

# THE APPOINTMENT OF MINISTERS FROM OUTSIDE OF PARLIAMENT

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## ABSTRACT

Members of the executive in Australia and other Westminster nations are traditionally appointed only from the ranks of parliamentarians, ostensibly to protect the principle of responsible government. However, there is a growing international trend in nations such as the United Kingdom for the appointment of ministers from outside of Parliament. This article examines the extent to which Australia's constitutional system can accommodate unelected members of a Commonwealth, State or Territory executive. This question is analysed from the perspective of the principle of responsible government and the text of Australia's various constitutional documents. The article also reviews existing practice in comparative jurisdictions and Australian law and practice in order to determine the form that such appointments might take.

## I INTRODUCTION

Australian Prime Minister Julia Gillard announced in March 2012 that Bob Carr, a former Premier of New South Wales, would join her Cabinet as Minister for Foreign Affairs. At the time, Carr did not hold a seat in federal Parliament. Rather, it was announced that Carr would assume his ministerial position after being selected for a seat in the Senate via a casual vacancy.<sup>1</sup> The Carr appointment was particularly unusual for Australia: historically, Ministers have been appointed from within the ranks of parliamentary members, ostensibly to protect the principle of responsible government.

Carr's appointment reflects a growing international trend for external ministerial appointments. As the demands placed on governments become more complex, it has

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<sup>1</sup> Emma Griffiths, 'Gillard's New Ministers Sworn In', *ABC News* (online), 5 March 2012 <<http://www.abc.net.au/news/2012-03-05/new-ministers-sworn-in/3868860>>. Casual vacancies are filled by the procedure set out in s 15 of the *Australian Constitution*.

become increasingly desirable for Ministers to have specific and technocratic expertise.<sup>2</sup> Selecting Ministers from the pool of people who are not currently members of Parliament is one means of enabling governments to draw on this expertise.<sup>3</sup> The need for additional expertise is also a result of the rising number of career politicians:<sup>4</sup> as a consequence, technical expertise can be lacking from the narrow talent pool from which Ministers are traditionally drawn.<sup>5</sup> In addition, the appointment of external Ministers can reflect the politicisation of the public service and a demise in the idea of the independent career public servant as an expert advisor.<sup>6</sup>

Places such as the United Kingdom (UK), Scotland and Canada have recognised the role that Ministers appointed from outside Parliament can play. On the other hand, Australian academic discussion and public commentary has remained relatively silent on the issue. While it has been suggested that the Commonwealth or the States should permit the appointment of external Ministers,<sup>7</sup> there has been only limited consideration of whether appointing Ministers from outside Parliament would enhance existing governance processes in Australia and improve the ability of governments to respond to contemporary challenges. Further, there has been little consideration of whether or how this practice could be adopted in Australia. Following the Carr appointment, the issue warrants more detailed consideration in the Australian context.

We do not seek in this article to draw final conclusions as to whether appointing Ministers not elected to Parliament is a desirable practice. However, given the many challenges facing modern government and overseas experience with the practice, we

<sup>2</sup> Ben Yong and Robert Hazell, *Putting Goats Amongst the Wolves: Appointing Ministers from Outside Parliament* (University College London, 2011) 7; Lord Turnbull quoted in Public Administration Select Committee, *Goats and Tsars: Ministerial and Other Appointments from Outside Parliament*, House of Commons Paper No 330, Session 2009–10 (2010) Ev 1; Sir John Major quoted in Public Administration Select Committee, *Goats and Tsars*, above n 2, Ev 36.

<sup>3</sup> R J L Hawke, *The Resolution of Conflict*, Boyer Lectures (Australian Broadcasting Commission, 1979) 23; Yong and Hazell, above n 2, 14; Public Administration Select Committee, *Goats and Tsars*, above n 2, 13–14.

<sup>4</sup> Bruce Hawker, 'The Problems of Political and Parliamentary Leadership' (2008) 23(2) *Australasian Parliamentary Review* 3, 4; Sarah Miskin and Martin Lumb, 'The 41st Parliament: Middle-aged, Well Educated and (Mostly) Male' (Research Note No 24, Parliamentary Library, Parliament of Australia, 2006); Parliamentary Library, Parliament of Australia, *Handbook of the 42nd Commonwealth Parliament* (2008) 270; Yong and Hazell, above n 2, 9, 14; Public Administration Select Committee, *Goats and Tsars*, above n 2, 11–12; Professor King quoted in Public Administration Select Committee, *Goats and Tsars*, above n 2, Ev 2; Patrick Weller and Michelle Grattan, *Can Ministers Cope: Australian Federal Ministers at Work* (Hutchinson of Australia, 1981) 34.

<sup>5</sup> Miskin and Lumb, above n 4; Yong and Hazell, above n 2, 9, 14; Public Administration Select Committee, *Goats and Tsars*, above n 2, 9–10; Powell quoted in Public Administration Select Committee, *Goats and Tsars*, above n 2, Ev 1; Sir John Major quoted in Public Administration Select Committee, *Goats and Tsars*, above n 2, Ev 30.

<sup>6</sup> R A W Rhodes, John Wanna and Patrick Weller, 'Reinventing Westminster: How Public Executives Reframe their World' (2008) 36 *Policy and Politics* 461, 464–5; Centre for Policy and Development Systems, *The Growing Case for a Professional Public Service* (14 July 2001) <[http://cpds.apana.org.au/Professionalism/Case\\_for\\_Professionalism.htm](http://cpds.apana.org.au/Professionalism/Case_for_Professionalism.htm)>.

<sup>7</sup> See, eg, Hawke, above n 3; Hawker, above n 4.

do accept that appointing external Ministers is an idea with promise worthy of further consideration and experimentation in Australia. Our focus is upon the extent to which Australia's constitutional system can accommodate unelected members of a Commonwealth, State or Territory executive. We analyse this question from the perspective of the principle of responsible government and the text of Australia's various constitutional documents. We also review existing practice in comparative jurisdictions and Australian law and practice in order to determine the form that such appointments might take.

## II THEORY AND PRACTICE OF EXTERNAL MINISTERIAL APPOINTMENTS

### A Responsible Government

#### I *Defining responsible Government*

Responsible government is a key tenet of the Westminster system.<sup>8</sup> The classic theory of responsible government states that the executive should be 'chosen by, is answerable to, and may be removed by' a popularly elected Parliament.<sup>9</sup> The concept establishes a line of accountability from the people (who elect Members of Parliament) to the executive (which holds office so long as it retains the confidence of Parliament).<sup>10</sup> The effect of responsible government is that the 'actual government of the State is conducted by officers who enjoy the confidence of the people.'<sup>11</sup> Ministers should thus hold office 'at the pleasure' of the lower house of Parliament and should be answerable to Parliament for their actions and those of their departments.<sup>12</sup>

<sup>8</sup> R S Parker, 'Responsible Government in Australia' in Patrick Weller and Dean Jaensch (eds), *Responsible Government in Australia* (Drummond, 1980) 12, 19. Cf R A W Rhodes, 'Australia: The Westminster Model as Tradition' in H Patapan, J Wanna and P Weller (eds), *Westminster Legacies: Democracy and Responsible Government in Asia and the Pacific* (UNSW Press, 2005) 129, 150.

<sup>9</sup> David Hamer, *Can Responsible Government Survive in Australia?* (Department of the Senate, 2004) xvii.

<sup>10</sup> A H Birch, *Representative and Responsible Government: An Essay on the British Constitution* (George Allen & Unwin, 1964) 20; Brian Galligan, 'Parliamentary Responsible Government and the Protection of Rights' (1993) 4 *Public Law Review* 100, 103; Christos Mantziaris, 'The Executive – A Common Law Understanding of Legal Form and Responsibility' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (The Federation Press, 2003) 126, 132; Parker, above n 8, 12; Marian Simms, 'Models of Political Accountability and Concepts of Australian Government' (1999) 58 *Australian Journal of Public Administration* 34, 34. See also Hamer, above n 9, 6.

<sup>11</sup> Sir Samuel Griffith, *Notes on Australian Federation: Its Nature and Probable Effects: A Paper Presented to the Government of Queensland* (University of Sydney Library, 2001) 19. See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559 ('Lange').

<sup>12</sup> Jim Chalmers and Glyn Davis, 'Power: Relations Between the Parliament and the Executive' (Research Paper No 14, Parliamentary Library, Parliament of Australia, 2000) <[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp0001/01RP14](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP14)>.

