid.*, 51.

<sup>33</sup> *Ibid.*, 55

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*, 56.

*C Home Affairs and Treasury – further appointments in 2021*

On the same day that the Governor General received the recommendation that Prime Minister Morrison be appointed to administer DISER, acting on a request from the PMO, PMC prepared a further brief for a prime ministerial appointment to administer the departments of Agriculture, Water and Environment, Home Affairs and Treasury.<sup>36</sup> By Governor-General's instrument, Prime Minister Morrison was appointed to administer Home Affairs and Treasury on 6 May 2021. Prime Ministerial instructions were issued to prepare a brief for appointment to administer the Agriculture, Water and Environment portfolio', but it was then decided not to proceed with that appointment.<sup>37</sup>

The Prime Ministerial appointments to Health and Finance were closely proximate to the onset of the Covid-19 pandemic, providing a residual plausibility in the stated justification of anticipating ministerial incapacity due to Covid 19 illness. In contrast, the 2021 appointments, over a year after the first two appointments, have no similar compelling pandemic link, nor any other legitimate link consistent with the substance of the institutional doctrine of responsible government.

Putative reasons for the Morrison appointments to Home Affairs and Treasury emerge in the Report, acknowledging obscure circumstances giving rise to the PMO request.<sup>38</sup> For Home Affairs, it appears likely that the appointment was made through interest in the s.36 B *Citizenship Act* power of cancellation of Australian citizenship. For Treasury, it appears as an interest in the Treasurer's powers under the *Foreign Acquisitions and Takeovers Act*.<sup>39</sup> A link to national security more broadly across both sets of powers was raised,<sup>40</sup> but subsequently defensively denied on the basis of unavailability of national security information to the Inquiry.<sup>41</sup> The Report is highly sceptical of any claimed link or relationship between both Home Affairs and Treasury powers and cogent Covid-19 pandemic responses.<sup>42</sup>

The Home Affairs and Treasury appointments were especially kept in secrecy – Home Affairs Minister Ms Andrews, was not advised of the appointment, the Secretary of the Department of Home Affairs knew nothing of the appointment until 16 August 2022, nor did the department. Treasurer Frydenberg was not advised of the Treasury appointment, first becoming aware of it in August 2022. Neither the Treasury Secretary nor the department 'received any notice of Mr Morrison's

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<sup>36</sup> Ibid., 55.

<sup>37</sup> 'Portfolios had 'Little if any connection to the pandemic', Virginia Bell found' *ABC News* (online 25 November 2022).

<sup>38</sup> Bell Report, n1, 55.

<sup>39</sup> Ibid., 56.

<sup>40</sup> Ibid. Mr Morrison had made public statements in relation to the Inquiry to the effect that the relevant statutory powers all related to ongoing matters of national security, in which he was fully briefed as Prime Minister.

<sup>41</sup> Ibid., 56 by Dr Tscalos, Mr Morrison's solicitor, in a letter of 22 November 2022: 'No inferences or conclusions can be drawn on the basis of any matter related to national security or national interest grounds given that the Inquiry had available to it incomplete information'.

<sup>42</sup> Ibid, 57.

appointment to administer the department before being provided by PMC with a copy of the instrument of appointment (of 6 May 2021) on 16 August 2022'.<sup>43</sup>

The established circumstances surrounding these appointments demonstrate aspects of the central thesis – a minimalist *political* conception of the ministerial responsibility doctrine, in disjuncture with a traditional *institutional* doctrine of ministerial responsibility. Critical features may be distilled. The three 2021 appointments appear less concerned with pandemic management than with political advantage through acquired Prime Ministerial discretion to exercise ministerial determinative decision making powers in key portfolios- Resources, Treasury and Home Affairs – in the lead up to the 2022 election.<sup>44</sup> This minimalist political re-purposing of ministerial responsibility encourages both function accumulations and executive power accretions as both likely and politically attractive.

Further, the motives, methodologies and behaviours relating to all five ministerial appointments fail to conform to even a relaxed interpretation of the traditional institutional doctrine of responsible government and ministerial responsibility. This is principally apparent from the consistent, irregular and differentially promulgated practice of non disclosure, the scope of and rationales for the appointments, and the creation of a knowledge deficit inimical to the accountability objectives of the traditional institutional doctrine of ministerial responsibility.

That doctrine firstly assumes both general endorsement and observance of critical principles (based on convention and practice)<sup>45</sup> from parties of governance, and secondly, publicly accessible information for political parties and electors as to ministerial appointments, the division of subject ministerial responsibilities and Cabinet membership, facilitating accountability.<sup>46</sup> These two critical principles demonstrably fail to underpin the five ministerial appointments.

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<sup>43</sup> Ibid, 61. This point is tellingly illustrative again of the point made by the Solicitor General that not informing 'the Parliament, the public and the other Ministers of the Morrison appointment 'was inconsistent with the conventions and practices that form an essential part of the system of responsible government prescribed by Ch II of the Constitution': *Solicitor-General's Opinion, 2022*, n 4, 4 [8].

<sup>44</sup> Ibid, 44: 'Mr Gaetjens and senior officers in the Government Division of PM&C were given to understand that Mr Morrison sought to be appointed to administer these additional departments so that he could exercise statutory powers in his role as minister in relation to particular subject matters within the relevant portfolio'.

<sup>45</sup> This content is engaged in the section immediately following: 'III The Doctrines Of Ministerial Responsibility and Responsible Government – A Ministerial Or Political Primer?'

<sup>46</sup> Such as the Annexure A – Ministry List dated 8 October 2021 Second Morrison Ministry and Annexure B – Morrison Ministry 28 August 2018 as annexures to *Solicitor-General's Opinion, 2022*, but regularly and obligatorily updated. See also Bell Report, n 1, 25 – the difficulty and deficiency in Prime Ministerial behaviour and practice when measured against this second critical principle of the institutional doctrine of responsible government is at the core of instant events when an additional ministerial appointment was made 'on the papers' ie not involving a swearing in as a minister at a ceremony with the Governor-General. In this respect, Prime Ministerial public notification of the appointments, consistent with the doctrine of responsible government, was self-regulating: 'details of the appointments are not shared more widely, either to other departments or within the PM&C, until the Prime Minister makes a public announcement in the case of these appointments. Mr Morrison made no announcement': Ibid.

A survey of responsible government principles provides *identifiable content to inform, illustrate and contrast the extent of departure of Prime Ministerial practices from traditional institutional ministerial responsibility principles*. It proved an erroneous background assumption that a person holding Australian Prime Ministerial office would substantively understand, endorse and act consistently with this convention – an outcome so irregular as not within ordinary contemplation. Of contextual and cultural significance for governance involving ministerial roles (and perhaps pointing to some explanation) is that irregular practices also emerged in other contemporaneous government ministerial matters, not limited to ministerial responsibility.<sup>47</sup>

### III DOCTRINES OF MINISTERIAL RESPONSIBILITY AND RESPONSIBLE GOVERNMENT - A MINISTERIAL OR POLITICAL PRIMER?

Commonly accepted principles of the institutional doctrine of ministerial responsibility, expressed in High Court cases and academic writings, may be usefully delineated. These principles are such that Commonwealth Parliamentarians, especially the Prime Minister, Ministers, the Leader of the Opposition and Shadow Ministers, should be well cognisant of their application in Cabinet, ministerial, parliamentary and electoral business. A modest, reasonable electorate expectation is of Prime Ministerial understanding of, support for and broad adherence to the institutional doctrine of ministerial responsibility, identified in familiar principles below.

For the undisclosed appointment to multiple portfolios, the *political* conception of ministerial responsibility involves not a mere technical departure from the *institutional* doctrine of ministerial responsibility, inviting ordinary censure. It also raises a putative inapplicability of the doctrine by the Prime Minister in multiple portfolio appointments. The Prime Minister might decide if, when, and in what circumstances, if any, was the relevance of ministerial responsibility. Ministerial responsibility assumed the character of an opt in doctrine. These discretionary features hint at arrogated Executive power, precisely what the institutional doctrine of responsible government is intended to check.

The High Court contrastingly considers accountability at the core of the institutional doctrine of responsible government:

A system of responsible government traditionally has been considered to encompass ‘the means by which Parliament brings the Executive to account’, so that ‘the Executive’s primary responsibility in its prosecution of government is owed to Parliament’ and that

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<sup>47</sup> See references to reported Government ministerial matters (in different contexts – such as the particular interpretation regarding the obligatory exercise of ministerial powers following a Federal Court ruling; potential ministerial contempt of court matters within the Victorian judicial system; and the Royal Commission into the Robodebt Scheme) variously with ministers Dutton, Hunt, Sukar, Tudge, Morrison, Robert and Porter, n 3.

‘to secure accountability of government activity is the very essence of responsible government’.<sup>48</sup>

Executive accountability pursued through Parliamentary means properly acknowledges the less precise, variable and politically enforceable nature of responsible government,<sup>49</sup> with some characteristically inherent limitations, its application founded in practice and convention.<sup>50</sup>

The concept of administration of departments of State appearing in s.64 is not further defined... The practices and conventions which promote efficient and effective government administration alter over time, and need to be able to respond to changes in circumstances and in theory.<sup>51</sup>

The Court should favour a construction of s.64 which is fairly open and which allows for development in a system of responsible ministerial government. The content of the various principles and practices which together may be identified in Australia as comprising ‘responsible government’ is a matter of continued debate between constitutional lawyers, political scientists and politicians themselves.<sup>52</sup>

Several commonly cited characteristics of ministerial responsibility doctrine nonetheless exist. Ministers are members of Parliament in the Westminster tradition.<sup>53</sup> This Ministerial membership of Parliament as a member of the House of Representatives or Senate ‘provides the machinery by which a Minister is accountable to Parliament’.<sup>54</sup> Importantly, that s.64 *Constitution* qualification, linking the structure of Executive Government in Chapter II to the Parliament in Chapter I ‘makes plain the design of these chapters to facilitate the application of the particular system of representative government, known as ‘responsible government’.<sup>55</sup> ‘Other sections of

<sup>48</sup> *Egan v Willis* (1998) 195 CLR 424, 451 (Gaudron, Gummow and Hayne JJ)

<sup>49</sup> These common characteristics, articulated with some flexibility, are *qualified by a necessary underpinning assumption of workability as a Parliamentary accountability mechanism* (if needs be by improvement by changes in practice, Parliamentary procedure or indeed legislative reform).

<sup>50</sup> Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law Foundations and Theory* 3<sup>rd</sup> Edition (OUP, 2012), 44; Judy Madigan, ‘Ministerial responsibility, reality or myth’ (2011) 26 (1) *Australasian Parliamentary Review* 158, 158-159.

<sup>51</sup> *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 403 (Gleeson CJ); see also text at n 73; see also George Winterton, *Parliament, The Executive and The Governor General* (Melbourne University Press, 1983), 149.

<sup>52</sup> *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 460 (Gummow and Hayne JJ)

<sup>53</sup> S.64 of *Commonwealth Constitution* requires that ‘no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or member of the House of Representatives’. An application of the three month tolerance exception arose in the instance of Prime Minister Gorton, who was appointed Prime Minister on 10 January 1968, resigned as a Victorian Senator on 1 February 1968, and between 2 February 1968 and 23 February 1968, was neither a Senator or a Member of the House of Representatives. Hon John Grey Gorton was elected in a by election to the House of Representatives for the Higgins electorate on 24 February 1968

<sup>54</sup> *Re Patterson* (2001) 207 CLR 391, 415 at [64] (Gaudron J).

<sup>55</sup> *McCloy v New South Wales* (2015) 257 CLR 178, 224 (Gageler J). Gageler J is essentially identifying responsible government as a particularised example of a broader category of representative government.

the Constitution establish a formal relationship between the Executive Government and the Parliament and provide for a system of responsible ministerial government'.<sup>56</sup>

Ministerial responsibility is further manifested in two forms. First, office holders are individually responsible as members of the Executive to the Parliament for decisions made in a ministerial capacity,<sup>57</sup> for the performance of their relevant ministry,<sup>58</sup> with their ultimate responsibility to enfranchised electors at periodic elections.<sup>59</sup> Second, Ministers, as members of the Executive, are further collectively responsible for Cabinet decisions,<sup>60</sup> which the whole ministry is obliged by practice and conduct to support in Parliament and in public,<sup>61</sup> in addition to the requirement that the Ministry maintain lower house support for confidence and supply to remain in government.<sup>62</sup> Various Parliamentary procedures - namely Question time, Senate estimates, Parliamentary Committees, the tabling of annual reports, aided by more diversified Senate representation arising from proportional representation<sup>63</sup> with the

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<sup>56</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 558- 559 (the Court), which lists ss 6, 83, 62, 64, and 49 of the Constitution as providing 'the means for enforcing the responsibility of the Executive to the organs of representative government': (1997) 189 CLR 520, 559. Academic writers also acknowledge that the doctrine of responsible government is constitutionally recognised: Peter Hanks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia* 3rd Edition (Lexis Nexis Butterworths, 2012), 224; Leslie Zines and James Stellios *The High Court and the Constitution* (7th Edition, Federation Press, 2022), 407; Gabriel Moens and John Trone *The Constitution of the Commonwealth of Australia Annotated* Ninth Edition (Lexis Nexis Butterworths, 2016) 275; Ratnapala and Crowe, n 50.