According to former Prime Minister Sir Robert Menzies, responsible government is 'the ultimate guarantee of justice and individual rights'.<sup>13</sup> The rationale for responsible government was further articulated by former Prime Minister Malcolm Fraser:

The principle of responsibility — to the electorate and the Parliament — is a vital one which must be maintained and strengthened because it is the basis of popular control over the direction of government and the destiny of the nation. To the extent that it is eroded, the people themselves are weakened. If the people cannot call to account the makers of government policy they ultimately have no way of controlling public policy or the impact of that policy on their own lives. For the government to be truly accountable to the people and Parliament the electoral and Parliamentary machinery must, of course, work effectively and democratically.<sup>14</sup>

Responsible government was a recurring theme throughout the 1891 and 1897–98 conventions that drafted the *Australian Constitution*. However, the delegates rarely turned their attention in any detail to the meaning of responsible government or what it would entail in an Australian federal state. This caused some confusion during the debates, with George Reid for example suggesting that some of his peers were 'rather cloudy as to what responsible government is'.<sup>15</sup> The difficulty of defining responsible government was recognised by John Hackett at the 1891 convention:

Responsible government is a phrase which I would defy anyone in this assembly to define. It is a phrase unknown to the British Constitution. It finds no place in our colonial constitutions ... It is unknown except as a newspaper phrase, or an oratorical expression. I will go further, and say this that if the words "responsible government" were adopted in our constitution, and the question of their meaning were referred to a bench of the ablest judges that could be found, they would end by declaring themselves utterly unable to define or to declare their meaning.<sup>16</sup>

These difficulties of definition have more recently been recognised by the High Court of Australia. In *Egan v Willis*, Kirby J stated:

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. As with the notion of 'representative government', it is possible to accept the words as a general description of a feature of constitutional arrangements in Australia without necessarily being able to derive from that feature precise implications which are binding in law.<sup>17</sup>

<sup>13</sup> R G Menzies, *Central Power in the Australian Commonwealth* (University Press of Virginia, 1967) 54. See also *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 30 March 1897, 288 (Alfred Deakin); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135–6 (Mason CJ), 228–9 (McHugh J).

<sup>14</sup> J M Fraser, 'Responsibility in Government' (1978) 37(1) *Australian Journal of Public Administration* 1, 1–2.

<sup>15</sup> See also *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 17 September 1897, 724 (George Reid).

<sup>16</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 12 March 1891, 280–1 (John Hackett).

<sup>17</sup> (1998) 195 CLR 424, 501 (Kirby J). See also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 184 (Dawson J).

Providing a clear description of responsible government is further complicated by its evolving nature.<sup>18</sup> The characteristics of responsible government are not fixed<sup>19</sup> or immutable and can be 'differently understood by different people or at different times'.<sup>20</sup> As noted by Gleeson CJ, responsible government is 'based upon a combination of law, convention, and political practice ... The nature and extent of the responsibility which is involved in responsible government depends as much upon convention, political and administrative practice, and the climate of public opinion, as upon rules of law'.<sup>21</sup>

Though it is challenging to define responsible government, it has been possible to identify its core meaning or purpose. At a very general level, there appeared to be a broad consensus in the 1890s constitutional convention debates that responsible government entailed 'responsibility of a ministry to parliament. ... [b]ecause parliament represents and is responsible to the people. ... [T]he end and object of responsible government is that the will of the people shall prevail'.<sup>22</sup> Similar sentiments have been expressed in more recent Australian case law.<sup>23</sup>

By convention, responsible government encompasses the twin notions of collective ministerial responsibility and individual ministerial responsibility.<sup>24</sup> Collective ministerial responsibility requires that Ministers support the decisions of Cabinet and uphold the collective government position. Ministers must not speak against government policy or reveal the deliberations of Cabinet.<sup>25</sup> Further, collective ministerial responsibility requires that the government resign if a vote of no confidence is passed against it in Parliament.<sup>26</sup> Lindell has argued that collective ministerial

<sup>18</sup> See, eg, *Official Report of the National Australasian Convention Debates*, Sydney, 4 March 1891, 40 (Sir Samuel Griffith), 9 March 1891, 162 (Charles Kingston), 11 March 1891, 239 (Duncan Gillies), 12 March 1891, 279 (John Hackett); *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 30 March 1897, 324 (John Gordon). See debate on this point: *Official Report of the National Australasian Convention Debates*, Sydney, 10 March 1891, 213 (Henry Wrixon and Sir Samuel Griffith).

<sup>19</sup> *Egan v Willis* (1998) 195 CLR 424, 451 (Gaudron, Gummow and Hayne JJ).

<sup>20</sup> *Egan v Willis* (1996) 40 NSWLR 650, 659 (Gleeson CJ). See also Birch, above n 10, 13.

<sup>21</sup> *Egan v Willis* (1996) 40 NSWLR 650, 660 (Gleeson CJ).

<sup>22</sup> *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 16 September 1897, 664 (Isaac Isaacs). See also *Official Report of the National Australasian Convention Debates*, Sydney, 12 March 1891, 296 (Adye Douglas); *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 26 March 1897, 184 (John Quick), 13 April 1897, 493 (Henry Higgins), 22 April 1897, 1170 (Isaac Isaacs); *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 10 March 1898, 2182 (Isaac Isaacs).

<sup>23</sup> See, eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ), 184–5 (Dawson J), 230 (McHugh J); *Egan v Willis* (1998) 195 CLR 424, 451 (Gaudron, Gummow and Hayne JJ).

<sup>24</sup> Birch, above n 10, 131. Cf Parker, above n 8, 17.

<sup>25</sup> See Oonagh Gay and Thomas Powell, 'The Collective Responsibility of Ministers – An Outline of the Issues' (Research Paper No 04/82, Parliamentary Library, House of Commons, 2004) 10–11.

<sup>26</sup> *Ibid* 10; Birch, above n 10, 133.

responsibility is the 'most important and relevant feature' of responsible government in Australia.<sup>27</sup>

Individual ministerial responsibility requires that Ministers be accountable to the Parliament for their policies, their own performance and the performance of people and entities within their portfolios.<sup>28</sup> To fulfil this requirement, Ministers are expected to explain their actions and policies to Parliament, inform Parliament of developments in their portfolio, take action to correct problems and, if required, resign their ministerial position.<sup>29</sup> Writing in 1995, Lindell asserted that individual ministerial responsibility was a 'diminished and diminishing notion' due to the strong presence of party politics in Australian legislatures.<sup>30</sup> Nothing has changed since that time to limit the force of his conclusion.

## II *Are Ministers in Parliament an essential feature of responsible Government?*

Responsible government requires Ministers to be accountable to Parliament, which is in turn accountable to the people through the electoral process. However, it is less clear whether this necessarily entails that Ministers are elected to Parliament.

One view of the Westminster system of responsible government requires Ministers to be members of Parliament.<sup>31</sup> Bagehot, who first articulated the features of the Westminster system, thought this membership to be essential for pragmatic reasons. Ministers needed first to learn the business of politics: 'Statesmanship — political business — is a profession which a man must learn while young, and to which he must serve a practical apprenticeship; and in England the House of Commons is the only school for acquiring the necessary skill, aptitude and knowledge.'<sup>32</sup> The notion of Ministers as having served a parliamentary apprenticeship is still present in modern politics.<sup>33</sup> However, Bagehot's ideas require some adjustment to fit the contemporary context. First, it is not uncommon for successful politicians to come to politics in their later years, gaining necessary skills and experiences while no longer 'young'. Second, while Bagehot limits his analysis to the House of Commons, in Australia (and, indeed, the UK), Ministers may sit in the upper house of Parliament and gain necessary experience in that house. While government is not formed in the upper house, it is still an environment in which Ministers may gain skills, aptitude and knowledge about the political process, albeit of a slightly different nature given the role of the upper house

<sup>27</sup> Geoffrey Lindell, 'Responsible Government' in P D Finn (ed), *Essays on Law and Government* (Lawbook, 1995) vol 1, 75, 79.

<sup>28</sup> See Oonagh Gay and Thomas Powell, 'Individual Ministerial Responsibility – Issues and Examples' (Research Paper 04/31, Parliamentary Library, House of Commons, 2004) 7–8.

<sup>29</sup> Ibid; Birch, above n 10, 140; Mantziaris, above n 10, 133.

<sup>30</sup> Lindell, above n 27, 93.

<sup>31</sup> Hamer, above n 9, 4. See also Parker, above n 8, 13; Sir Billy Snedden, 'Ministers in Parliament – A Speaker's Eye View' in Patrick Weller and Dean Jaensch (eds), *Responsible Government in Australia* (Drummond, 1980) 68, 70.

<sup>32</sup> Walter Bagehot, 'Politics as a Profession', *The Economist* (London), 17 June 1865 in Mrs Russell Barrington (ed), *The Works and Life of Walter Bagehot* (Longmans, Green, and Co, 1915) vol 9 <<http://oll.libertyfund.org/title/2167/200902>>.

<sup>33</sup> See, eg, Jason Markusoff, 'More Seats at Tory Table', *The Edmonton Journal* (online), 7 March 2008 <<http://www2.canada.com/edmontonjournal/features/albertavotes/story.html?id=7ebc5d6b-5209-4bf3-bf02-235edf8e01c5&p=2>>.

as a place of review. The different experiences gained in each house may be reflected somewhat in the convention that the Prime Minister must sit in the lower house. Finally, it is possible that political skill and knowledge may be obtained through means other than sitting in a house of Parliament, a possibility not accounted for by Bagehot.

Over time, the presence of Ministers in Parliament has come to be conflated with responsible government. However, it appears that this is more an accident of history than an essential feature of the concept. Indeed, Bagehot notes:

The cabinet, in a word, is a board of control chosen by the legislature, out of persons whom it trusts and knows, to rule the nation. The particular mode in which the English ministers are selected ... the rule which limits the choice of the cabinet to the members of the legislature ... are accidents unessential to its definition — historical incidents separable from its nature. Its characteristic is that it should be chosen by the legislature out of persons agreeable to and trusted by the legislature. Naturally these are principally its own members, but they need not be exclusively so. A cabinet which included persons not members of the legislative assembly might still perform all useful duties.<sup>34</sup>

While Bagehot intended in his final sentence to accommodate ministerial appointments from the unelected upper house of the British Parliament, it could equally provide a rationale for appointing as Ministers people who have not been elected to either house of Parliament.

This debate also featured in the Australian constitutional conventions. Sir Samuel Griffith, subsequently the first Chief Justice of Australia's High Court, declared the requirement that Ministers sit in Parliament to be one of 'many misapprehensions as to what is the essence of the system called responsible government.' He stated:

We are accustomed to think that the essence of responsible government is this: that the ministers of state have seats, most of them, in the lower house of the legislature, and that when they are defeated on an important measure they go out of office. That I venture, with the greatest submission, to say is only an accident of responsible government, and not its principle or its essence. [Instead] the system depends on these propositions — that the ministers are appointed by the head of the state, the Sovereign, or her representative, and that they may hold seats in Parliament. That is all that will be found in the Constitution of the United Kingdom. They are appointed by the head of the state, and some of them may hold seats in Parliament — a limited number. ... [Having ministers with seats in parliament] is not common by any means to the system of responsible government, as it is known throughout the British empire, nor as it is known in the other European country where they have adopted, after profound study, what they believe to be the essential principles of the British Constitution as at present administered.<sup>35</sup>

Hence, rather than requiring Ministers to hold seats in Parliament, responsible government implies only that Ministers *may* hold seats in Parliament. This was echoed in the case of *Egan v Willis*, where Gaudron, Gummow and Hayne JJ noted: 'One aspect of responsible government is that Ministers may be members of either House of a bicameral legislature and liable to the scrutiny of that chamber in respect of the conduct of the executive branch of government.'<sup>36</sup>

<sup>34</sup> Walter Bagehot, *The English Constitution* (Little, Brown & Co, 2<sup>nd</sup> ed, 1873) 49.

<sup>35</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 4 March 1891, 34 (Sir Samuel Griffith). See also at 9 March 1891, 162 (Charles Kingston).

<sup>36</sup> *Egan v Willis* (1998) 195 CLR 424, 453 (Gaudron, Gummow and Hayne JJ).

### III Responsible Government in the Australian Constitution

Responsible government has been variously described as a 'cardinal [feature] of our political system which [is] interwoven in its texture',<sup>37</sup> 'part of the fabric on which the written words of the Constitution are superimposed',<sup>38</sup> the 'keystone of our political system'<sup>39</sup> and a 'central feature of the Australian constitutional system'.<sup>40</sup> These strong endorsements of responsible government are at odds with the general tenor of debate at the constitutional conventions.<sup>41</sup> Some delegates at the 1890s conventions were reluctant to incorporate responsible government into the new federal constitutional structure.<sup>42</sup> Many speakers acknowledged the difficulties inherent in responsible government, including the tendency for strong party politics to emerge,<sup>43</sup> and questioned whether responsible government could truly be accommodated in a federal system.<sup>44</sup> John Hackett captured the mood of some delegates at the 1891 convention when he declared: 'either responsible government will kill federation, or federation ... will kill responsible government'.<sup>45</sup> Drawing on these concerns, a number of delegates proposed that the draft constitution be sufficiently flexible to allow for the evolution of

<sup>37</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 147 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>38</sup> *Commonwealth v Kreglinger* (1926) 37 CLR 393, 413 (Isaacs J).

<sup>39</sup> *Horne v Barber* (1920) 27 CLR 494, 500 (Isaacs J).

<sup>40</sup> *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275.

<sup>41</sup> It is interesting to note that many of these strong judicial pronouncements were made by Isaacs J, who also gave an impassioned speech in favour of responsible government at the constitutional conventions: see *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 26 March 1897, 169 (Isaac Isaacs). This speech was also at odds with the general tenor of the conventions, which were far more pragmatic: see, eg, *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 25 March 1897, 96 (Henry Higgins).

<sup>42</sup> See, eg, *Official Report of the National Australasian Convention Debates*, Sydney, 11 March 1891, 259 (Sir John Bray).

<sup>43</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 5 March 1891, 65, 68 (William Russell), 9 March 1891, 162 (Charles Kingston), 11 March 1891, 244 (Andrew Clark), 12 March 1891, 280–1 (John Hackett), 17 March 1891, 421 (Henry Wrixon). Cf *Official Report of the National Australasian Convention Debates*, Sydney, 5 March 1891, 65, 68 (William Russell), 10 March 1891, 210 (Nicholas Brown). Compare also Isaac Isaacs's impassioned plea for responsible government: *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 26 March 1897, 169 (Isaac Isaacs).

<sup>44</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 6 March 1891, 101–2 (Sir John Downer), 122 (Bolton Bird), 13 March 1891, 284 (William Moore), 17 March 1891, 426 (Thomas Playford), 6 April 1891, 734 (Thomas Playford); *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 23 March 1897, 28–30 (Sir Richard Baker), 25 March 1897, 92 (Joseph Carruthers), 96 (Henry Higgins), 106 (Bernhard Wise), 26 March 1897, 146 (Frederick Holder), 175–6 (Isaac Isaacs), 193 (Henry Dobson). Cf *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 25 March 1897, 134 (Josiah Symon).

<sup>45</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 12 March 1891, 279 (John Hackett).

Australian politics away from responsible government so as to ensure a system more compatible with federalism or to facilitate the refinement of the system over time.<sup>46</sup>

By the conclusion of the convention debates, a tacit agreement had emerged that responsible government should be one of the founding principles of the new Australian federal government<sup>47</sup> — predominantly because it was the system of government the people of the colonies were familiar with.<sup>48</sup> However, no explicit statement to this effect was included in any draft of the constitution bill.<sup>49</sup> In describing the *Commonwealth of Australia Bill 1898*, Alfred Deakin noted: 'Not only is the very fact of responsible government not set forth in express terms, but the results, as we know them, of the working of responsible government are scarcely more than indicated, even to the practised eye.'<sup>50</sup>

The only express embodiment of responsible government within the *Australian Constitution* as finally enacted is s 64,<sup>51</sup> which establishes that no person may serve as a federal Minister for longer than three months unless he or she is or becomes a member of the federal Parliament. Section 64 reads:

**Ministers of State** The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.

Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.

**Ministers to sit in Parliament** After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.

<sup>46</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 9 March 1891, 162 (Charles Kingston), 10 March 1891, 198–9, 203 (John Cockburn), 11 March 1891, 244 (Andrew Clark), 6 April 1891, 775 (Charles Kingston); *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 24 March 1897, 72–3 (Patrick Glynn), 25 March 1897, 97 (Henry Higgins), 26 March 1897, 148–9 (Frederick Holder), 194 (Henry Dobson), 29 March 1897, 213 (Sir John Downer), 30 March 1897, 307 (Matthew Clarke), 324 (John Gordon), 334–5 (William Trenwith); *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 17 September 1897, 797 (Henry Dobson).

<sup>47</sup> *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 17 September 1897, 784 (Sir Richard Baker).

<sup>48</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 5 March 1891, 83 (Alfred Deakin), 6 March 1891, 99 (Edmund Barton), 10 March 1891, 210 (Nicholas Brown); *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 24 March 1897, 51 (Richard O'Connor), 80 (Simon Fraser), 25 March 1897, 96 (Henry Higgins), 119 (John Henry), 133 (Josiah Symon), 29 March 1897, 247 (Sir John Forrest), 255 (Vaiben Solomon), 30 March 1897, 287 (Alfred Deakin), 334–5 (William Trenwith), 31 March 1897, 381 (Edmund Barton).

<sup>49</sup> See John Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005).

<sup>50</sup> *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 17 February 1898, 1064 (Alfred Deakin).

<sup>51</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 229 (McHugh J); *Lange* (1997) 189 CLR 520, 559.

Section 64 evolved over the course of the constitutional conventions. Indeed, the provision requiring Ministers to sit in Parliament was not adopted until the 1897–98 convention. At the conclusion of the 1891 convention, the draft *Commonwealth of Australia Bill 1891* did not include any requirement that Ministers sit in Parliament – rather, provision was made that Ministers *might* sit in Parliament. The relevant section provided:

For the administration of the executive government of the Commonwealth, the Governor-General may, from time to time, appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may from time to time establish, and such officers shall hold office during the pleasure of the Governor-General, and shall be capable of being chosen and of sitting as Members of either House of the Parliament.