<sup>57</sup> JW Shaw, 'The established principles of cabinet government' (2001) 73 (2) *Australian Quarterly* 21, 21; John Summers 'Parliament and responsible government' in Alan Fenna, Jane Robbins and John Summers (eds) *Government and Politics in Australia*, 10<sup>th</sup> edition (Pearson 2014), 35; Winterton, n 51, 78-79

<sup>58</sup> *Comcare v Banerji* (2019) 267 CLR 373, 410 (Gageler J) citing *FAI v Winneke* (1982) 151 CLR 342, 364 (Mason J).

<sup>59</sup> As the Constitution intended, the business of government must be examinable and the subject of scrutiny, debate and ultimate accountability at the ballot box': *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 231 (McHugh J); See also Anne Twomey, *The Veiled Sceptre Reserve Powers of Heads of State in Westminster Systems*, (Cambridge University Press, 2018), 16.

<sup>60</sup> Patrick Weller, 'Disentangling Concepts of Ministerial Responsibility' (2002) 58 (1) *Australian Journal of Public Administration*, 62, 63; *Comcare v Banerji* (2019) 267 CLR 373, 410 (Gageler J)

<sup>61</sup> Kevin Martin, 'Ministerial Responsibility and Parliamentary Accountability: Observations on the Role of the Leader and Ministerial Responsibility' (2008) 23 (1) *Australasian Parliamentary Review* 229, 230

<sup>62</sup> Note however the peculiar circumstances of the 1975 dismissal of the Whitlam Government, where on the afternoon of 11 November 1975, following its dismissal by Governor General Kerr, the Senate passed the Whitlam Government Appropriation Bills, and in the House of Representatives, newly commissioned caretaker Prime Minister Fraser's motion to advise a double dissolution and adjourn the House was defeated, followed by the passage of a motion of no confidence in the Fraser caretaker government. By the time the Speaker of the House Scholes was able to obtain an appointment with Governor General Kerr, the Parliament had been dissolved.

<sup>63</sup> Gabrielle Appleby, Alexander Reilly and Laura Grenfell, *Australian Public Law* Third Edition (OUP, 2019) 266-274, 322-326; Phil Larkin 'Ministerial Accountability to Parliament' in Keith Dowding and Chris Lewis (eds) *Ministerial Careers and Accountability in the Australian Commonwealth Government* (ANU Press, 2012) 99-108; Summers, n 57, 35, 40-41.

unlikely of a Government Senate majority,<sup>64</sup> form mechanisms by which ministerial actions are scrutinised and the institutional doctrine of ministerial responsibility is sought to be realised and maintained.

These parliamentary mechanisms rely for their efficacy upon investigation and reporting by multiple forms of modern media. Australian practice supplements them by a Ministerial Code,<sup>65</sup> under which ‘All Ministers and Assistant Ministers are expected to conduct themselves in line with standards established in this Statement ... This Statement is principles based and is not a complete list of rules.’<sup>66</sup> The Morrison Government Statement of Ministerial Standards outlined ministerial responsibility through its opening principles:

Ministers must accept accountability for the exercise of the powers and functions of their office- that is to ensure that their conduct, representations and decisions as Ministers ... are open to public scrutiny and explanation... Ministers must accept the full implications of the principle of ministerial responsibility. They will be required to answer for the consequences of their decisions and actions.<sup>67</sup>

These principles<sup>68</sup> align closely with the institutional doctrine of ministerial responsibility, further highlighting the contradictory circumstances of the Morrison multiple ministry appointments. The reference to Ministers necessarily includes the Prime Minister and would apply to the activities of the Prime Minister in advising the Governor-General in relation to the s.64 ministerial appointment process. Of further particular note in the *Statement of Ministerial Standards*<sup>69</sup> are paragraphs 4.4 Accountability<sup>70</sup> and 5.1 Responsibility.<sup>71</sup>

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<sup>64</sup> Decline in the percentage of electors supporting the major parties, resulting in substantial numbers of minor party and independent representatives in both the Senate and the House of Representatives, particularly after the 2022 election, logically should increase opportunities for parliamentary practices directed towards ministerial responsibility ends. Refer: Senate Composition: [https://www.aph.gov.au/Senators\\_and\\_Members/Senators/Senate\\_composition](https://www.aph.gov.au/Senators_and_Members/Senators/Senate_composition)  
House of Representatives Composition: Members by Party: [https://www.aph.gov.au/Senators\\_and\\_Members/Members](https://www.aph.gov.au/Senators_and_Members/Members) .

<sup>65</sup> Commonwealth Government, *Statement of Ministerial Standards* (August 2018) Scott Morrison, ‘Statement of Ministerial Standards’ (Prime Minister Media Release 30 August 2018) ‘Morrison puts stamp on new Ministerial Standards’ *The Mandarin* (online, 31 August 2018); see also Larkin, n 63, 98.

<sup>66</sup> *Statement of Ministerial Standards*, Ibid, 3 ‘Foreword’.

<sup>67</sup> Ibid., 4-5 (emphasis added). In June 2022, the Albanese Government introduced a new ministerial code of conduct replacing the Morrison Government’s *Statement of Ministerial Standards*: Commonwealth Government, Department of the Prime Minister and Cabinet, *Code of Conduct for Ministers* (June 2022) ; Anna MacDonald, ‘Albanese Enacts Changes in Ministerial Code of Conduct’ *The Mandarin* (online 11 June 2022)

<sup>68</sup> Refer to the emphasis added text above, n 67.

<sup>69</sup> *Statement of Ministerial Standards* n 65

<sup>70</sup> ‘Ministers are required to provide an honest and comprehensive account of the exercise of public office, and of the activities of agencies within their portfolios...’: Ibid., 9 [4.4]

<sup>71</sup> ‘Ministers are expected to be honest in the conduct of public office and take all reasonable steps to ensure that they do not mislead the public or the Parliament’: Ibid., 9 [5.1]

The institutional doctrine of ministerial responsibility has commonly identified influences and constraints. Enforcement of conventions, including ministerial responsibility, relies on political and not legal means.<sup>72</sup> Its significant convention basis<sup>73</sup> means the boundaries and content are occasionally imprecise and contested.<sup>74</sup> Ministerial discretion may be improperly invoked to deny or avert individual responsibility, where sufficient political resolve exists to resist pressure to admit error or to resign, even if a breach of a threshold ordinarily demands resignation.<sup>75</sup> Ministerial resignation is rare, compelled more by a party political calculus of ‘severe embarrassment by public criticism and risks of an electoral backlash’<sup>76</sup> than adherence to formal doctrinal principle. The ministerial responsibility doctrine here collides with the hard reality of a government’s lower house numbers, where resignation for defalcation of ministerial standards more likely arises from damaging publicity, rather than strict doctrinal adherence.<sup>77</sup>

A related issue arises in the disjuncture between the *public perception* of the broad circumstances of what ministerial responsibility incorporates, including expected resignation for defalcation, contrasted with the political realities of significantly narrower circumstances and much higher resignation thresholds.<sup>78</sup> The modern distinction between policy and administration,<sup>79</sup> partly explains a contraction of ministerial responsibility. Ministerial responsibility attaches to the former, but not the latter. The distinction presumes a neat bright line, gaining currency through other Parliamentary Committee based accountability mechanisms.<sup>80</sup> This division facilitates debate into which category a subject matter falls, creating potential confusion and evasion of ministerial responsibility. Further, individual ministerial responsibility (in the sense of personal responsibility) for policy, is counteracted by the doctrine of

<sup>72</sup> Twomey, n 59, 23, 27; Geoffrey Lindell, ‘Responsible Government’ in Paul Finn (ed) *Essays on Law and Government* Volume 1 Principles and Values (Law Book Company, 1995), 80; Winterton, n 51, 80; Zines and Stellios n 56, 409.

<sup>73</sup> See *Re Patterson* (2001) 207 CLR 391, 403 ‘Responsible government is a concept based upon a combination of law, convention and political practice. The characteristics of responsible government are not immutable’: (Gleeson CJ); and *Egan v Willis* (1998) 195 CLR 424, 501, ‘Care must be observed in the use of the notion of ‘responsible government’ in legal reasoning. It is a political epithet rather than a definition which specifies the precise content of constitutional requirements’ (Kirby J).

<sup>74</sup> Richard Mulgan, ‘Assessing Ministerial Responsibility in Australia’ in Keith Dowding and Chris Lewis (eds) *Ministerial Careers and Accountability in the Australian Commonwealth Government* (ANU E-Press, 2012) 177, 177; Summers, n 57, 41; John Summers, ‘Parliament and Responsible Government’ in Dennis Woodward, Andrew Parkin and John Summers (eds) *Government, Politics, Power and Policy in Australia* 9<sup>th</sup> edition (Pearson 2010), 81

<sup>75</sup> Examples are cited by Mulgan Ibid, 178.

<sup>76</sup> Ratnapala and Crowe, n 50, 54.

<sup>77</sup> Summers (2010), n 74, 82.

<sup>78</sup> Practically, this means Ministers not being held vicariously liable for departmental failings (including those of its personnel) absent explicit Ministerial involvement or culpability: Mulgan, n 74, 179; Larkin, n 63, 95; Bill Blick, ‘Ministerial responsibility in practice: a Commentary’ (1999) 58 (1) *Australian Journal of Public Administration* 58, 60; Ian Callinan, ‘Responsible government – in dilution’ (2008) 52 (4) *Quadrant* 1, 6

<sup>79</sup> Mulgan, n 74, 179

<sup>80</sup> Ibid.

collective ministerial responsibility for agreed Cabinet policy. Under the Cabinet solidarity principle, ‘ministers who are protected by collective decision making will rarely be held responsible’.<sup>81</sup>

These challenging features of the institutional doctrine of ministerial responsibility require a keen awareness of its principles and the bounds of propriety. Ministerial responsibility is ultimately reliant upon consensual support, shared understandings and applications for its framework accountability principles and practices. Such Ministerial responsibility doctrine challenges are magnified in national security circumstances, where the doctrine is significantly more complicated.<sup>82</sup> Relevant here is Prime Minister Morrison’s appointment to the Home Affairs Ministry, which included various security focused or security related agencies within the portfolio.<sup>83</sup> The expansive remit of the Prime Ministerial accumulated portfolios, acquiring *options* to exercise executive power and alternative ministerial discretionary powers, is underlined by this portfolio’s inclusion.<sup>84</sup> The Home Affairs appointment overlaid this secrecy of an undisclosed ministerial appointment upon the secrecy norms and practices of this particular national security portfolio.

In essence, the consistency, extensiveness and circumstantial context of accumulating portfolios, alongside their non-disclosure, frames the appointments within a minimalist *political* conception of ministerial responsibility.<sup>85</sup> Essential workability of the traditional institutional doctrine of ministerial responsibility was rendered impossible by non-disclosure, creating multiple disconnections of convention and practice within and between the appointed portfolios, the Executive and the Parliament, inconsistent with the system of responsible government.<sup>86</sup> We turn now to further details, insights and analysis of these events.

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<sup>81</sup> Weller, n 60, 63.

<sup>82</sup> This is due to secrecy matters and the bipartisan practices of neither confirming nor denying national security matters in Parliament: Commonwealth, *Parliamentary Debates*, Senate 4 December 2013, 819 (George Brandis); Commonwealth, *Parliamentary Debates*, Senate, 4 December 2015, 766 (John Faulkner).

<sup>83</sup> See the preceding discussion under the heading II Prime Ministerial Undisclosed Ministerial Appointments C Home Affairs and Treasury – further appointments in 2021, including the text and footnote content relating to n 40 and n 41. Ten security focused or security related agencies, including ASIO, were originally concentrated under the umbrella ministry of Home Affairs: Malcolm Turnbull, George Brandis, Peter Dutton and Michael Keenan, ‘A Strong and Secure Australia’ (joint Media Release Prime Minister, Attorney General and Leader of the Government in the Senate, Minister for Immigration and Border Protection, Minister for Justice and Minister Assisting the Prime Minister and Minister Assisting the Prime Minister for Counter Terrorism) 18 July 2017. The 2022 Labor Government re-assigned ministerial responsibility for the AFP to the Attorney-General’s portfolio: ‘AFP back in the A-G’s hands amid portfolio reshuffle’ *Australian Financial Review* (Sydney) 3 June 2022, 32. Austrac and ACIC were also re-assigned to the Attorney-General’s portfolio: ‘National security fears over AFP shift’ *The Australian* (online, 3 June 2022).

<sup>84</sup> Particularly in relation to the power under Section 36 B of the *Australian Citizenship Act 2007* (Cth) to determine that a person cease to be an Australian citizen: See witness comments relating to this aspect: Bell report, n 1, 56.

<sup>85</sup> Refer to the discussion text under the heading I Introduction, above.

<sup>86</sup> Refer to the discussion text and n text at n 4 and n 5 regarding the conclusions of the Solicitor General and Hon V Bell on this point, under the heading I Introduction, above.

#### IV EXPOSING EXCEPTIONALITY – ACUTY IN THE REPORT’S FINDINGS AND CRITICISMS

The Report bases its standards upon the type of content canvassed in the preceding summary of ministerial responsibility and responsible government.<sup>87</sup> Its analysis and findings focus on serial behavioural and procedural departures from the doctrine. The exceptionality of the Prime Ministerial appointments is highlighted by the differences between the Report’s judicial-like assessment and communication of norms,<sup>88</sup> against Prime Ministerial personal political idiosyncrasies.<sup>89</sup> The Report communicates a culture of regularity upon the assessed irregularities of unusual Prime Ministerial actions. These features highlight the *disjunctive dimensions of political practice within a nominal responsible government framework*, (being a political conception of responsible government), falling significantly short of the standards of an institutional responsible government doctrine. A pattern is revealed of aggrandised executive power and practices at odds with these responsible government tenets, which are central to parliamentary government functionality.

The appointments challenged assumptions of Prime Ministerial commitment to institutional responsible government in two principal ways. First, the appointments’ secrecy rendered almost entirely inoperable the principal features of the institutional doctrine of ministerial responsibility. Second, authoritative legal and political analyses, and judicial articulations of such doctrinal principles, were subordinated to characteristically arbitrary and inventive initial Executive, and subsequent Prime Ministerial decisions, regarding ministerial appointments. The accountability rationale of the institutional responsible government doctrine was largely excised and rendered ineffective, creating political advantage within a minimalist political conception of ministerial responsibility. It diminished belief in, and commitment to, the higher principles and practices of propriety and accountability.

These two principal items are substantiated by the Report’s fundamental findings<sup>90</sup> with further significant observations focused upon four precise parts of its Terms of Reference.<sup>91</sup>

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<sup>87</sup> Under the heading III The Doctrines of Ministerial Responsibility and Responsible Government – A Ministerial or Political Primer?

<sup>88</sup> Hon V Bell SC AC was formerly a High Court of Australia justice from 3 February 2009 to 28 February 2021 and a Justice of the Supreme Court of New South Wales from 25 March 1999 to 19 December 2008 (including an appointment as a Justice of the New South Wales Court of Appeal in 2008). The dispassionate legal tone of the findings underlines the gravity of behaviours inconsistent with the responsible government doctrine.

<sup>89</sup> See generally Sean Kelly, *The Game A Portrait of Scott Morrison* (Black Inc, Melbourne, 2021) 128-129, 250-251 and Errington and van Onselen, n 9. It is insufficient to exonerate, dismiss or diminish the risks posed to responsible government doctrine and practice in the instant circumstances by characterising these activities in purely personal or idiosyncratic terms.

<sup>90</sup> These findings are principally accessible in the Executive Summary: Bell Report, n 1, 1-6.

<sup>91</sup> *Ibid*, 11 - These observations centre upon four precise Parts of the Terms of Reference, as cited in paragraph 32 (b).

*A The Fundamental Findings*

The Report's fundamental findings identify and admonish issues of propriety, convention, and credibility, confirmatory of ministerial responsibility doctrinal breaches:

It is difficult to reconcile Mr Morrison's choice not to inform his ministers of the appointments out of his wish not to be thought to be second guessing them, with his belief that the appointments had been notified in the Commonwealth Gazette<sup>92</sup> The omission to state that he had acted at all times on the assumption that each appointment had been notified to the public in the Gazette is striking<sup>93</sup>

Mr Morrison does not appear to have attached any significance to the fact from the time of making each appointment operated in law to charge him with responsibility for administration of the whole department. There was no delineation of responsibilities between Mr Morrison and the other minister or ministers appointed to administer the department. In the absence of such delineation, there was a risk of conflict had Mr Morrison decided to exercise a statutory power inconsistently with the exercise of the power by another minister administering the department.<sup>94</sup>

The 2021 appointments were not taken with a view to Mr Morrison having any active part in the administration of the department but rather to give Mr Morrison the capacity to exercise particular statutory power should the minister charged with responsibility for the exercise of that power propose to do so in a manner with which Mr Morrison disagreed, or fail to make a decision that Mr Morrison wanted to be made.<sup>95</sup>

Recourse to being appointed to administer multiple departments seems an exorbitant means of addressing Mr Morrison's concern about his ministers exercise of statutory power in cases that were not subject to Cabinet oversight.<sup>96</sup>

Given that the Parliament was not informed of any of the appointments, it was unable to hold Mr Morrison to account in his capacity as minister administering any of these five departments. As the Solicitor General concluded, the principles of responsible government were fundamentally undermined because Mr Morrison was not 'responsible' to the Parliament, and through the Parliament to the electors, for the departments he was appointed to administer.<sup>97</sup>

The lack of disclosure of the appointments to the public was apt to undermine public confidence in government. Once the appointments became known, the secrecy with which they had been surrounded was corrosive of trust in government.<sup>98</sup>

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<sup>92</sup> Ibid, 4

<sup>93</sup> Ibid.

<sup>94</sup> Ibid, 5.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid, 6

<sup>98</sup> Ibid.

These items collectively identify disjunctive issues frustrating responsible government operation, juxtaposed against the substantiated constitutional assumption that a responsible government doctrine is reflected in key sections of the Constitution.<sup>99</sup> The audacious and contrary nature of these activities separately highlights their irregularity and impropriety.

### B *Further Significant Observations*

The Report *provides some significant observations* focused around the implications for the doctrine of responsible government - particularly responding to a precise section of the Terms of Reference.<sup>100</sup> These four responsible government references reveal significant departures from convention, producing detrimental impacts upon Parliamentary government, qualitatively diminishing future parliamentary and executive practice.

#### 1.1 *The functioning of the departments of State*<sup>101</sup>

For the functioning of departments, it was described as ‘extremely irregular’<sup>102</sup> that the Prime Minister sought to be appointed to administer DISER and the Departments of Home Affairs and the Treasury, not assuming responsibility for their administration, instead positioned to exercise a particular statutory power should the relevant minister responsible for the exercise of that power propose a course with which Mr Morrison disagreed, or fail to make a decision that Mr Morrison wanted to be made.

#### 1.2 *The Structure of the Ministry*<sup>103</sup>

It appeared that Prime Minister Morrison was concerned about ministerial exercise of statutory powers in situations not subject to Cabinet oversight. The Report observed ‘Recourse to being appointed to administer multiple departments seems an exorbitant means of addressing this concern. [It is envisaged]...that some significant or potentially controversial exercises of ministerial power may be the subject of

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<sup>99</sup> See the discussion under the heading III Doctrines of Ministerial Responsibility and Responsible Government – A Ministerial or Political Primer?, especially the associated text and content of n 55 and n 56.

<sup>100</sup> Ibid, 11 ‘Establishment of the Inquiry ; Terms of Reference Paragraph 32 (b) ‘examine and report on the implications arising from the appointments, including on i the functioning of departments of state, Government Business Enterprises and statutory bodies; ii the structure of the Ministry iii the accountability of the executive to the Parliament and iv public confidence in government

<sup>101</sup> Ibid, Term of reference Paragraph 32 (b) (i).

<sup>102</sup> Ibid, 79.

<sup>103</sup> Ibid, 11, Term of reference Paragraph 32 (b) (ii)

Cabinet consideration notwithstanding that ultimately the decision rests with the minister in whom the power is vested.<sup>104</sup>

In this aspect, the additional ministerial appointments created cascading, unexamined complications, producing potential misuse, or improper restraint from use, of ministerial powers:

The scheme to have himself appointed to administer departments of State against the risk of the responsible minister failing to exercise particular statutory power in a manner with which Mr Morrison agreed does not appear to have been closely thought through. Amongst other things, while the appointment remained unknown to the responsible minister, there does not appear to have been any obstacle to that minister proceeding to exercise the power in a manner with which Mr Morrison disagreed. In the event, once Mr Morrison made his interest in the exercise of a particular power known...his evident disagreement with [the minister] appears to have sufficed to ensure that [the minister] did not pre-empt matters by deciding the applications while the brief remained with him...It speaks to Mr Morrison's authority as Prime Minister and makes the decision to be secretly appointed to the additional departments of State bizarre.<sup>105</sup>

### 1.3 *The accountability of the executive to Parliament*<sup>106</sup>

The Report provides a standard conception of the operational features of representative government<sup>107</sup> regarding responsibility and accountability. The concomitant responsibility of the accrued ministerial appointments is recorded, its effectiveness reliant upon knowledge of the making of the appointments:

Whether he chose to actively administer these departments or not, Mr Morrison was in law responsible for the administration of each. And yet the Parliament was not informed of any of the appointments and was unable to hold Mr Morrison to account in his capacity as Minister administering the five departments and therefore responsible for the conduct of that administration.<sup>108</sup>

A fundamental contestation or affront to the responsible government convention occurred. Mr Morrison's ministerial responsibility was pivotal upon knowledge of the appointments, because 'there are a number of accountability mechanisms available to parliamentarians which depend on knowledge of the identity of the relevant Minister'<sup>109</sup> – including questions without notice to Ministers in Question Time, moving of motions to have the Minister provide the House with an explanation for the exercise or non-exercise of powers within the portfolio, the framing of calls to access documents or questions within the parliamentary chamber or committee proceedings. 'Self-evidently the mechanisms that allow parliamentarians to 'question

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<sup>104</sup> Ibid, 88

<sup>105</sup> Ibid, 89

<sup>106</sup> Ibid, 11, Term of reference Paragraph 32 (b) (iii)

<sup>107</sup> Ibid, 90.

<sup>108</sup> Ibid..

<sup>109</sup> Ibid, 91

and criticise government on behalf of the people' depend on knowing who is responsible for the administration of the departments of State.<sup>110</sup>

#### 1.4 *Public confidence in government*<sup>111</sup>

Consistent with an ordinary meaning of confidence, the Hon V Bell stated that 'I am concerned with the implications of the appointments for the belief of 'the public' in the trustworthiness of government.'<sup>112</sup>

The sole Morrison ministerial intervention was in the PEP – 11 decision whilst appointed as DISER Minister. No other ministerial decisions were made pursuant to the Prime Ministerial additional portfolios. That however is substantively irrelevant, as the secrecy was in a dormant capacity to exercise those powers,<sup>113</sup> which if subsequently revealed, might raise questions in the mind of a reasonable member of the public as to why the appointment was kept secret. Even when powers are not exercised, the appointment may lead that reasonable member of the public to think that the individual may have intended to exercise powers enjoyed by reason of that appointment in secret.<sup>114</sup> Public confusion may also arise as to lack of reasons why there was both a publicly known figure charged with the responsibility of administering a department, as well as a hitherto secret appointment in the same role.<sup>115</sup>

The critical factor was about public perceptions and a likely imputation of improper motives in unexplained circumstances, detrimentally impacting governmental public confidence. This basis was in an unrealised contemporaneous expectation of knowledge, instead emerging ex post facto:

The public was not aware of the appointments of Mr Morrison to administer the five departments. The public did not know something that it was entitled to know, namely the identity of persons appointed to administer departments of State. Once they became known, the secrecy with which the appointments had been surrounded was corrosive of trust, and thus confidence, in government.<sup>116</sup>

These four analyses reveal exceptionalism behaviour, with strong residual and discretionary qualities of micro-management, intervention and influence, to steer ministerial decisions towards Prime Ministerial objectives. As such, they *again reflect a minimalist political conception of the ministerial responsibility doctrine* – plausibly explaining why secrecy measures were maintained in relation to relevant portfolio ministers, the Cabinet, the Parliament, most of the Public Service and the electorate. Interlocking characteristics in and around the Report content responding to the four precise terms

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<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid. See also Part VI Confidence In And Contestation of Democracy – The Australian And International Democracy Contexts Framing the Morrison Ministerial Appointments and Highlighting Their Seriousness

<sup>113</sup> Ibid, 94.

<sup>114</sup> Ibid, 95

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

of reference show the ministerial responsibility doctrine rendered as unworkable.<sup>117</sup> That unworkability was facilitated through the technical justification that the appointments were not illegal – yielding various political opportunities, a sense of political bravado, or pragmatic disdain for the reliance on political, rather than legal, enforceability of Westminster ministerial responsibility.

## V SOME IMPLICATIONS FOR A BROADER, MORE COMPLEX DEMOCRACY BASED AND ACCOUNTABILITY CULTURE

### A *The additional authority and leverage of the Solicitor General's opinion to the Bell Inquiry findings*

The authority of the Solicitor-General's earlier opinion lends further gravity to the above Report findings. The Report terms of reference required 'The inquiry shall have regard to the Solicitor-General's Opinion in the matter of the appointment of Mr Morrison to administer the Department of Industry, Science, Energy and Resources (DISER) (SG No 12 of 2022)'.<sup>118</sup> That authority<sup>119</sup> is enhanced through acceptance of the Solicitor General's central finding that appointing the Prime Minister to administer DISER was constitutionally valid,<sup>120</sup> which is then extrapolated to the other four appointments.<sup>121</sup>

This *constitutional legality* of the appointment forms a fulcrum regarding improprieties and breaches around the *constitutional convention* of responsible government. Consistent with an *institutional doctrine* of ministerial responsibility, the totality of constitutional ministerial responsibility arrangements are critical, not confined to justiciable content, but including both legal and political enforceability avenues. The foundational item in the Prime Ministerial apparently reconceived schema of ministerial roles, is that technical legality exhausted public accountability. Such a position again reflects a minimalist political conception of the ministerial responsibility doctrine and its disjuncture from the institutional doctrine. Accordingly, in the Solicitor General's opinion<sup>122</sup> two points are significant for Bell Inquiry's acceptance of its analysis and conclusions, again confirming the disjuncture between political and institutional doctrinal conceptions

While the Solicitor General considered that the Prime Minister's appointment to administer DISER *was valid*, in the absence of notification of the appointment to the Parliament, 'the public, the other Ministers administering DISER or DISER itself', the

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<sup>117</sup> This is demonstrated in the above findings of the Bell Report under the heading B *Further significant observations* relating to the paragraph 32 (b) (ii) Term of Reference.