Such officers shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.<sup>52</sup>

During debate, it was repeatedly noted that the constitutions of other nations with a system of responsible government did not generally contain provisions requiring Ministers to sit in Parliament<sup>53</sup> – though, as a matter of practice, it was generally considered expedient for them to do so.<sup>54</sup> In explaining the rationale for the 1891 provision, Sir Samuel Griffith stated that it:

practically embodies what is known to us as the British Constitution as we have it working at the present time; but the provisions of the bill are not made so rigid that our successors will not be able to work out such modifications as their experience may lead them to think preferable. It is proposed that the ministers of state ... may sit in either house of parliament. That is the practice under what we know as the British Constitution, and no doubt under the practical working of our constitution ministers here will also be required to sit in parliament, except in cases where a minister may for a longer or a shorter time be unable to obtain a seat there. ... These provisions introduce what we call responsible government ... a government responsible in name and form to the head of the state and in substance to the parliament of the commonwealth.<sup>55</sup>

Despite the lack of any requirement that Ministers must sit in Parliament in the 1891 bill, the delegates were satisfied that the section would introduce a system of responsible government into the new federation.<sup>56</sup>

The 1891 provision was amended by committee during the 1897–98 convention to include a requirement that Ministers sit in Parliament. The revised provision read:

For the administration of the executive government of the Commonwealth, the Governor-General may, from time to time, appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may

<sup>52</sup> *Draft of a Bill to Constitute the Commonwealth of Australia, Draft of a Bill as Adopted by the National Australasian Convention*, 9th April 1891 (29 June 1891) 15.

<sup>53</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 4 March 1891, 40 (Sir Samuel Griffith), 9 March 1891, 162 (Charles Kingston), 11 March 1891, 239 (Duncan Gillies), 12 March 1891, 295 (Henry Cuthbert), 18 March 1891, 467 (Sir Samuel Griffith).

<sup>54</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 11 March 1891, 239 (Duncan Gillies), 18 March 1891, 468 (James Munro), 6 April 1891, 765 (Duncan Gillies).

<sup>55</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 31 March 1891, 527 (Sir Samuel Griffith).

<sup>56</sup> *Ibid* 527 (Sir Samuel Griffith), 6 April 1891, 766 (Henry Wrixon).

from time to time establish, and such officers shall hold office during the pleasure of the Governor-General, and shall be capable of being chosen and of sitting as members of either House of The Parliament.

Such officers shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.

After the first general election no Minister of State shall hold office for a longer period than three calendar months unless he shall be or become a member of one of the Houses of The Parliament.

In justifying this change, Edmund Barton, later to become Australia's first Prime Minister and a member of the High Court, stated that the clause would ensure that the continuance in office of Ministers would be 'subject to the vote of Parliament' and, as a result, that Ministers would be subject to parliamentary control.<sup>57</sup> Barton further stated:

If the hon member is in doubt that the system of government under which the machinery of this Bill will operate will be responsible government as we understand it, that doubt will be altogether removed by the requirement of the presence of Ministers in Parliament.<sup>58</sup>

Section 64 was further described by Barton as a 'safeguard [of] responsible government'.<sup>59</sup>

Later in the 1897–98 proceedings, a further amendment proposed by the House of Assembly of Tasmania would have removed the requirement that Ministers sit in Parliament.<sup>60</sup> In the debate that ensued, a number of delegates again pressed the desirability of keeping the constitutional provisions sufficiently flexible to allow for changes to the system of responsible government.<sup>61</sup> Further, it was noted that the provision was unnecessary to secure responsible government.<sup>62</sup> The proposed amendment failed by a vote of 21 to 14. The result was s 64 as it is currently expressed in the *Australian Constitution*.

Compared to other constitutional questions, whether Ministers should sit in Parliament received only limited attention at the conventions. Indeed, during the 1891 convention Philip Fysh declined to comment on a draft section on the basis that he doubted 'whether the general public has any particular interest at the present moment in the method in which you will frame your executive, and in the mode in which your duties will be discharged'.<sup>63</sup> In the highly politicised federation process, the issue was not regarded as a key concern.<sup>64</sup>

<sup>57</sup> *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 12 April 1897, 443 (Edmund Barton).

<sup>58</sup> *Ibid.* See also *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 19 April 1897, 913 (George Reid).

<sup>59</sup> *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 17 September 1897, 794 (Edmund Barton).

<sup>60</sup> *Ibid* 793–4.

<sup>61</sup> *Ibid* 797 (Henry Dobson).

<sup>62</sup> *Ibid* 797 (Josiah Symon).

<sup>63</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 4 March 1891, 42 (Philip Fysh).

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

### III COMPARATIVE PERSPECTIVES

At the time of Federation, the constitutions of other nations with a system of responsible government did not generally contain a provision requiring Ministers to be members of Parliament.<sup>65</sup> Modern constitutions are more likely to provide for this, as detailed in Table 1 below, which sets out the relevant constitutional provisions in a number of Westminster systems.

The Indian, Irish and Pakistani Constitutions exempt the Attorney-General from the need to sit in Parliament.<sup>66</sup> In Ireland, the exemption appears to reflect a desire for the Attorney-General to be independent from the executive: indeed, the Constitution explicitly provides that the Attorney-General 'shall not be a member of the Government'.<sup>67</sup> The Irish Attorney-General is described as 'the adviser of the Government in matters of law and legal opinion' and is responsible for prosecuting crimes.<sup>68</sup> Given this conception of the role of the Attorney-General, a degree of independence from the executive is to be expected.

In contrast, in India and Pakistan the Attorney-General is exempt due to the need for specialist expertise that is not necessarily available within the ranks of Parliament. Under the Indian Constitution, the Attorney-General must be 'qualified to be appointed a Judge of the Supreme Court'.<sup>69</sup> To satisfy this condition, a prospective Attorney-General must be a citizen of India and have been either a Judge of a High Court for at least five years or an advocate in the High Court for at least ten years or, in the opinion of the President, be a distinguished jurist.<sup>70</sup> This expertise might not be available within the ranks of Parliament at any given time, thereby justifying the exemption of the Attorney-General from the requirement to sit in Parliament. Similar provisions apply under the Pakistani Constitution. However, in Pakistan a prospective Attorney-General must have been an advocate in the High Court for at least fifteen years and there is no provision for the appointment of a 'distinguished jurist',<sup>71</sup> further limiting the likelihood that the necessary expertise will be present in Parliament.

<sup>65</sup> Ibid, 4 March 1891, 40 (Sir Samuel Griffith), 9 March 1891, 162 (Charles Kingston), 11 March 1891, 239 (Duncan Gillies), 12 March 1891 (Henry Cuthbert), 18 March 1891, 467 (Sir Samuel Griffith).

<sup>66</sup> *Constitution of India* (India) art 76; *Irish Constitution* (Ireland) art 30; *Constitution of Pakistan* (Pakistan) art 100.

<sup>67</sup> *Irish Constitution* (Ireland) art 30(4).

<sup>68</sup> *Irish Constitution* (Ireland) art 30(1)–(3).

<sup>69</sup> *Constitution of India* (India) art 76(1).

<sup>70</sup> *Constitution of India* (India) art 124(3).

<sup>71</sup> *Constitution of Pakistan* (Pakistan) art 177.

Table 1: Constitutional Requirements in Westminster Systems

Jurisdiction	Relevant Provision	Constitutional Requirement
United Kingdom	Nil	Ministers sit in Parliament by convention
Canada	Nil	Ministers sit in Parliament by convention
New Zealand	<i>Constitution Act 1986</i> (NZ) s 6	Ministers must be members of Parliament; 40 days leeway at election; 28 days leeway at end of parliamentary term
India	<i>Constitution of India</i> (India) ss 75(5), 76	Ministers cease to hold their position if they are not members of Parliament for six consecutive months; Attorney-General for India is not required to sit in Parliament
Pakistan	<i>Constitution of Pakistan</i> (Pakistan) ss 91(9), 92, 100	Ministers are appointed from members of Parliament; Ministers cease to hold their position if they are not members of the National Assembly for six consecutive months (this does not apply to Ministers who are members of the Senate); Attorney-General for Pakistan is not required to sit in Parliament
Malaysia	<i>Federal Constitution</i> (Malaysia) art 43(2)(b)	Ministers are appointed from among members of Parliament; Ministers cease to hold office if not a member of Parliament
Singapore	<i>Constitution of the Republic of Singapore</i> (Singapore, 1999 reprint) s 25(1)	Ministers are appointed from among members of Parliament; Ministers cease to hold office if not a member of Parliament
Ireland	<i>Irish Constitution</i> (Ireland) art 28(7.2), 30	Ministers must be members of Parliament; Attorney General is not required to sit in Parliament
Scotland	<i>Scotland Act 1998</i> (UK) c 46, 47	Ministers appointed from members of Parliament; Lord Advocate and Solicitor General for Scotland are not required to be members of Parliament

While the need for independence is most relevant to the role of the Attorney-General, it is conceivable that other ministerial positions might also benefit from specialist expertise. There is increasing recognition internationally that Ministers appointed from outside Parliament can play significant and valuable roles in national governance. The experiences of countries such as the UK, Scotland and Canada illustrate the potential advantages and challenges associated with external ministerial appointments and provide models that could inform how Australia might adopt such a process within its constitutional framework.