<sup>118</sup> Bell Report, n 1, 11, paragraph 32 (b) (ii).

<sup>119</sup> Ibid, 1.

<sup>120</sup> Solicitor-General's Opinion 2022, n 4, para 29.

<sup>121</sup> Bell Report, n 1, 1, namely 'The reasoning applies with equal force to each of the appointments. I approach my task upon acceptance of the Solicitor-General's analysis and conclusions'

<sup>122</sup> Solicitor-General's Opinion 2022, n 4

appointment was not consistent with the responsible government principle inherent in Chapter II of the Constitution.<sup>123</sup>

Secondly, the efficacy of ministerial responsibility turns upon parliamentary and public knowledge of appointments. This inconsistency with the principle of responsible government arose through Parliament's consequent inability to hold ministers accountable for administering departments 'if it does not know which Ministers are responsible for which departments'.<sup>124</sup> Importantly, parliamentary knowledge enables further accountability mechanisms, such as the implied freedom of political communication and periodic elections.<sup>125</sup>

The Report's adoption of the Solicitor-General's findings spotlights in the Prime Ministerial dual appointments an institutional and personal separation from the norms of legal and institutional reality around ministerial responsibility. It prompts further speculation of Prime Ministerial risk-taking, ignorance of, or disregard for, this bedrock Westminster parliamentary convention. Beyond narrowly defined legality questions of ministerial appointment, political justification and opportunity appeared to attempt to narrowly re-set the scope of the doctrine.

#### B *A clash of cultures : Judicial like assessment of politically crafted ministerial accountability*

The language and tone of the Report and its subject matter of Ministerial appointments reveal a collision of legal institutional and political cultures, and attendant perspectives on accountability – the values and legal contours of the opportunistically political against the normatively legal. The Report's detailed, dispassionate and clinical analysis in exposition of fundamental breaches of the ministerial responsibility doctrine, starkly contrasts with political indulgence and self-interest. These breaches of propriety, convention and the doctrine of ministerial responsibility are succinctly identified. The contrast is sharp, as the language of legal analysis is applied to suspect political practice. The findings form a compelling democracy grounded rebuke to the serious contestations to the responsible government doctrine and its diminution of democratic accountability.

#### C *Wither political conservatism – conservatism transformed ?*

The Report findings of the stark dimensions of ministerial responsibility inconsistencies highlights the strange relationship of a Prime Minister of a conservative Coalition government, with practical and reputational undermining of Westminster accountability. Traditional conservative political doctrine emphasises the functional regularity of the institutions and practices of representative government, with expectations of high standards of propriety and Ministerial adherence to conventions.

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<sup>123</sup> Ibid, 14 para 29

<sup>124</sup> Ibid, 15 para 32

<sup>125</sup> See references to these points: Ibid, 16, para 32.

That conservatism ordinarily respects rule of law and constitutional conventions, and independent Chapter III judicial adjudication of the limits of Commonwealth constitutional power.

Stability, certainty and regularity of Cabinet decision making, Ministerial decision making and administrative delivery are similar hallmarks of conservative political governance. It likewise assumes a bipartisan public interest in the values and expectations of representative and responsible government, surpassing partisan politics. Indeed, the democracy based virtues of representative and responsible government are evidenced by their conservative progeny, human rights statutory protections,<sup>126</sup> rejecting the model of constitutional or statutory charters of rights.<sup>127</sup>

The Prime Ministerial appointments contrastingly displayed a perfunctory disregard in their exceptionality towards responsible government and the secrecy enveloping them. They radically departed from, or contested, these doctrines. The radicalism was authored by a conservative, Coalition Prime Minister. These ministerial appointments, through the undermined doctrine, produced a personalised concentration of executive power, ripe with possibilities. The accompanying secrecy compounded matters by upending a central principle of the executive as individually and collectively responsible to the Parliament.

Conservatism reconfigured itself now as a re-engineering of ministerial responsibility as a residual artefact of the constitutional legality of appointment, stripped of convention binding obligations, or with the doctrine contoured by executive discretion or interest around politically partisan or executive centric factors. Discretionary optionality, and executive centric self-interpretation of what responsible government entails, are prominent features of this re-engineering. Such practices are more accurately neo conservative or radical conservative in disposition. All again lean strongly towards a minimalist political conception of the responsible government doctrine.

#### D *An enabling Australian Public Service culture*

Facilitative of this conservatively informed expansion of discretionary executive power, an additional enabler was through the Prime Minister's Department attitudes.<sup>128</sup> The Head of PM and C juxtaposed present acceptable practices with those of earlier times:

Mr Gaetjens...contrasted the public service today with the public service in the days of Sir Arthur Tange when...senior public servants had effectively vetoed some initiatives. In Mr Gaetjens view, provided a proposed course is legal, and the government has made a decision to take the course, it is wrong for the public service to overplay the risks of

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<sup>126</sup> For example, *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth); 'Australia's Human Rights Framework' n 6; 'The Protection and Promotion of Human Rights in Australia' (Attachment to Media Release), n6.

<sup>127</sup> David Erdos, n 6; George Williams and Daniel Reynolds, n 6; George Williams and Lisa Burton, n 6 .

<sup>128</sup> Bell Report, n1, esp pp 66-69.

the decision in an attempt to stop a decision being implemented. Mr Gaetjens went on to emphasise that he had seen no sign that Mr Morrison was seeking to become ‘a President’. As Mr Gaetjens viewed the 2021 appointments, Mr Morrison was not seeking to displace Cabinet government, he was seeking to displace individual ministers on individual issues. Mr Gaetjens saw no evidence of a ‘systemic or creeping acquisition of [] sole power’, which would have raised a flag for him in his role as Secretary of PM and C.<sup>129</sup>

Interestingly, the Report takes issue with where and when risks were overlaid, finding risks apparent in relation to ministerial arrangements around the PEP-11 decision making process, and more generally in the 2021 appointments’ capacity to countermand the exercise of ministerially held statutory powers. Mr Gaetjens (constrained by the terms of reference of the Report ) was obliquely reprimanded:

It remains that Mr Gaetjens as Secretary of PM and C, and with knowledge of the appointments and the lack of publicity that surrounded them, at no time sought to raise the propriety of them with Mr Morrison. What this says about the effectiveness of the partnership between the elected government and its senior officials raises issue that have been considered elsewhere and which is not within my Terms of Reference.<sup>130</sup>

The messaging from PM and C here is fairly audacious – that short of illegality, APS business does not include insistence on Ministerial standards substantively consistent with the institutional responsible government doctrine. It is another disjunctive example. It neither substantively questions the motives of Ministerial conduct, nor endorses a substantive PM and C public interest role in promoting a principled *institutional* scope of ministerial responsibility.

*E. A contrition deficiency and lack of acknowledgment of the ministerial appointment consequences in and for Parliament – the Parliamentary censure motion*

The former Prime Minister’s responses and those of the Coalition to the Report’s public release and public commentary, as well as the Parliamentary censure of the former Prime Minister, demonstrated insufficient respect for Parliamentary institutions and practices. Emphases on the technical legality of the ministerial appointments (justifying no further action be taken) or criticising the Government Report response as politically motivated, fail to comprehend the abnormality of the ministerial appointments. Coalition censure motion opposition renewed some disconcerting attitudes: not appreciating a bi-partisan need for the democratic institutional legitimacy of Parliament, whilst adversely communicating about the efficacy of ministerial responsibility and Executive accountability to the Parliament,

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<sup>129</sup> Ibid, 69.

<sup>130</sup> Ibid.

pointedly within the chamber itself. These matters are a further disjuncture example around the doctrine of ministerial responsibility.

They also flag some attitudinal and perspective deficiencies by likely future Coalition Government representatives in assumptions underpinning ministerial responsibility and its accountability function – a likely disjuncture in these future governments of a rhetorical constitutional formality of the responsible government convention, hollowing out important substantive meaning.

Absent non-partisan commitment to such ideals, the functional character of Australian democracy's institutions and practices is contested and depleted. This reality signals a clear need for legislative and administrative reform, which has now mostly occurred<sup>131</sup> – but further, the electorates' expectations of its politicians' integrity and propriety should require higher standards.

The opportunity for Coalition restoration of faith in and commitment to the convention of responsible government arose in the censure motion, as the Liberal backbencher, Brigid Archer, observed:

It would be remiss of me not to mention that for me this issue also sits at the heart of the ability of our party to move forward. This is a clear opportunity for a line to be drawn and to move in the right direction...I am a Liberal. I believe in Liberal values and our statement of values says [that] we believe in the rule of law...democracy depends upon self-discipline, obedience to the law and honest administration of the law.<sup>132</sup>

The former Prime Minister's censure motion reply<sup>133</sup> unfortunately failed to build trust and confidence in parliamentary practice and accountability, by clear acceptance of institutional responsible government norms. Exonerating responses externalised responsibility for decisions made or incidents which arose – a disjuncture being the antithesis of ministerial responsibility.

The secrecy around the appointments, including uninformed portfolio Ministers, was explained as a mistake, but 'Had I been asked about these matters at the time at the numerous press conferences I held, I would've responded truthfully about the arrangements I had put in place'.<sup>134</sup> Confusion and obfuscation arose in the distinction between *swearing in* to the office of past ministries held,<sup>135</sup> and more recent *appointments* as a minister of state to administer the departments for any of the portfolios (that were

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<sup>131</sup> See *administrative reform* announcements after the release of the Solicitor General's opinion: 'Safeguarding Against 'Shadow Government' Appointments and Strengthening Australia's Democracy' n 27; Mark Dreyfus, *ABC News Breakfast* (Commonwealth Attorney General Interview Transcript 24 August 2022); *Ministers of State Amendment Act 2023* (Cth)

<sup>132</sup> Commonwealth, *Parliamentary Debates* House of Representatives 30 November 2022, 3869 (Brigid Archer). Ms Archer was the sole Coalition member supporting the censure motion.

<sup>133</sup> Commonwealth, *Parliamentary Debates* House of Representatives 30 November 2022, 3854-3857 (Scott Morrison).

<sup>134</sup> *Ibid.*, 3856. This response requires a public asking of quite specific questions relating to unknown information not in the public domain – that is, the asking of unknown unknowns.

<sup>135</sup> Ministerial appointments previously held by Prime Minister Morrison included Treasurer (21 September 2015 to 28 August 2018), Minister for Social Services (23 December 2014 to 21 September 2015) and Minister for Immigration and Border Protection (18 September 2013 to 23 December 2014).

the subject of the Report).<sup>136</sup> This argument's gist was that *swearing in* provided a full ministerial position, whereas *an appointment to administer a department* of state yielded some unquantified inferior status – 'This is a very important distinction. Just because a minister is sworn to administer a department does not mean they hold the office of minister in that portfolio...I was not sworn to hold the office of any of those ministerial portfolios, and as a result, any contention that I served as minister of those portfolios in that office is false'.<sup>137</sup> This is confused, distracting sophistry.

Disconnected appraisal of public knowledge and perception as cohering with conventional ministerial responsibility (again depleting, rather than reassuring trust and confidence in Parliamentary conventions) was the default claim for both Prime Ministerial authority over government departments and accountability for government portfolio actions.<sup>138</sup> This presented as a highly personalised, rather than a grounded analysis of how responsible government might pragmatically work. It simplistically observed that 'I was present each and every day at that dispatch box to answer any and all questions in this House regularly directed to me as Prime Minister on all matters involving all portfolios that were the subject of the Bell inquiry'.<sup>139</sup>

Exceptionalism from responsible government accountability was similarly justified by Covid-19 pandemic challenges and well intentioned efforts of effective pandemic management.<sup>140</sup> A failure to notify other Government ministers, their departments and the public of the Ministerial appointments, was flipped as attributable to inconsistent gazettal arrangements between PMC (in contrast with the Office of the Governor General) and the PMO – with no action taken to *prevent* public knowledge being acquired,<sup>141</sup> standing in place of a *positive obligation* for timely communication.

Despite likely ongoing damage to the responsible government convention and public trust and confidence in parliamentary institutions, the Coalition opposed the censure motion and voted against it.<sup>142</sup> Coalition members engaged further practices diminishing the seriousness of the responsible government convention.

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<sup>136</sup> Commonwealth, *Parliamentary Debates* House of Representatives 30 November 2022, 3855 (Scott Morrison). The distinction represents a fundamental misunderstanding between the different pathways available for ministerial appointments to be made respectively under s.64 and under s.65 of the Constitution.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.* It was of course, unknown to the Parliament that the Prime Minister appearing at the dispatch box in fact held several other ministerial portfolios and therefore in a position to answer questions about them.

<sup>140</sup> *Ibid.*, 3855-3856, particularly in the saving of lives and in economic performance.

<sup>141</sup> *Ibid.*, 3855: 'there was a different understanding of the process of publication between myself and the department and that no instruction was given by me as Prime Minister or my office not to publish those arrangements in the Gazette'.

<sup>142</sup> Commonwealth *Parliamentary Debates* House of Representatives 30 November 2022, 3877 -3878 (Tally of 86 Ayes 50 Noes in the censure motion) (Milton Dick).

First, the Opposition Leader, Mr Dutton, made no reply in Parliament to the censure motion.<sup>143</sup> Previously disapproving of Mr Morrison's actions,<sup>144</sup> he publicly opposed a censure motion as a politicised stunt.<sup>145</sup> Second, with few exceptions, Coalition members queued to handshake the former Prime Minister, offering tactile and verbal support after his censure motion response, vacating the chamber in large numbers, as censure motion speeches proceeded.<sup>146</sup> Third, senior Coalition frontbenchers<sup>147</sup> in the Coalition censure motion response, attempted to downplay damage to responsible government and public trust in parliamentary institutions.

The censure motion was characterised as a highly politicised stunt,<sup>148</sup> and ironically argued as constituting an abuse of parliamentary process.<sup>149</sup> It was emphasised that the Solicitor-General found the appointments were legal,<sup>150</sup> and that appointments were not operationalised for Ministerial decision making.<sup>151</sup> The proper response was claimed as simple implementation of Report recommendations,<sup>152</sup> with claims that such implementation was improperly delayed for political purposes, delays including the censure motion.<sup>153</sup> A further rejoinder was that the Australian public considered practical issues more important than responsible government issues—the present Government was failing to address cost of living pressures and housing affordability.<sup>154</sup>

The Coalition response variously underplayed the seriousness of the institutional responsible government doctrine, signalling an alarming disjuncture between doctrine and a likely empty constitutional ritualism. That response aligns with an likely ongoing weakening of trust in politicians and Parliament.<sup>155</sup> Neither contrition nor embarrassment emerged from the Coalition as the historically predominant (and at some future point) Government, without recognising damage to the institution,

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<sup>143</sup> Commonwealth, *Parliamentary Debates* House of Representatives 30 November 2022, 3852-3878.

<sup>144</sup> Commonwealth, *Parliamentary Debates* House of Representatives 30 November 2022, 3858 (Mark Dreyfus) – quotations from the Hon Peter Dutton.

<sup>145</sup> 'Morrison censure is payback: Dutton' *The Australian* (online 29 November 2022) ; 'Eroded public trust' text of Scott Morrison censure motion revealed as colleagues back Scott Morrison as he faces parliamentary censure motion' *The Guardian* (online 29 November 2022).

<sup>146</sup> Rachel Withers, 'The censure of attention' *The Monthly* (online 30 November 2022)

<sup>147</sup> In particular, Hon Paul Fletcher (Manager of Opposition Business, Shadow Minister for Government Services, Digital Economy, Science and the Arts) and Hon Julian Leeser (Shadow Attorney General and Shadow Minister for Indigenous Australians)

<sup>148</sup> Commonwealth *Parliamentary Debates* House of Representatives 30 November 2022 3860 (Paul Fletcher), 3866 (Julian Leeser)

<sup>149</sup> *Ibid.*, (Paul Fletcher) regarding proper purpose of censure motions under standing orders; *Ibid.*, 3867 (Julian Leeser)

<sup>150</sup> *Ibid.*, Paul Fletcher) and *Ibid.*, 3866 (Julian Leeser)

<sup>151</sup> *Ibid.*, 3861 (Paul Fletcher)

<sup>152</sup> *Ibid.*, (Paul Fletcher), 3866 (Julian Leeser)

<sup>153</sup> *Ibid.*

<sup>154</sup> *Ibid.*, 3866-3867 (Julian Leeser). It is unclear how such issues are not intertwined in parliamentary debate and in executive action.

<sup>155</sup> See also on related public confidence matters, Part VI Confidence In And Contestation of Democracy – The Australian And International Democracy Contexts Framing the Morrison Ministerial Appointments and Highlighting Their Seriousness

standards and conventions of Parliament. Resolution by simple implementation of Report recommendations presents as a concessional and desultory face saving response. Nor is any concession made that a one month interregnum between receipt of the letter of 26 October 2022 from Hon V Bell regarding prospective recommended legislative changes,<sup>156</sup> the censure motion of 30 November 2022 and the introduction the *Ministers of State Amendment Bill 2022* (Cth) on 1 December 2022, might conceivably be a reasonable Parliamentary time frame, not a politicised manoeuvre.

## VI CONFIDENCE IN AND CONTESTATION OF DEMOCRACY – THE AUSTRALIAN AND INTERNATIONAL DEMOCRACY CONTEXTS FRAMING THE MORRISON MINISTERIAL APPOINTMENTS AND HIGHLIGHTING THEIR SERIOUSNESS

### A *The Australian Political Surveys and Electoral Studies – Background Challenges To Confidence In Democratic Institutions and Actors*

Most significantly, the Morrison ministerial appointments and the Report's adverse findings are framed by recent contextual circumstances of declining public confidence in the institutions and personalities of Australian politics and governance, reported in several contemporary Australian electoral studies.<sup>157</sup> A generally consistent dissatisfaction with the performance of Australia's representative government institutions, practices and actors has been demonstrated.

The Report identified a significant disregard of the responsible government convention. The timing, context and justification of the occurrence of these activities – within the onset and duration of the Covid -19 pandemic in Australia – positions unprecedented government pandemic responses<sup>158</sup> within an era of contested trust in Australian democratic institutions. Coincidental to the undisclosed nature of the Prime Ministerial appointments, democracy and government findings improved in the initial pandemic years, likely reflecting early successful responses to it, prior to many problems later emerging.<sup>159</sup>

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<sup>156</sup> Bell Report, n 1, Appendix E, 136 'Letter from Hon Virginia Bell AC to the Prime Minister dated 26 October 2022'.

<sup>157</sup> See the discussion immediately following of the electoral studies by the ANU Election Study, the Scanlon Foundation, the Lowy Institute Poll, the Grattan Institute Study and several studies from the Democracy 2025 project.

<sup>158</sup> See Federal Legislation Register: Legislative Instruments registered under the *Biosecurity Act 2015* (Cth): <https://www.legislation.gov.au/F2020L00306/latest/versions>

<sup>159</sup> An initial successful 18 months of pandemic management were followed by serious problems, including vaccine availability, quarantine facility unpreparedness, lax arrival protocols resulting in the Delta variant introduction at Sydney Airport, the unavailability of rapid antigen tests, and arrival of the significantly more transmissible Omicron variant.

The Australian political studies and surveys reveal low pre-Covid levels of political trust, with some improvements in trust evidenced in later iterations.<sup>160</sup> Given the subsequent revelation of the five additional Morrison ministries, there is a *further changed context* around the sensitivities of public confidence in Australian democratic institutions and the conduct of politics. Exposure of secrecy and impropriety may represent serious structural and cultural confidence challenges in Australian democracy's operation.

The problem freshly emerges from credibility issues of the Prime Ministerial appointments - improvements in trust of government *were likely attributable to unknowingly false working assumptions*. Subsequent known withholding of Ministerial appointments critical information undermines such credibility, aggravated by a lack of coherent explanations and an unconditional apology. Presentational responses around Covid 19 crises will likely fuel public scepticism and adversely impact public confidence in responsible government matters.

The first of the studies,<sup>161</sup> provided striking distrust and dissatisfaction examples regarding features of Australian representative government.<sup>162</sup> The May 2022 ANU Election Study<sup>163</sup> provided further major insights, indicative of trust and confidence issues. It noted a general satisfaction in the Australian population with the outcome and conduct of the election; in particular, a large increase in satisfaction with country's direction was recorded between the start of the campaign (in April 2022 at 62.4 per cent) and the period immediately after the election<sup>164</sup> (in late May 2022 at 73.3 per cent). The two major political groupings - Coalition and Labor - returned a record low first preference vote,<sup>165</sup> suggesting significant voting re-alignment,<sup>166</sup> which may be loosely associated with trust and confidence issues in the major political groupings.

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<sup>160</sup> The important point regarding political trends is the *strength and consistency* of five separate Australian studies engaging the trust in government issue. This provides variegated studies, *some over longitudinal time frames*. The contrary position is that political trust might be more cynically driven by the practical delivery of self-interested individual economic or governance outcomes – a position strongly contested by survey characteristics just identified.

<sup>161</sup> The ANU Election Study of the 2019 federal election. This study is part of a *broader longitudinal study*, which commenced with the 1987 election. See Sarah Cameron and Ian McAllister, 'Trends in Australian Political Opinion Results from the Australian Election Study 1987-2019,' School of Politics and International Relations, ANU College of Arts and Social Sciences (December 2019).

<sup>162</sup> The major findings are included in Sarah Cameron and Ian McAllister, *The 2019 Australian Federal Election Results From The Australian Election Study*, School of Politics and International Relations ANU College of Arts and Social Sciences (December 2019), 3 (Executive Summary) and 15-16 (Political Trust).

<sup>163</sup> *Explaining the 2022 Australian Federal Election Result* ANU Centre for Social Research and Methods (20 June 2022).

<sup>164</sup> *Ibid*, 16.

<sup>165</sup> *Ibid*, 3. The first preference vote was 68.3 per cent

<sup>166</sup> Namely through the election in the House of Representatives of six Teal independents in previously held Liberal Party seats, and an increase in Greens Brisbane seat representation. There was also the lowest ever primary vote of an incoming government: *Ibid*, 2022, 3.

For example, in April 2022, relatively low levels of satisfaction with the direction of the country were recorded,<sup>167</sup> with a decline trend commencing in November 2020.<sup>168</sup>

Mixed results regarding public trust in Australian democracy, including collapse, decline and stabilisation appeared in the 2019 Scanlon Foundation study.<sup>169</sup> Interesting changes occurred in the following three Scanlon Foundation study reports, coinciding with Covid 19 pandemic onset and government management, many decisions impacting directly on community sentiment and cohesion. Perceptions of effective government in crises will often enhance public trust, approval and community unity around shared values.

The 2020 Scanlon Foundation study engaged with a democracy theme. 69 per cent of respondents 'considered that Australian democracy works fine, or only needs minor change'.<sup>170</sup> Similarly, trust in the Federal government, improved from low levels over the preceding decade to 54 per cent of respondents indicating confidence in the Federal government 'to do the right thing for the Australian people'.<sup>171</sup> The 2020 study question 'How well is the federal government responding to the Covid 19 pandemic?' received a response of 85 per cent indicating 'very well' or 'fairly well'.<sup>172</sup> The conclusion was reached that in 2020, 'Australian governments have to a large extent won back trust and satisfaction...the response to a range of questions indicates a widely held view that effective leadership is being provided in the time of crisis'.<sup>173</sup>

The 2021 Scanlon Foundation study displays evolving attitudes to democracy and government within the Covid 19 pandemic. Trust in the Federal Government 'to do the right thing by the Australian people' had fallen to 44 per cent.<sup>174</sup> The related question of whether the Australian system of government works fine or needs only minor change<sup>175</sup> attracted a reduced figure of 60 per cent, with those advocating major change or replacement reverting to closer to 2019 figures.<sup>176</sup> Significant confidence change occurred regarding the federal government's pandemic response- only 52 per cent of respondents considered 'that it was doing 'very well' or 'fairly well', with assessment of it 'performing 'fairly badly' or 'very badly' increasing to 48 per cent.<sup>177</sup>

The 2022 Scanlon Foundation study generally continued the statistical trends from the preceding two 2020 and 2021 Covid-19 era studies, reflecting that 'although

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<sup>167</sup> N Biddle and I McAllister, 'Age and education key to election win' (ANU Newsroom Media Release, 20 June 2022).

<sup>168</sup> Explaining the 2022 Australian Federal Election Result n 163, 15 Figure 7.

<sup>169</sup> Andrew Markus, Mapping Social Cohesion The Scanlon Foundation Surveys 2019 (Scanlon Foundation, 2019), 38-45.

<sup>170</sup> Andrew Markus, Mapping Social Cohesion The Scanlon Foundation Surveys 2020 (Scanlon Foundation, 2020), 3.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid, 48.

<sup>174</sup> Andrew Markus, *Mapping Social Cohesion – Launching the National Social Cohesion Index – Incorporating the Scanlon Monash Index* (Scanlon Foundation, 2021), 38, 'but was still substantially higher than recorded in surveys between 2010 and 2019'.

<sup>175</sup> Ibid, 42

<sup>176</sup> Ibid.