As countries without any express constitutional requirement that Ministers must sit in Parliament, the UK and Canada provide interesting insights into how external Ministers might be appointed and accommodated in a system of responsible government. While Scotland requires the appointment of Ministers from members of

Parliament, the *Scotland Act 1998* (UK) also makes provision that certain specialist executive positions may be filled other than by parliamentary members.

### A United Kingdom

Ministers in the UK have traditionally followed a similar 'pathway to power' to their Australian counterparts. By convention, UK Ministers are appointed from Parliament.<sup>72</sup> However, Ministers have occasionally been appointed from outside Parliament to provide expertise and experience that is otherwise lacking.<sup>73</sup>

In 2007, Prime Minister Gordon Brown commenced building a 'government of all the talents' ('Goats') that included six Ministers appointed from outside Parliament.<sup>74</sup> The appointments included technocrats from business and science, former politicians, and 'hybrids' with experience in both technical policy and politics.<sup>75</sup> The Goats' appointments differed from previous external ministerial appointments in both their timing, in that individuals were immediately appointed to a ministerial portfolio without first developing an understanding of Parliament, and in their numbers.<sup>76</sup> Table 2 below details the external ministerial appointments made by Brown between 2007 and 2009.

**Table 2: External Ministers Appointed by Gordon Brown 2007–09<sup>77</sup>**

Minister	Position(s)	Expertise	Total time as Minister
Lord Malloch-Brown	Minister of State, Foreign and Commonwealth Office	Former diplomat	2 years 1 month
Lord Darzi of Denham	Parliamentary Under-Secretary, Department of Health	Surgeon	2 years 1 month
Lord Jones of Birmingham	Minister of State, Department for Business, Enterprise and Regulatory Reform	Former Director of Confederation of British Industry	1 year 4 months
Lord West of Spithead	Parliamentary Under-Secretary, Home Office	Former First Sea Lord	2 years 11 months
Baroness Vadera	Under Secretary of State, Department for International Development	Banker and government adviser	2 years 3 months

<sup>72</sup> Yong and Hazell, above n 2, 9, 25.

<sup>73</sup> Ibid 10–11, 30–5.

<sup>74</sup> Ibid 9, 30.

<sup>75</sup> Ibid 35.

<sup>76</sup> Ibid 30; Public Administration Select Committee, *Goats and Tsars*, above n 2, 8.

<sup>77</sup> Yong and Hazell, above n 2, 34–5.

Minister	Position(s)	Expertise	Total time as Minister
Lord Carter of Barnes	Under Secretary of State, Department for Business, Enterprise and Regulatory Reform	Businessman and government adviser	9 months
	Under Secretary of State, Department for Business, Innovation and Skills		
	Parliamentary Secretary of State, Cabinet Office		
	Under Secretary of State, Dept for Culture, Media and Sport		
Lord Myners	Parliamentary Under-Secretary, Dept for Business, Innovation and Skills	Businessman	1 year 10 months
	Parliamentary Secretary, Treasury		
Lord Davies of Abersoch	Minister of State, Foreign and Commonwealth Office	Businessman	1 year 3 months
Lord Mandelson	Minister of State, Dept for Business, Innovation and Skills	Former MP, Cabinet Minister	1 year 7 months
	Secretary of State, Dept for Business, Enterprise and Regulatory Reform		
Baroness Kinnock of Holyhead	President of the Council, Privy Council Office	Member of the European Parliament	11 months
	Minister of State, Foreign and Commonwealth Office		

The Goats were appointed to the House of Lords as life peers, thereby becoming accountable to that House.<sup>78</sup> While this ensured some level of accountability for the Ministers, it relied upon the existence of an unelected second chamber.<sup>79</sup> The practice

<sup>78</sup> Public Administration Select Committee, *Goats and Tsars*, above n 2, 22.

<sup>79</sup> Yong and Hazell, above n 2, 7.

has been criticised for reinforcing an undemocratic appointment process and resulting in peerages for life for external Ministers even if their term as a Minister was short lived.<sup>80</sup>

The UK experience reveals a number of strengths and challenges associated with the appointment of external Ministers. The size and complexity of modern government can mean that there is greater need for technocratic skills in ministerial portfolios.<sup>81</sup> There is also increasing recognition that politicians are being drawn from a shrinking pool of talent,<sup>82</sup> particularly given the rising number of career politicians without other expertise.<sup>83</sup> In the UK, there is growing acknowledgment that external ministerial appointments allow governments to access talent beyond this limited pool.<sup>84</sup> For example, in the case of Lord Digby Jones, it was recognised that his appointment facilitated much stronger linkages between government and business.<sup>85</sup> The range of expertise held by Brown's Goats, as illustrated by Table 2 above, demonstrates one of the potential advantages of external ministerial appointments.

Despite these advantages, a number of limitations emerged. Brown's Goats were often criticised for having a high failure rate based on their typically short time in office,<sup>86</sup> as revealed in Table 2. These 'failures' were attributable in part to a lack of political and parliamentary skills. There is evidence that the Goats struggled with the parliamentary function,<sup>87</sup> reflecting their lack of a political apprenticeship.<sup>88</sup> A recent report into these issues has recommended a number of reforms to address these problems, including formal induction processes, the setting of clear objectives for new Ministers and the possibility of mentoring.<sup>89</sup> There was also recognition that external Ministers who have both technocratic and transferrable political skills are most likely to be successful in managing the transition.<sup>90</sup>

## B Scotland

Under the *Scotland Act 1998* (UK), the First Minister of Scotland may, with the approval of the Queen and the agreement of Parliament, appoint Ministers from among the

<sup>80</sup> Public Administration Select Committee, *Goats and Tsars*, above n 2, 22–3.

<sup>81</sup> Yong and Hazell, above n 2, 7; Lord Turnbull quoted in Public Administration Select Committee, *Goats and Tsars*, above n 2, Ev 1; Sir John Major quoted in Public Administration Select Committee, *Goats and Tsars*, above n 2, Ev 36.

<sup>82</sup> Yong and Hazell, above n 2, 9, 14; Public Administration Select Committee, *Goats and Tsars*, above n 2, 9–10; Powell quoted in Public Administration Select Committee, *Goats and Tsars*, above n 2, Ev 1; Sir John Major quoted in Public Administration Select Committee, *Goats and Tsars*, above n 2, Ev 30.

<sup>83</sup> Yong and Hazell, above n 2, 9, 14; Public Administration Select Committee, *Goats and Tsars*, above n 2, 11–12; Professor King in Public Administration Select Committee, *Goats and Tsars*, above n 2, Ev 2.

<sup>84</sup> Yong and Hazell, above n 2, 14; Public Administration Select Committee, *Goats and Tsars*, above n 2, 13–14.

<sup>85</sup> John Willman, 'Ears and Eyes in Business for No 10', *Financial Times* (London), 8 February 2008, 3.

<sup>86</sup> Yong and Hazell, above n 2, 7.

<sup>87</sup> Ibid 7, 21; Public Administration Select Committee, *Goats and Tsars*, above n 2, 21.

<sup>88</sup> See Bagehot's theory of political apprenticeship, above n 32.

<sup>89</sup> Yong and Hazell, above n 2, 37, 39, 40.

<sup>90</sup> Ibid 85.

members of Parliament.<sup>91</sup> As a result, most Scottish Ministers are drawn from within Parliament so as to ensure that 'the Executive [is] fully accountable to the Parliament'.<sup>92</sup> However, the positions of Lord Advocate and Solicitor General for Scotland may be held by non-Parliamentarians, reflecting the 'lack of appropriately-qualified members who could be appointed Law Officers'.<sup>93</sup> The Lord Advocate is the principal legal advisor to the Scottish government and the Solicitor General is the Lord Advocate's deputy.<sup>94</sup>

Historically, the offices of the Lord Advocate and Solicitor General for Scotland were ministerial offices in the UK government. Under the *Scotland Act*, this ceased<sup>95</sup> and the Scottish Law Officers instead became members of the Scottish executive. The functions of the Scottish Law Officers include prosecuting crime, providing general advice to the First Minister and other Scottish Ministers, representing the Crown in civil proceedings, representing the public interest in litigation and scrutinising bills to ensure they are within the legislative competence of the Parliament.<sup>96</sup>

The Law Officers are appointed by the Queen on the First Minister's recommendation with the agreement of the Parliament, and may only be removed with the approval of Parliament.<sup>97</sup> Once appointed, they are considered to have the same status as members of Parliament. As a result, they may exercise any of the functions of Scottish Ministers<sup>98</sup> and may participate in parliamentary proceedings (but cannot vote).<sup>99</sup> Further, as a member of the executive, their actions are subject to scrutiny to ensure they are not incompatible with rights under the European Convention on Human Rights and European Community law.<sup>100</sup> Through their participation in parliamentary proceedings, the Law Officers may be questioned by members of Parliament about the exercise of their functions, ensuring a level of

<sup>91</sup> *Scotland Act 1998* (UK) c 46–7.