<sup>177</sup> Ibid, 40

levels [of trust] have since declined, trust in government remains at or above pre-pandemic levels'.<sup>178</sup> Substantial positive majorities of 'fairly well' existed for state governments' handling of the Covid-19 crisis.<sup>179</sup>

The Federal government Scanlon findings are however relative – 41 per cent of respondents believed that the Federal government could be trusted to do the right thing for the Australian people all or most of the time and 63 per cent believed that the system of government in Australia works fine or needs only minor changes.<sup>180</sup> Even more noteworthy were the widely held doubts about the integrity of politicians and the electoral system.<sup>181</sup>

The 2019 Lowy Institute Poll, asking three important questions about the worthiness of, and preference for, democracy, returned surprising and significant minority scores.<sup>182</sup> The next relevant attitudes to democracy survey occurred with the 2022 Lowy Institute Poll,<sup>183</sup> where the overall trend in the three relevant questions was strengthened support for democracy.<sup>184</sup>

The 2018 Grattan Institute study made variously recommended improvements in representative government – focused on transparency, accountability, facilitating alternative voices in policy debates, and reducing improper influence impacting the public interest.<sup>185</sup> An additional Grattan Institute study<sup>186</sup> raised, *inter alia*, an important theme of whether distrust in government and politicians helped drive the minor party vote.<sup>187</sup> It observed that 'Failing trust in government loosely correlates in time with the rise in minor party vote. People who vote for minor parties are much more likely than others to distrust government...trust in established political parties is particularly low...dissatisfaction is widespread, with similar levels of distrust among people, irrespective of location, education or income'.<sup>188</sup>

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<sup>178</sup> James O'Donnell, *Mapping Social Cohesion* (Scanlon Foundation, 2022) 7, 52.

<sup>179</sup> *Ibid.*, 7. This ranged from 63 per cent in Victoria to 81 per cent in Western Australia.

<sup>180</sup> *Ibid.*, 52

<sup>181</sup> *Ibid.* - a majority of respondents (78 per cent) believed government leaders abused their power some or all of the time; 47 per cent believed that elections are fair most of the time and 34 per cent believed that elections are fair some of the time.

<sup>182</sup> *Lowy Institute Poll 2019 (Democracy)* (Lowy Institute, 2019) responses included 22 per cent for 'In some circumstances, a non-democratic government can be preferable' and 12 per cent for 'For someone like me, it doesn't matter what kind of government we have' (Lowy Institute 26 June 2019)

<sup>183</sup> Lowy Institute Poll 2022 Democracy Attitudes to Democracy (Lowy Institute, 2022)

<sup>184</sup> 74 per cent thought democracy as preferable to any other kind of government (an increase in nine points from 2019). Only 7 per cent (a decrease of four points from 2019) thought that 'for someone like me, it doesn't matter what kind of government we have' the lowest ever response on this question: *Ibid.*, 1.

<sup>185</sup> Danielle Wood and Kate Griffiths, *Who's in the room? Access and influence in Australian politics* (Grattan Institute Report September 2018), 56-68.

<sup>186</sup> Danielle Wood and John Daley, *A crisis of trust The rise of protest politics in Australia* (Grattan Institute Report March 2018).

<sup>187</sup> *Ibid.*, Chapter 6, 69

<sup>188</sup> *Ibid.*

A Democracy 2025 2018 study<sup>189</sup> found reasonably low approvals for several political trust and confidence matters, in relation to Federal, State and Local Governments, Ministers and members of parliament, and in political parties, including a majority considering low integrity and honesty of politicians.<sup>190</sup>

Three later Democracy 2025 studies offered additional insights. Report 6<sup>191</sup> concluded that a lack of political trust affected the quality of democratic practice, with low trust levels for Australian parliaments, political parties and politicians contrasting with higher levels of political trust in some other democracies. Report 7<sup>192</sup> noted that ‘there is overwhelming support for representative democracy but with a focus on making the representative system of government more representative, accountable and responsive to the citizenry meant that collegial and collaborative politics would need to have greater prominence.’<sup>193</sup> Report 8<sup>194</sup> observed in 2020 that Australians (of a group of four nations)<sup>195</sup> held the highest degree of political trust in the national government, that is confidence in institutions.<sup>196</sup> Similarly, Australians expressed the highest level of confidence in government, political parties and leaders.<sup>197</sup>

Public belief in the *bona fides* of government policy delivery – such as the Commonwealth Government Covid 19 pandemic response in 2020 and 2021 - was critical to the efficacy of these programs and more broadly in the legislative processes of review, enactment and executive application of Covid related laws. The 2020-2021 Commonwealth response restored a level of trust and confidence. Collectively, the studies indicated a general need to improve confidence in democratic processes and institutions. Significantly better integration and orientation of legislative and executive contributions towards democratic methods and objectives are desirable to build, remediate and nurture public trust, including in legislative process.

Stability and improvement in public confidence in government and democratic institutions are vulnerable through public cynicism regarding subsequently discovered secrecy and lack of rational justification in *the type of example of the Morrison additional ministerial appointments* – a rhetorical and practical disjuncture between minimalist

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<sup>189</sup> Gerry Stoker, Mark Evans and Max Halupka, *Trust and Democracy in Australia Democratic decline and renewal Democracy 2025 Report No 1* (Museum of Australian Democracy and University of Canberra December 2018)

<sup>190</sup> Ibid, 12.

<sup>191</sup> Mark Evans, Will Jennings and Gerry Stoker How Does Australia Compare: What Makes A Leading Democracy? Two Paradoxes For Australian Democratic Governance Democracy 2025 Report No 6 (Museum of Australia Democracy and University of Canberra April 2020), 2, 3-4, 20

<sup>192</sup> Mark Evans, Viktor Valgardsson, Will Jennings and Gerry Stoker Political Trust and Democracy In Times of Coronavirus Is Australia Still The Lucky Country? A Snapshot of the findings from a national survey Democracy 2025 Report No 7 (Museum of Australian Democracy and University of Canberra July 2020)

<sup>193</sup> Ibid, 7, 26, 28.

<sup>194</sup> Will Jennings, Viktor Valgardsson, Gerry Stoker, Dan Devine, Jen Gaskell and Mark Evans *Political Trust and the Covid 19 Crisis; Pushing Populism to the Backburner? Democracy 2025 Report No 8* (Museum of Australian Democracy August 2020).

<sup>195</sup> United Kingdom, United States, Italy and Australia

<sup>196</sup> Political Trust and the Covid 19 Crisis; Pushing Populism to the Backburner?, n 194, 21-22.

<sup>197</sup> Ibid., 23-25

political conception and a conventional institutional doctrine of ministerial responsibility.

*The question arises as to what pragmatic reform initiatives within the parliamentary model would be likely to secure inclusive, participatory and rights informed democratic models, and so address Report findings about the Morrison ministries.* These reforms are an essential pathway to stabilise any losses of confidence in institutional responsible government practice. Such reforms are further compelling by international contractions of and contestations of democratic governance, parallel to the Australian experience.

#### B *The International Contestation Of and Contraction of Democracy and International Trends Toward Executive Authoritarianism*

Identified dissatisfaction with, and challenges to confidence in, Australian political institutions and actors, *is further contextually informed* by international challenges to democracy's legitimacy. Established representative democratic states, such as Australia, are not immune from emerging global trends of depleting democratic structures, institutions and practices, and increased exercises of arbitrary executive power. Democratic states' experience where complacency around institutions and practices of democracy is one of increased stress and contestation including from the executive.<sup>198</sup> Contemporary international experience reveals a growth in formalistic continuation of democratic institutions, such as elections and Parliaments, whilst democratic culture, practices and restraints are hollowed out.<sup>199</sup>

*This international contextual background alerts us of certain aspects of the Prime Ministerial appointments.* Secretly accumulated options to exercise executive power, including overriding that co-existent ministerial power of conventional, public appointment of ministers, contested conventions and institutions. Prime Ministerial capacity to exert authority over Cabinet and ministers increased (through suggestion, or threat, to arrogate decisions in individual Ministerial statutory powers, augmenting Cabinet agenda control and compelling ministerial compliance under the doctrine of collective responsibility). Parliamentary accountability, through questions and answers and seeking documentation, both in Parliament and in committees, is made opaque. Such collective, identifiable features raise potential dangers to qualitative characteristics of

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<sup>198</sup> 'History and not only ancient history shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected': per Dixon J in *Australian Communist Party v Commonwealth (Communist Party Case)* (1951) 83 CLR 1, 187.

<sup>199</sup> The examples of Hungary, Turkey and the proposed radical curtailment of Israel Supreme Court independence by Netanyahu Coalition government are instructive: See Gideon Rachmann, *The Age of the Strong-Man How The Cult Of the Leader Threatens Democracy around the World* (Penguin Random House 2021) 41-53 (Turkey), and 89-98 (Hungary). For Israel, see Patrick Kingsley and Isabel Kershner 'The Israeli Government's Plan to Overhaul the Judiciary: What to Know' *New York Times* (online 29 March 2023) and Naomi Schalt, Boax Atzill, David Mednicoff and Dov Waxman 'Israel's highest court protects its power to curb government extremism – 3 essential reads' *The Conversation* 3 January 2024. The problem freshly emerges from credibility issues of the Prime Ministerial appointments - improvements in trust of government *were likely attributable to unknowingly false working assumptions.*

liberal democratic representative and (*in Westminster derived systems*) responsible government.

The broadest contextual feature is the global *contraction* in democratic governance models.<sup>200</sup> Global trends for two decades after the end of the Cold War politically and economically favoured Western liberal democracies and United States and European Union influence.<sup>201</sup> A second thought strand posits declines in democracy as part of a retreat of states into isolationism, nativism and authoritarianism, including last decadal Australian socio-political narrative examples.<sup>202</sup>

Three recent international democracy studies pinpoint disturbing trends relating to democratic characteristics.<sup>203</sup> *First*, the 2023 Freedom House Report<sup>204</sup> identified several adverse developments – patterns of democratic decline,<sup>205</sup> declines in freedom of expression linked to global democratic decline,<sup>206</sup> and threats posed by democratically elected powerful incumbent leaders.<sup>207</sup>

*Second*, the Economist Democracy Index's<sup>208</sup> major finding was of the stagnated state of global democracy. The Index canvassed various international democracy impacts, with signature importance given to the relationship between sovereignty and

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<sup>200</sup> The apogee of democratic governments' growth (both quantitatively and qualitatively) was the two decades from the end of the Cold War in 1989. In 1945 democratic nations were statistically fewest in number, but by 2002, they statistically exceeded autocracies, before declining: Rachmann, *Ibid*, 2, 7.

<sup>201</sup> That advantage has now eroded, with China's ascent and the emergence of new authoritarian examples as political/developmental alternatives to the liberal democratic model: Steven Levitsky and Daniel Ziblatt, *How Democracies Die What History Reveals About Our Future* (Penguin Random House, 2018) 204, 206

<sup>202</sup> Greg Barns, *Rise of the Right The War on Australia's Liberal Values* (Hardie Grant Books, 2019), 16, 26.

<sup>203</sup> For an earlier discussion of similar matters, see James Miller, *Can Democracy Work? A Short History of a Radical Idea, from Ancient Athens to our World* (Oneworld, 2018) 237-239.

<sup>204</sup> *Freedom in the World 2023 Marking 50 Years in the Struggle for Democracy* (Freedom House, 2023), 2 – in the sense that 'the gap between the number of countries that registered overall improvements in political rights and civil liberties and those that registered overall declines was the narrowest it has ever been.'

<sup>205</sup> A 17 year pattern of democratic decline amongst countries, though a more marginal decline was experienced in 2022: *Ibid*, 1 (Executive Summary) and 3.

<sup>206</sup> *Ibid*, 1 (Executive Summary) and 13- coinciding with the growth in information and communication technologies, particularly impacting independent journalism and personal political expression: *Ibid*, 5.

<sup>207</sup> *Ibid*, 5, who rejected 'established democratic process [and sought] to rewrite the rules of the game to maintain their grip on power'.

<sup>208</sup> *Democracy Index 2022 Frontline democracy and the battle for Ukraine* (Economist Intelligence Unit 2023), noting that positive effects of restoration of Covid 19 curtailed individual freedoms were cancelled out by other negative global developments: *Ibid*, 5. The *Democracy Index 2022* uses four classifications of democracy, by government type index values: Full democracies (24), Flawed democracies (48) Hybrid regimes (36) and Authoritarian regimes (59). For an explanation of these categories, see *Democracy Index 2022*, 67. The Democracy Index uses five indices to obtain a composite score – (i) Electoral process and pluralism (ii) Functioning of government (iii) Political Participation (iv) Political culture and (v) Civil Liberties – see *Democracy Index 2022*, 7.

democracy.<sup>209</sup> The contrast of Western Europe with other regions,<sup>210</sup> and with the United States,<sup>211</sup> was stark.<sup>212</sup>

*Third*, the V-Dem Institute Report<sup>213</sup> provides several significant democracy referenced findings, around levels of democracy,<sup>214</sup> autocratisation<sup>215</sup> and identifiable effects and consequences.<sup>216</sup>

The three studies afford reflective background around the Prime Ministerial appointments. These international developments are commonly paralleled by other identifiable democracy contractions, alerting the possibility of similar qualitative risks to Australian democracy, if aberrant responsible government practices were left unchecked and normalised. First, a shift from evolving monitory democracy<sup>217</sup> to a highly attenuated form of electoral democracy,<sup>218</sup> inducing conditions for possible rise of illiberal democracy. Second, the arrogation of democratic legitimacy by strong populist figures, contemptuous of democratic conventions but rhetorically fond of

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<sup>209</sup> Prompted by the Russian invasion of Ukraine, suggesting ‘the vital importance of defending national sovereignty, without which real freedom and democracy are unattainable’ and extrapolating that observation to a general application of democracy principle: Ibid., 4 and Ibid., 19 ‘In 2022 it became clear how important those things [Sovereignty and nation state borders] are for any country aspiring to determine its own future’: Ibid, 19.

<sup>210</sup> Western Europe was ‘the only region to improve its score decisively in 2022 compared to 2021, every other region registers a negligible improvement or a decline’: Ibid, 30

<sup>211</sup> United States’ internal political and cultural polarisation has resulted in the collapse of social cohesion and consensus, centring upon a range of culture war issues, compromising the functioning of government, and increasing the threat level to US democracy: Ibid, 34. Functionality is reliant upon pluralism and competing alternatives.

<sup>212</sup> Western Europe was ‘the only region to improve its score decisively in 2022 compared to 2021, every other region registers a negligible improvement or a decline’: Ibid, 30.

<sup>213</sup> *Democracy Report 2023 Defiance in the Face of Autocratization* (V-Dem Institute, University of Gothenburg, 2023). It uses four government classification categories – Liberal Democracy, Electoral Democracy, Electoral Autocracy and Closed Autocracy: *Democracy Report 2023*, 12.

<sup>214</sup> Advances over the last 35 years of democracy have been eliminated, reducing democracy levels for the average global citizen to 1986 levels: Ibid., 6.

<sup>215</sup> Trends display an increased number of autocratising countries (including within existing democracies) with a decrease in democratising countries: Ibid. and Closed autocracies have exceeded liberal democracies for the first time in more than two decades: Ibid, 6 with deteriorating freedom of expression in 35 countries in 2022: Ibid.

<sup>216</sup> Where authoritarianism increases, disinformation, polarisation and autocratisation become mutually reinforcing: Ibid, 6, 25; Autocratising states’ common targets are media censorship, repression of civil society organisations and attacks on academic and cultural freedom and freedom of discussion: Ibid, 24.

<sup>217</sup> Monitory democracy typically includes many new kinds of extra-parliamentary power-scrutinising mechanisms, by which contestation, review and advocacy become significant: see John Keane, *The Shortest History of Democracy* (Black Inc, 2022) , 161-162. It frequently decentralises, multiplies and intensifies citizen and civil society democratic knowledge and participation.

<sup>218</sup> Including inducing conditions for possible rise of Illiberal democracy. Electoral democracy in Australia is identified with free and fair periodic elections, and a broad franchise maintaining a system of representative and responsible government and other formal institutions. For advocacy of these electoral mechanisms as an alternative to more specifically human rights focused measures, see Daryl Williams, ‘Against constitutional cringe: the protection of human rights in Australia’ (2003) 9 *Australian Journal of Human Rights* 1.

making things happen.<sup>219</sup> Third, discrediting and undermining independent state institutions, such as courts, irritatingly obstructive of reforms and deserving strategized responses eroding their independence.<sup>220</sup> Manipulation of public opinion and sentiment, through social media and other individualised populist messaging, and marginalisation, ostracism and condemnation of views incompatible with the majority, are similar democracy impairing developments.<sup>221</sup> Familiar also is the contraction of politically shared informal democracy facilitating values, beliefs, behaviours and standards, essential for the operation of conventions, such as responsible government.

The Australian and International political and democracy studies show erosion of accountability mechanisms (such as institutional responsible government) usually precedes more serious undermining of confidence in democratic institutions and executive and parliamentary practices. This suggests that *a suite of preventative reforms, extending beyond the recommendations in the Report*, is desirable. Re-assertion of a conventional institutional ministerial responsibility doctrine requires a combination of administrative and legislative reforms, along with developments in policy and programs. Such reforms are properly reconceptualised as part of a broader government restorative integrity project.

## VII CONCLUDING OBSERVATIONS: THE IMPORTANCE OF COMPREHENSIVE DEMOCRACY AFFIRMING AND REMEDIAL RESPONSES – IMPLEMENTING, BUT ALSO SUPPLEMENTING, THE REPORT RECOMMENDATIONS

### A *Locating the Response to the Morrison Additional Ministries within these National and International Issues of Confidence In and Contestation of Democracy*

Prime Minister Morrison's additional ministerial appointments and their potential concentration of executive power, presents as a distinctively Australian initial example of the international phenomenon of democracy contestation and weakening. Fortunately it became known prior to incremental impacts to Australian democratic institutions and practices.

It can only be speculated how Parliamentary democracy and ministerial responsibility might have been substantively and permanently changed.<sup>222</sup> Revelation of the practices – which did not occur until 13 August 2022, with further details accumulating on 14 August 2022 and 16 August 2022 - then prompted the seeking of

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<sup>219</sup> Keane, n 217, 188; Rachman, n 199, 1.

<sup>220</sup> Rachman Ibid, 12 and Barns, n 202, 106, 108, 109, 124, including inducing conditions for the rise of illiberal democracy

<sup>221</sup> A C Grayling, *The Good State On the Principles of Democracy* (Oneworld 2020), 159-160; AC Grayling *Democracy and Its Crisis* (Oneworld 2018) 132, 146.

<sup>222</sup> Perhaps involving further secret ministerial appointments and normalising a culture of irregularity in the event of a return of the government at the May 2022 elections.

the Solicitor General's opinion<sup>223</sup> and subsequently on 26 August 2022, the Bell inquiry.<sup>224</sup>

The chance intervention of the 2022 election disrupting the potential for significant political and legal consequences from the five appointments, highlights some fragility of Australian parliamentary practice in its conventions. Importantly, the inaction of the APS, within PMC, reveals a modern, politically attuned culture, significantly bounded by bare legality. Constitutional convention, practice and restraint, traditionally (anterior to issues of legal enforceability) is an essential *quid pro quo* of institutional responsible government. Such APS thinking discounts the intermeshing of legal constitutionality and convention to ensure responsible government functionality. Pointedly, the APS failed as a constraining state institution in this respect.

The prudential issue now is the adequacy of remedial steps taken, and additional measures against repetition. There are major differences between the present Government and present Opposition, over impropriety perceptions and culpability,<sup>225</sup> indicating again significant disjuncture over the scope and relevance of the Ministerial responsibility doctrine. Common ground extended only to passage of the *Ministers of State Amendment Bill 2022* (Cth) – a bare legislative response, which alone seems inadequate.

#### B *Government response and thematic issues*

Clear identification of breaches of the doctrine and conventions of responsible government in the Solicitor General's Opinion and in the Report through the five additional ministerial appointments, the important contextual considerations of trust and confidence in Australian political institutions and democratic processes, and democratic systems under contestation internationally, necessitate other remedial responses to restore integrity and functionality to the doctrine and operations of Commonwealth responsible government.

The Government response focused threefold on administrative practice,<sup>226</sup> parliamentary censure<sup>227</sup> and legislative reform.<sup>228</sup> It engaged in limited ways with broader domestic and international contexts of democratic government confidence and integrity.<sup>229</sup> The Government committed to the Report's full implementation

<sup>223</sup> *Solicitor-General's Opinion, 2022*, n 4.. The opinion was delivered on 22 August 2022.

<sup>224</sup> Bell Report, n 1, 11

<sup>225</sup> This sharply emerged in the censure debate. See the discussion above under the heading V E *A contrition deficiency and lack of acknowledgment of the ministerial appointment consequences in and for Parliament – the Parliamentary censure motion*

<sup>226</sup> Reformed administrative practice was announced immediately after the release of the Solicitor General's opinion: See 'Safeguarding Against 'Shadow Government' Appointments and Strengthening Australia's Democracy' n 27.

<sup>227</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 30 November 2022 3852 -3854 (Tony Burke)

<sup>228</sup> *Ministers of State Amendment Bill 2022* (Cth); Commonwealth, *Parliamentary Debates*, House of Representatives, 1 December 2022, 4028-4029 (Mark Dreyfus) (Second reading).

<sup>229</sup> See for example contributions in the Censure Motion debate: Commonwealth, *Parliamentary Debates*, House of Representatives, 30 November 2022, 3875 (Kate Chaney); 3875 (Sophie Scamps);

following receipt,<sup>230</sup> being recommendations 1 to 6 of the Report.<sup>231</sup> The reporter had previously written<sup>232</sup> ‘to the Prime Minister to advise of a recommendation for legislative change in a timely way if that were desired’.<sup>233</sup>

The characteristics of response to and implementation of the Report are predictive of the future effectiveness of an integrated remedial restorative approach to institutional responsible government, including re-aligning political practice more conformably with that parliamentary convention. The Government expeditiously responded to the disclosed ministerial appointments on 13 August 2022 by seeking the opinion of the Solicitor General by 22 August 2022 and announcing the establishment of the Bell Inquiry on 26 August 2022.<sup>234</sup>

Continued fraying and fragmentation of, rather than restorative and remedial principles for, responsible government (and implicitly for constitutional practice and conventions more broadly) emerged in Coalition responses to the Parliamentary censure of the former Prime Minister. All Coalition members with one exception voted against the censure motion.<sup>235</sup> Respect for Parliament as an institution and its conventions (such as responsible government), informed the censure motion remarks of a dissenting Coalition Member:

[The] actions taken were corrosive to trust in politics...a move to ensure direct power was quietly held over a number of portfolios, unbeknownst to our own party, our own ministers and the Australian public, was entirely unnecessary. It is an affront to our democratic Westminster system...This house has the right to be informed of the appointments. The people of Australia had the right to be informed of the appointments...I do not accept any of the explanations put forward by the former Prime

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3876 (Zoe Daniel) representing a consistent Teal independent approach of broader democracy issues; Government references to democracy issues focused on domestic references to conventions, the Constitution, parliamentary practice and parliamentary structures are found in: Commonwealth, *Parliamentary Debates*, House of Representatives, 30 November 2022 3854 (Tony Burke); 3861 (Catherine King); 3864 (Madeleine King).

<sup>230</sup> Anthony Albanese, ‘Government Welcomes Bell Inquiry Report’ (Prime Minister Media Release 25 November 2022).

<sup>231</sup> Bell Report, n 1, 7-8 (Recommendations). Recommendation 1 involved legislative change to require publication in the Commonwealth Gazette or in a notifiable instrument registered on the Federal Register of Legislation as soon as reasonably practicable after nominated factual actions occurred pursuant to Section 62, Section 64 and Section 65 of the Constitution. Recommendations 2 to 6 involved various reforms to administrative practices around different forms and issues of ministerial appointments.

<sup>232</sup> On 26 October 2022. *Ibid*, Appendix E, 136-137.

<sup>233</sup> The Reporter’s anticipatory action was to provide the option of early legislative action: ‘the Prime Minister indicated that the report would be provided on 25 November 2022 so that any changes could be put to the Parliament in the following sitting week commencing 28 November 2022’: Bell Report, n 1, 19. The *Ministers of State Amendment Bill 2022* (Cth) closely follows the Appendix E content.

<sup>234</sup> Anthony Albanese and Mark Dreyfus, ‘Establishment of Inquiry into the Appointment of the Hon Scott Morrison MP in Multiple Departments’ (Prime Minister and Attorney General Media Release 26 August 2022) – with a reporting date of 25 November 2022.

<sup>235</sup> Commonwealth, *Parliamentary Debates* House of Representatives 30 November 2022, 3878 (Speaker, Milton Dick). The Coalition dissenter was the Member for Bass, Bridget Archer, recorded in the Ayes in the Censure Motion vote: *Ibid*.

Minister for his actions, and I'm deeply disappointed by the lack of genuine apology or, more importantly, understanding of the impact of these decisions.<sup>236</sup>

### C *A compelling need for additional measures*

The Coalition's positive interaction with the censure motion was confined to supporting Report recommendations implementation. As indicated, the overlap consensus between the Government and Opposition is again one of *bare legality*. The *Minister of State Amendment Bill 2022* (Cth) was uncontroversial - its content closely replicated the Report's Recommendation 1.<sup>237</sup> Extended parliamentary debate occurred, with its enactment delayed.<sup>238</sup> However, the Coalition's (as a future Commonwealth government) ambivalent damage containment approach, makes desirable further responses strengthening accountability and compliance. Increasing the political risk and damage calculus of non-observance would encourage stronger conformity with the conventional institutional doctrine of ministerial responsibility. Several interlocking adaptable measures exist, combining legislation and policy/publicity programs.

The first is to position, highlight and frame language and policy regarding the convention of institutional responsible government as an integral attitudinal and cultural reform in a broader government restorative integrity project.<sup>239</sup> Such practices

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<sup>236</sup> Commonwealth, *Parliamentary Debates* House of Representatives 30 November 2022, 3869 (Bridget Archer).