<sup>92</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 12 January 1998, vol 304, col 29 (Donald Dewar); United Kingdom, *Parliamentary Debates*, House of Lords, 17 June 1998, vol 590, col 1571 (Lord Sewel).

<sup>93</sup> Rodney Brazier, 'The Scottish Government' [1998] *Public Law* 212, 213.

<sup>94</sup> It is interesting to note that the UK Attorney General is generally a member of the House of Commons: House of Commons Constitutional Affairs Committee, *Fifth Report: Constitutional Role of the Attorney General* (2007).

<sup>95</sup> *Scotland Act 1998* (UK) c 48(6), sch 9.

<sup>96</sup> See generally J L Jamieson, 'Devolution and the Scottish Law Officers' (1999) 15 *Scots Law Times* 117. See also House of Commons Select Committee on Constitutional Affairs, *Evidence submitted by the Lord Advocate, Scotland* (April 2007).

<sup>97</sup> *Scotland Act 1998* (UK) c 48(1).

<sup>98</sup> *Ibid* c 52(3)–(4).

<sup>99</sup> *Ibid* c 27.

<sup>100</sup> *Ibid* sch 6; Tony Kelly, 'Advocate General for Scotland: Informal Consultation on Devolution Jurisdiction' (2010) 39 *Scots Law Times* 211, 211; United Kingdom, *Parliamentary Debates*, House of Lords, 28 October 1998, vol 593, col 1942 (Lord Drumadoon); Aidan O'Neill, 'Fundamental Rights and the Constitutional Supremacy of Community Law in the United Kingdom after Devolution and the Human Rights Act' [2002] *Public Law* 724, 726–7; Stephen Tierney, 'Convention Rights and the Scotland Act: Re-defining Judicial Roles' [2001] *Public Law* 38. See also *Starrs v Ruxton* [2000] SLT 42.

accountability. Further, a Law Officer must resign if the government loses the confidence of the Parliament.<sup>101</sup>

Following the introduction of the *Scotland Act*, the two Law Officers became members of the Scottish executive<sup>102</sup> and the Lord Advocate was appointed to Cabinet. This caused some public disquiet, particularly concerning how the Lord Advocate could reconcile his or her various roles as a 'politician, prosecutor and judge-maker'.<sup>103</sup> Concern was also expressed that the Lord Advocate could use the Cabinet role to influence policy without a popular mandate.<sup>104</sup> In 2007 the Lord Advocate was removed from Cabinet, signifying a move toward depoliticising the role and shifting its focus instead towards the prosecutorial function.<sup>105</sup> As a result, the Lord Advocate now only attends Cabinet meetings when required to provide legal advice. However, the Lord Advocate retains the right to address Cabinet.<sup>106</sup>

The appointment of Law Officers external to Parliament under the *Scotland Act* allows access to specific legal expertise that may be otherwise lacking. By providing the Law Officers with the status of members of Parliament (excluding the ability to vote), they are given the power to effectively fulfil their roles and are made subject to a degree of accountability and responsibility to Parliament. However, the depoliticising and reduction of the Law Officer role reflects the public disquiet in Scotland associated with unelected officials having a role in directing government policy.

## C Canada

As in the UK, there is no constitutional requirement that Canadian Ministers be appointed from Parliament. However, by convention, Ministers are generally members of that body. In Canada, external Ministers are appointed intermittently – only four have been appointed since 1990. External Ministers are typically appointed in anticipation of being elected into Parliament and most hold office for only a few months before their election (or, more unusually, appointment into a seat in the upper house, the Senate). In the event that they are not successful in obtaining an elected seat, most are removed from their ministerial post within days or weeks.<sup>107</sup> The exception to this trend was Andrew George Latta McNaughton, who retained his ministerial

<sup>101</sup> *Scotland Act 1998* (UK) c 48(2).

<sup>102</sup> *Ibid* c 44(1)(c).

<sup>103</sup> Christine O'Neill, *The Constitutional Position of the Lord Advocate* (1 March 2000) Journal Online <<http://www.journalonline.co.uk/Magazine/45-3/1000843.aspx>>. See also 'Honey, we Shrunk the Lord Advocate', *The Scotsman* (online), 3 October 2006 <[http://www.scotsman.com/news/scottish-news/edinburgh-east-fife/honey\\_we\\_shrunk\\_the\\_lord\\_advocate\\_1\\_1143014](http://www.scotsman.com/news/scottish-news/edinburgh-east-fife/honey_we_shrunk_the_lord_advocate_1_1143014)>; Liam McDougall, 'Call to Remove Lord Advocate from Cabinet Politics', *Sunday Herald* (Glasgow), 8 October 2006.

<sup>104</sup> O'Neill, above n 103.

<sup>105</sup> Scotland, *Parliamentary Debates*, 24 May 2007, col 105 (Alex Salmond); Robbie Dinwoodie, 'Salmond Keeps Angiolini as Lord Advocate – but Out of Cabinet', *Herald Scotland* (online), 23 May 2007 <<http://www.heraldscotland.com/salmond-keeps-angiolini-as-lord-advocate-but-out-of-cabinet-1.842280>>.

<sup>106</sup> Scotland, *Parliamentary Debates*, 24 May 2007, col 105 (Alex Salmond).

<sup>107</sup> Parliament of Canada, *Ministers Named from Outside Parliament* (18 May 2011) <<http://www.parl.gc.ca/Parlinfo/Compilations/FederalGovernment/OutOfParliamentMinisters.aspx?Language=E>>.

office for nearly six months after being defeated in a by-election in 1945. However, given McNaughton's ministry spanned the end of World War II, this exception is less noteworthy given the upheaval that characterised the era. Table 3 below provides the key statistics around external Ministers in Canada.

**Table 3: Canadian External Ministers 1867–2011<sup>108</sup>**

External Ministers appointed since 1867	169
Number defeated at election	19
Number appointed to Senate	6

While more unusual than being elected into the lower house of Parliament, external Ministers are occasionally appointed to the upper house within a few months of being appointed to a ministerial role. Members of the Senate are appointed by the Governor General on the advice of the Prime Minister<sup>109</sup> and hold the position until the age of 75.<sup>110</sup> Unlike the UK, there are only 105 upper house seats,<sup>111</sup> which limits the government's ability to appoint external Ministers to the Senate to situations in which a seat becomes available.<sup>112</sup> In addition, Senate seats are divided amongst the Canadian provinces and territories, and Senators must reside in the province for which they are appointed,<sup>113</sup> further limiting flexibility.<sup>114</sup> Finally, in Alberta elections are held to nominate 'Senators-in-waiting', who act as nominees for the province's Senate seats. While the Prime Minister is not bound to accept these nominations, the Conservative party has endorsed the notion of an elected Senate.<sup>115</sup> To date, only two elected Senators have been appointed: Stanley Waters in 1990 and Bert Brown in 2007.

The most recent example of an external ministerial appointment to the Senate is that of Michael Fortier, who was appointed as Minister of Public Works and Government Services on 6 February 2006 and appointed as a Senator on 27 February 2006. In his maiden speech, Fortier noted that '[i]n' order to be accountable to Parliament, the Prime Minister appointed me to the Senate' following his appointment as a Minister.<sup>116</sup> Although appointed to the Senate, there was an expectation that Fortier would later run for the House of Commons, with the Prime Minister describing

<sup>108</sup> Ibid.

<sup>109</sup> *Constitution Act 1867* (Imp), 30 & 31 Vict, c 24 ('*Constitution Act 1867*').

<sup>110</sup> Ibid c 29.

<sup>111</sup> Ibid c 21.

<sup>112</sup> However, see c 26 of the *Constitution Act 1867* which allows for the appointment of 4 to 8 additional Senators in exceptional circumstances. This provision has only been successfully used once: see Peter W Hogg, *Constitutional Law of Canada* (Thomson, 5th revised ed, 2009) 9-17.

<sup>113</sup> *Constitution Act 1867* c 23(5).

<sup>114</sup> Ibid c 22.

<sup>115</sup> 'Canada Politics: Cutting Corners', *EIU ViewsWire* (online), 10 February 2006; 'Canada: Senate Reform may be on Harper's Agenda', *Oxford Analytica Daily Brief Service* (online), 7 April 2006. However, note that Conservative Prime Minister Stephen Harper, while endorsing an elected Senate, then appointed Michael Fortier to the Senate in 2006.