<sup>237</sup> Bell Report, n 1, 7, Recommendation 1 advising that legislation be enacted to require publication in the Commonwealth Gazette or a notifiable instrument registered on the Federal Legislation Register of the fact of (i) swearing in of an Executive Councillor under section 62 of the Constitution; (ii) the appointment of an officer to administer a department of State under section 64 of the Constitution; (iii) the direction to a Minister to hold office under section 65 of the Constitution; and (iv) the revocation of membership of the Federal Executive Council, an appointment to administer a department, and a direction to hold an office, when affected by an instrument executed by the Governor General. These recommendations are respectively reflected in the *Ministers of State Amendment Bill 2022* (Cth) inserting new sections 5 (Executive Councillors) 6 (administering a department of State) and 6A (direction of a Minister to hold office) into the *Ministers of State Act 1952* (Cth). Each new section includes notification procedures on the revocation of the individual appointment.

<sup>238</sup> A large number of speakers participated in the Bill's debate. See *Parliamentary Debates* House of Representatives 8 February 2023, 313-320; 9 February 2023, 479-487; 13 February 2023, 663-669; 14 February 2023, 758-764; 15 February 2023, 880-885; 6 March 2023, 111-115; 7 March 2023, 11; 9 March 2023, 30-34; 20 March 2023, 41-48; 21 March 2023, 15-16; 23 March 2023, 1-29, 37-42; 19 June 2023, 4632-4633, comprising second reading debates on the *Ministers of State Amendment Bill 2022* (Cth), introduced on 1 December 2022: Commonwealth, *Parliamentary Debates* House of Representatives 1 December 2022, 4028-4029 (Mark Dreyfus). See *Parliamentary Debates* Senate 19 June 2023, 2649-2650 and 17 November 2023 68-69. The legislation eventually passed the Parliament on 17 November 2023 and was assented to on 28 November 2023.

<sup>239</sup> See for example, Mark Dreyfus, 'Appointment as Attorney-General of Australia' (Attorney General Media Release 1 June 2022): 'It is clear there is a great deal of work to do in the Attorney-General's portfolio and first and foremost is the need to repair and strengthen the keynote of our democratic system – the rule of law'. In relation to the rule of law, the Attorney General raised three major integrity issues: Government unaccountability under Robodebt; reputational damage

would necessarily be incorporated into major *legislative* reforms - such as the national anti-corruption commission,<sup>240</sup> the abolition of the Administrative Appeals Tribunal and its replacement by a merit based appointed administrative decisions review body,<sup>241</sup> and legislated responses to Robodebt Royal Commission<sup>242</sup> recommendations.<sup>243</sup>

These areas touch and concern responsible government principles. Ministerial responsibility language relating to executive actions in the legislative content and public advocacy of the reforms, should expansively highlight institutional responsible government as a common accountability methodology across the various newly legislated areas.

A further reform is to strengthen the doctrine of responsible government relating to APS cultural norms in senior public servants' communication of critical constitutional convention information to responsible Ministers. The Report revealed an inert and minimalist APS culture, bounded by a narrow legality criterion. Such passivity is likely grounded in anticipatory behaviour of avoiding contestation or controversy in advice to Ministers, acting conformably with perceived Ministerial political objectives and individual career prospects. This impacted detrimentally upon

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to institutions such as the Administrative Appeals Tribunal through abusing political appointments; and Prime Minister Morrison's secret ministerial appointments: 'The damage done to the rule of law in recent years must be repaired, and doing so has been one of my priorities as Attorney-General': Mark Dreyfus, '2022 Seabrook Chambers Public Lecture – Melbourne Law School' (Speech, University of Melbourne, 13 October 2022).

<sup>240</sup> Mark Dreyfus, 'National Anti-Corruption Commission Bill 2022' (Attorney General Media Release 28 September 2022); Mark Dreyfus, 'National Anti-Corruption Commission Legislation Amendments' (Attorney General Media Release 22 November 2022); Mark Dreyfus, 'Parliament passes National Anti-Corruption Commission bills' (Attorney General Media Release 30 November 2022); Mark Dreyfus, 'Inaugural National Anti-Corruption Commission Appointments' (Attorney General Media Release 29 March 2023)

<sup>241</sup> Reform of the federal administrative review system' (News, Administrative Appeals Tribunal web page, 16 December 2022): <https://www.aat.gov.au/news/reform-of-the-federal-administrative-review-system>; 'A new federal administrative review body' (Attorney-General's Department web page 'Legal System'): <https://www.ag.gov.au/legal-system/new-system-federal-administrative-review>; Mark Dreyfus, 'Expert Advisory Group to Guide Reform to Australia's System of Administrative Review' (Attorney General Media Release 17 February 2023); Mark Dreyfus, 'Consultation opens on design of the new federal administrative review body' (Attorney General Media Release 2 April 2023); Mark Dreyfus, 'Law Council of Australia Gala Dinner – Administrative Appeals Tribunal reform update' (Attorney General Media Release 1 December 2023); *Administrative Review Tribunal Act 2024* (Cth); Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2023, 9198-9203 (Mark Dreyfus)

<sup>242</sup> *Robodebt Royal Commission Report* n 3, xiii-xxiii; Mark Dreyfus, 'Government response to Robodebt Royal Commission' (Attorney General Media Release 13 November 2023), stating the 'Government has agreed, or agreed in principle, to all 56 of the Royal Commission's recommendations'; cf Rick Morton, 'A serious flaw in the robodebt response' *Saturday Paper* 18 November 2023; Australian Government, *Government Response Royal Commission into the Robodebt Scheme* (November 2023)

<sup>243</sup> The envisaged legislation for the 2023 defeated Voice to Parliament referendum was similarly situated: *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) Bill 2023* (Cth), which proposed to insert a new Chapter IX Recognition of Aboriginal and Torres Strait Islander Peoples s.129 Aboriginal and Torres Strait Islander Voice into the *Commonwealth Constitution*; Commonwealth Parliament, Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Advisory Report on the Constitutional Alteration (Aboriginal and Torres Strait Islander Voice) 2023* (12 May 2023).

minuted communications of responsible government issues regarding the Ministerial appointments, ultimately aiding doctrinal breaches.

The present composition of the Australian parliament, with eight elected Teal independents committed to changing Parliament's accountability standards and governmental integrity,<sup>244</sup> provides a Labor government with negotiating capital to reform Parliamentary practice consonant with responsible government principles.<sup>245</sup> Teal members' contributions in the Prime Ministerial censure debate were noticeably strong on integrity issues.<sup>246</sup> A useful addendum to these proposals would be inclusion of a specific session on responsible government in new Federal Parliamentarians induction.<sup>247</sup>

A populist conservative media can be a problematic facilitator of aberrant governance practices,<sup>248</sup> weakening ministerial responsibility culture, and creating political distraction. A fruitful line of inquiry for contemporary on line alternative media is the significant disjuncture between traditional conservative values of the proper functioning of state institutions, due process, the rule of law and accountability of the executive through Parliament (and its conventions, such as responsible government) and an independent judiciary,<sup>249</sup> juxtaposed against the additional Prime Ministerial appointments. Broad based support across the political spectrum, within Parliament and in the community, needs to highlight this contradiction with core conservative political beliefs and traditions. Far from the conservation and cultivation of democracy, it leans towards a depletion of checks and balances.

The Report's citation of Prime Minister Morrison evidence as failing to coherently justify the five additional ministerial appointments makes imperative more probing debate and responses in the new media. Mr Morrison's later sanguine remarks, disputing trust in government and the United Nations, suggest a need for ongoing contestation. They are perhaps interpretable as another disclaimer or absolution of ministerial responsibility:

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<sup>244</sup> 'Australian Federal Election 2022: Teal Independent Summary' (GovConnex Research 29 April 2023); 'Teal independents say corruption includes pork-barrelling' *Australian Financial Review* (online, 11 May 2022)

<sup>245</sup> In giving Teal independents equal credit for such reforms, to help ensure that the Coalition does not regain at the next election Teal seats won in the 2022 election from Liberal party representatives.

<sup>246</sup> See discussion at n 229 and associated text regarding the Teals.

<sup>247</sup> Commonwealth Government, Department of Finance, *Induction Guide for Federal Parliamentarians 47<sup>th</sup> Parliament June 2022*, 54 'Attachment B: 47<sup>th</sup> Parliament – Parliamentarian Induction Program' – neither the 'Orientation for new Senators' (Duration 2 Days Face to Face) and 'Seminar for new Members of the House of Representatives' (Duration 3 Days Face to Face) includes any content remotely engaging or referencing foundational Parliamentary and governance principles such as representative and responsible government.

<sup>248</sup> As demonstrated most recently: *Robodebt Royal Commission*, n 3, Transcript 31 January 2023 P-2778-2842 (evidence of Ms Rachel Miller, former senior media adviser to Human Services Minister Hon A Tudge); 'Robodebt victims' details released to media in bid to deter them from speaking out, royal commission told' *ABC News* (on line 31 January 2023).

<sup>249</sup> See the discussion above under V Some Implications for a Broader, More Complex Democracy Based and Accountability Culture C Wither political conservatism – conservatism transformed?

God's kingdom will come. It's in his hands. We trust in him. *We don't trust in governments. We don't trust in the United Nations, thank goodness.* We don't trust in all these things, fine as they may be and as important as the role that they play. Believe me, I've worked in it and they are important. But as someone who's been in it, if you are putting your faith in those things as I put my faith in the lord, you're making a mistake. They are earthly, they are fallible. I'm so glad we have a bigger hope.<sup>250</sup>

A further remedial response is improving public awareness of the proprieties of parliamentary and executive practice within Australian responsible government, raising public consciousness of the identity and impropriety of breaches of conventions. This might deter future incidences, through the likelihood of adverse electoral and opinion poll reaction.

A significantly undeveloped Australian pathway is civics education. A 2021 Senate Committee report<sup>251</sup> provided a detailed examination, methodologically informed by effective citizen participation in democracy and ensuring democratic political system health.<sup>252</sup> It substantially recommended<sup>253</sup> the conduct of civics education in secondary education, increasing yearly hours and revising the Australian National Curriculum civics and citizenship module,<sup>254</sup> alongside a revised Parliamentary and Civics Education Rebate.<sup>255</sup>

Interest might be further engendered by expanding government funded civics publicity and programs, promoted by the Parliamentary Education Office<sup>256</sup> (following content and design consultation with Parliamentary parties and independents) simple through to more detailed, in a blended delivery or on line modes, for both schools and adults. Such programs would maturely progress from the basic content of the Australian citizenship test. Various civics education versions would, over time, create a better educated voting public, familiar with the basics of representative and responsible government conventions, improving awareness of the responsible government norms, providing a more substantive behavioural deterrent to their breach.

#### D *In summary – the desirability of a comprehensive response*

The Report recommendations have been largely legislatively implemented,<sup>257</sup> representing a bare legality. The legal and administrative reforms respond by providing

<sup>250</sup> Josh Butler, 'We don't trust in governments' or UN, Scott Morrison tells Margaret Court's Perth church', *The Guardian* (online, 18 July 2022) (emphasis added)

<sup>251</sup> Commonwealth Parliament, Senate, Legal and Constitutional Affairs References Committee *Nationhood, national identity and democracy* (February 2021)

<sup>252</sup> *Ibid*, 64.

<sup>253</sup> *Ibid*, 67 Recommendation One.

<sup>254</sup> *Ibid*.

<sup>254</sup> *Ibid*

<sup>255</sup> *Ibid*, 69, Recommendation Three.

<sup>256</sup> Parliamentary Education Office: <https://peo.gov.au/>

<sup>257</sup> Ministers of State Amendment Act 2023 (Cth) sections 5, 6, and 6A.

notification and alert mechanisms<sup>258</sup> intended to prevent recurrence of the 2020 and 2021 Morrison government responsible government issues. However, this only partly remediates cultural attitudes exemplified in the PMO of normalising accretions of executive power, attrition of the informalities of accountable parliamentary culture, including its conventions, relying upon presumed electoral indifference.

Importantly, workable, optimal legal and administrative reforms need to be referenced and formulated by the several contextual factors canvassed: a loss of trust and confidence, shown through several Australian electoral studies, in politicians and Australian democratic institutions; the threats to and contestations of representative democratic systems internationally; along with a pronounced Parliamentary denial in acknowledging possible serious institutional consequences from the additional ministerial appointments.

The implemented Report recommendations require effective, targeted supplementation. It is a familiar (if often mistaken) reliance to resort to exclusively legal and administrative solutions in public policy responses— whereas reform effectiveness will improve by imprinting them, through additional measures, in the national democratic culture, with the overriding objective of re-orientating ministerial responsibility towards a traditional, institutional form.

Such initiatives should improve democratic practice and expectations, better integrate the responses legal, administrative and cultural in addressing how the Commonwealth Parliament operates under responsible government and ministerial responsibility, and signal that Australian electors are more civically curious about, and opposed to, Parliamentary infractions than hitherto assumed. A significant accountability moment exists to establish clear future alternatives, linking such measures to a broader suite of Commonwealth integrity reforms.

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<sup>258</sup> Ibid.