<sup>116</sup> Canada, *Parliamentary Debates*, Senate, 9 May 2006, 258 (Michael Fortier).

his Senate appointment as 'temporary'.<sup>117</sup> At the time, the Prime Minister said that the appointment was a 'flexible' way to deal with government realities, including the need to have a Cabinet Minister from Montreal.<sup>118</sup> Fortier resigned from the Senate to stand for the House of Commons in 2008 and was defeated in the election. He ceased to be a Minister soon thereafter.<sup>119</sup> Fortier's appointment generated significant disquiet in Canada, particularly because the Prime Minister had previously advocated an elected Senate.<sup>120</sup> Further, it is unclear how much benefit the government received from the appointment.<sup>121</sup>

In recent times, external Ministers have not played a major role in Canadian politics. This is in part because attempts to appoint external Ministers have had negative political repercussions, particularly if viewed as an attempt to circumvent the democratic process.<sup>122</sup> Unlike the UK, it appears that the Canadian electorate is strongly adverse to ministerial appointments of unelected individuals — especially when those individuals are not likely to obtain an elected parliamentary seat in the near future. It is likely that Australia's political sensitivities reflect those of Canada more closely than those of the UK. As a result, any Australian process would need to be managed extremely carefully, with strong consideration given to the democratic implications.

#### IV AUSTRALIAN CONSTITUTIONAL FRAMEWORK

In this section we review Australian constitutional provisions and practice to examine whether or how Australia might adopt external ministerial appointments at the Federal, State and Territory level.

##### A Commonwealth, State and Territory constitutional provisions

Australian ministerial appointments are regulated by the Federal, State and Territory constitutions. The relevant provisions are detailed in Table 4 below.

As this Table demonstrates, the constitutions of New South Wales, Queensland and Western Australia do not expressly require Ministers to be members of Parliament. In these three States, external ministerial appointments are possible without

<sup>117</sup> 'Cabinet Includes Defector and Senator-to-be', *CBC News* (online), 6 February 2006, <<http://www.cbc.ca/news/canada/story/2006/02/06/emerson-jumps060206.html>>.

<sup>118</sup> Ibid. See also 'Canada Politics: Cutting Corners', above n 115.

<sup>119</sup> Parliament of Canada, *Fortier, The Hon Michael, P.C.* <<http://www.parl.gc.ca/Parlinfo/Files/Parliamentarian.aspx?Item=eba06c09-3978-475a-92a4-0c80a0ede435&Language=E>>.

<sup>120</sup> 'Canada Politics: Cutting Corners', above n 115; Paul Wells, 'Guergis, Bernier, and the PM's secrets' (2010) 123(6) *Maclean's* 22, 22-3; Andrew Coyne, 'The Issues: Time for a Truth in Politics Act: There's a Way to Stop Politicians from Lying, or at Least Reward the Honest Ones' (2011) 124(14) *Maclean's* 26, 26; Murdoch Davis, 'The West is In, and Already it Feels Offended', *The Toronto Star* (Toronto), 11 February 2006, 5; L Ian Macdonald, 'A Staggering Start: Stephen Harper Used up a Lot of his Political Capital by Appointing a Senator and a Liberal Defector to Cabinet', *Montreal Gazette* (Montreal), 8 February 2006, 25.

<sup>121</sup> See, eg, Wells, above n 120, 22-3.

<sup>122</sup> See, eg, 'Canada Politics: Cutting Corners', above n 115; Wells, above n 120, 22-3; Coyne, above n 120, 26; Davis, above n 120, 5; Macdonald, above n 120, 25.

constitutional amendment. In contrast, the constitutions for the Commonwealth, Victoria, Tasmania, South Australia, Northern Territory, Australian Capital Territory and Norfolk Island specify that Ministers must be members of Parliament. As a result, external ministerial appointments in these jurisdictions would require constitutional or legislative change.

At the State level, constitutional change could be effected by an Act of State Parliament as constitutional provisions do not entrench the status of Ministers in any State. At the Territory level, change would require an Act of Federal Parliament passed under the territories power in s 122 of the *Australian Constitution*. As a result, reform to allow for external ministerial appointments is readily achievable in Victoria, Tasmania, South Australia and the Territories. In contrast, the *Commonwealth Constitution* is relatively inflexible, with only 8 of 44 referendums to change the Constitution succeeding since 1901, and none at all since 1977.<sup>123</sup>

**Table 4: Federal, State and Territory Constitutional Provisions Regulating Ministerial Appointments**

<b>Jurisdiction</b>	<b>Relevant provision</b>	<b>Requirements</b>	<b>Procedure to change</b>
Commonwealth	<i>Australian Constitution</i> s 64	No Minister shall hold office for more than three months unless they are a member of federal Parliament.	<i>Australian Constitution</i> s 128 – vote of Parliament and referendum.
Victoria	<i>Constitution Act 1975</i> (Vic) s 51	No Minister shall hold office for more than three months unless they are a member of Parliament.	<i>Constitution Act 1975</i> (Vic) s 18 – Act of State Parliament.
New South Wales	<i>Constitution Act 1902</i> (NSW) ss 35C, 35E	No express requirement that Ministers be members of Parliament.	<i>Constitution Act 1902</i> (NSW) ss 7, 7A, 7B – Act of State Parliament.
Queensland	<i>Constitution of Queensland 2001</i> (Qld) s 23, 43	No express requirement that Ministers be members of Parliament. <sup>124</sup>	Act of State Parliament.
Tasmania	<i>Constitution Act 1934</i> (Tas) s 8B	Ministers must be a member of Parliament.	Act of State Parliament.

<sup>123</sup> See generally George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (University of New South Wales Press, 2010).

<sup>124</sup> It is arguable that s 23 imposes an implied requirement that Ministers be appointed from the members of the Legislative Assembly.

Jurisdiction	Relevant provision	Requirements	Procedure to change
South Australia	<i>Constitution Act 1934</i> (SA) s 66	No Minister shall hold office for more than three months unless they are a member of Parliament.	<i>Constitution Act 1934</i> (SA) s 8 — Act of State Parliament.
Western Australia	<i>Constitution Acts Amendment Act 1899</i> (WA) s 43	Must be at least one Minister in the upper house. Otherwise, no express requirement that Ministers be members of Parliament.	<i>Constitution Act 1889</i> (WA) s 73 — Act of State Parliament.
Northern Territory	<i>Northern Territory (Self-Government) Act 1978</i> (Cth) s 36	Ministers must be members of Legislative Assembly.	Act of Federal Parliament.
Australian Capital Territory	<i>Australian Capital Territory (Self-Government) Act 1988</i> (Cth) s 41	Ministers must be members of Legislative Assembly.	Act of Federal Parliament.
Norfolk Island	<i>Norfolk Island Act 1979</i> (Cth) s 13	Ministers must be members of Legislative Assembly.	Act of Federal Parliament.

## B Constitutional practice in Australia

Despite the relative ease with which external Ministers could be appointed in the States and Territories, there has been only limited inclination to do so. As in the UK, constitutional convention in Australia dictates generally that Ministers be appointed from within Parliament, thereby reflecting a strict view of the requirements of responsible government. However, like the notion of responsible government, constitutional conventions are capable of changing in response to contemporary circumstances and changing political values, as has been seen in the UK.<sup>125</sup> As well-established habits and practices,<sup>126</sup> conventions are capable of change if the political will exists to do so. A recent example relates to the convention that the opposition leader shall be a member of Parliament. In April 2011 the Lord Mayor of Brisbane, Campbell Newman, was chosen by the Liberal National Party opposition in the Queensland Parliament as its leader. He held that role until he was elected to the Queensland Parliament and became Premier of Queensland as result of the March 2012 State election.

<sup>125</sup> L J M Cooray, *Conventions, the Australian Constitution and the Future* (Legal Book, 1979) 5.

<sup>126</sup> G S Reid, 'Commentaries' in G Evans (ed) *Labor and the Constitution: Essays and Commentaries on Constitutional Controversies of the Whitlam Years in Australian Government* (Heinemann, 1977) 244.

### 1 *Historical Australian constitutional practice*

The appointment of external Ministers is not unknown in Australia. Prior to Federation, external Ministers were appointed as members of the Queensland government.<sup>127</sup> In one case, George Raff was appointed as a Minister without portfolio in the Herbert government in a period of turbulent political and economic circumstances. In July 1866, Premier Arthur Macalister resigned after a dispute with the Governor over the issuing of inconvertible bank-notes as a response to a financial crisis. The Governor then invited former Premier Robert Herbert and Raff to form a temporary committee to run the affairs of government, despite Raff not being a member of Parliament at the time. In Parliament, Herbert described this arrangement as 'assist[ing] the Governor in managing public affairs until a new Government was... appointed'.<sup>128</sup> Raff continued as a Minister without portfolio until November 1866.<sup>129</sup> The Governor's actions in appointing Herbert and Raff were unpopular with politicians, the media and the public and were regarded as 'overstepp[ing] the limits of responsible government'.<sup>130</sup> However, as Bernays notes, the 'circumstances [in this case] were exceptional'.<sup>131</sup>

External Ministers have also been appointed at the federal level of government using s 64 of the *Australian Constitution*. Two members of the first federal ministry never held seats in the Commonwealth Parliament: the first, Sir Neil Elliott Lewis, was appointed as a Minister without portfolio and chose not to stand for election, relinquishing his ministerial position after four months;<sup>132</sup> the second, Sir James Dickson, was appointed as Minister of Defence but died after 10 days in office, preventing him from standing for election.<sup>133</sup> Other than in these two instances, s 64 has been of limited utility in bringing external expertise into the federal ministry.

<sup>127</sup> *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 17 September 1897, 796 (James Walker).

<sup>128</sup> Charles A Bernays, *Notes on the Political History of Queensland - 1859-1917* (Government Printer, 1918) 203.

<sup>129</sup> Noeline V Hall, *Raff, George (1815-1889)*, Australian Dictionary of Biography, <<http://adb.anu.edu.au/biography/raff-george-4444/text7227>>. See also B A Knox, *Herbert, Sir Robert George Wyndham (1831-1905)*, Australian Dictionary of Biography <<http://adb.anu.edu.au/biography/herbert-sir-robert-george-wyndham-3757/text5921>>.

<sup>130</sup> R B Joyce, *Bowen, Sir George Ferguson (1821-1899)*, Australian Dictionary of Biography <<http://adb.anu.edu.au/biography/bowen-sir-george-ferguson-3032/text4451>>. See also Bernays, above n 128, 203; Hall, above n 129.

<sup>131</sup> Bernays, above n 128, 204.

<sup>132</sup> Scott Bennett, *Lewis, Sir Neil Elliott (1858-1935)*, Australian Dictionary of Biography, <<http://adb.anu.edu.au/biography/lewis-sir-neil-elliott-7188>>. Section 64 of the *Australian Constitution*, which provides a three month window in which Ministers may not be a member of Parliament, only commenced after the first general Commonwealth election, which was held on 29-30 March 1901. As a result, Sir Neil Elliott Lewis only held this position for a short period under s 64 before resigning.

<sup>133</sup> D. D. Cuthbert, *Dickson, Sir James Robert (1832-1901)*, Australian Dictionary of Biography, <<http://adb.anu.edu.au/biography/dickson-sir-james-robert-5979>>.

## 2 Contemporary Australian constitutional practice

The appointment of Bob Carr as Minister for Foreign Affairs following his appointment as a Senator for New South Wales<sup>134</sup> reflects a distinct shift in Australian ministerial appointments. Using the casual vacancy provisions, the Labor government was able to bring external expertise into its Cabinet in a similar fashion to the appointment of external Ministers in Canada.<sup>135</sup> Interestingly, s 64 was not used to bring Carr into the ministry prior to his Senate appointment.

Some commentators praised Carr's appointment, describing him as a 'professional' Minister whose 'long record of understanding international affairs' would help to promote Australia's international interests.<sup>136</sup> However, the appointment was criticised by former Liberal Party federal Treasurer Peter Costello, who said: 'From now on, the Prime Minister can choose any minister from outside Parliament so long as her political party can manufacture a Senate vacancy to accommodate the new entrant. The only limit is the number of senators willing to retire at the disposal of the party machine.'<sup>137</sup> It is not conceivable that the Carr appointment will herald an era of unrestrained external Senate appointments. If nothing else, serving Senators are unlikely to fall on their sword to provide a vacancy for an incoming Minister. The appointment of external Ministers in these circumstances is more likely to continue to occur where a vacancy occurs fortuitously.

Other measures have been used in contemporary State politics to introduce external expertise into ministerial deliberations. In South Australia the Rann Labor government appointed people from outside of Parliament to sit on committees within the Cabinet system. Premier Mike Rann appointed Robert Champion de Crespigny, a prominent South Australian businessman in the mining sector, and Monsignor David Cappel, a leader in the Roman Catholic church, to the Executive Committee of Cabinet, a high level committee responsible for oversight of the South Australian Strategic Plan.<sup>138</sup> As noted above, the *Constitution Act 1934* (SA) s 66 prevents a Minister from holding office for more than three months unless they are a member of Parliament. Rather than seeking to amend this provision, the government adopted a 'fall-back position'<sup>139</sup> under which the appointees exercised 'considerable de facto executive authority' due to their close ties and access to Cabinet.<sup>140</sup> Like ministerial appointments, these positions were subject to the rules of Cabinet confidentiality and other ministerial

<sup>134</sup> Griffiths, above n 1.

<sup>135</sup> See Part IIIC above.

<sup>136</sup> ABC Radio National, 'Bob Carr "the Professional" Foreign Minister', *The World Today*, 22 March 2012 (Linda Jakobson) <<http://www.abc.net.au/worldtoday/content/2012/s3461035.htm>>.

<sup>137</sup> Peter Costello, 'Labor's Carr Trick Brings Australia within a Whisker of US Cabinet Model', *Sydney Morning Herald* (Sydney), 14 March 2012, 9.

<sup>138</sup> Geoff Anderson and Haydon Manning, 'The South Australian Election: Implications for Democracy in the Festival State' (Discussion Paper No 12, Democratic Audit of Australia, April 2006) 7; Hawker, above n 4, 9–10.

<sup>139</sup> Peter Beattie, 'Rann Leaves us with Good Ideas', *The Australian* (Sydney), 8 October 2011, 22.

<sup>140</sup> Anderson and Manning, above n 138, 7; Roslyn Ann Averis, *Averting the Crisis – or Avoiding the Compromise? A Regulation Approach to Social Inclusion Policies and Practices in the Australian Context* (PhD Thesis, The University of Adelaide, 2008) 28.

standards. However, they were not subject to parliamentary accountability mechanisms.

Hawker has described Rann's appointments as a way of 'dealing creatively and constitutionally' with a lack of talent in Parliament.<sup>141</sup> The appointments were also generally endorsed by the media, being described in one editorial as a 'masterstroke'.<sup>142</sup> It appears that the appointments have also been beneficial for South Australia – de Crespigny's initiative to accelerate mining exploration in South Australia led to a tenfold increase in mining explorations in five years.<sup>143</sup> More generally, de Crespigny's appointment allowed the South Australian government to forge stronger linkages with business.<sup>144</sup> In his role, Cappelletto led reviews of South Australia's mental health system and disability provisions and spearheaded a Social Inclusion Initiative.<sup>145</sup>

The appointments also generated political controversy. In 2007, de Crespigny was involved in a company which was reportedly seeking to establish a nuclear power plant in South Australia. While publically denied by Rann, suggestions were made that de Crespigny might have obtained information to assist the bid from his role in the Executive Committee of Cabinet.<sup>146</sup> Questions were also raised regarding Cappelletto's appointment, with critics arguing that it was inappropriate for a senior member of the Catholic Church to have such a high level of influence over government policy.<sup>147</sup> On the other hand, the Rann government was also criticised for failing to heed Cappelletto's advice in relation to Aboriginal crime gang problems,<sup>148</sup> and some commentators have

<sup>141</sup> Hawker, above n 4, 9.

<sup>142</sup> Editorial, 'Good Premier who Fell Short of Greatness', *The Advertiser* (Adelaide), 20 October 2011, 20.

<sup>143</sup> Hawker, above n 4, 10; Christopher Pearson, 'How the West is Being Lost', *The Australian* (Sydney), 11 October 2008, 28.

<sup>144</sup> John Colvin, 'Political Gene Pool Needs Outsiders', *The Australian* (Sydney), 3 September 2010, 27.

<sup>145</sup> Catherine Hockley, 'Cappelletto Steps Down as Commissioner for Social Inclusion to Head Mental Health Commission', *The Advertiser* (online), 7 September 2011 <<http://www.adelaidenow.com.au/news/south-australia/david-cappelletto-to-head-commission/story-e6frea83-1226130986795>>; Letters to the Editor, 'Letters: David Cappelletto Contribution an Ongoing Bone of Contention', *The Advertiser* (Adelaide), 9 September 2011, 22.

<sup>146</sup> 'Rann Denies Cabinet Stint Helped Company Plan Power Plant', *ABC News* (online), 7 March 2007 <<http://www.abc.net.au/news/2007-03-07/rann-denies-cabinet-stint-helped-company-plan/2211094>>; George Lekakis and Cameron England, 'Bid to Build Nuclear Power Plant in SA', *The Advertiser* (Adelaide), 27 February 2007, 2.

<sup>147</sup> ABC Local Radio, 'Church-State Links in SA Questioned', *The World Today*, 1 February 2006 <<http://www.abc.net.au/worldtoday/content/2006/s1559797.htm>>.

<sup>148</sup> Pia Akerman, 'Action on Gang of 49 "Going Backwards"', *The Australian* (Sydney), 19 October 2009, 7; Michael Owen, 'David Cappelletto Quits Role with SA Government to Take Position in Canberra', *The Australian* (online), 7 September 2011 <<http://www.theaustralian.com.au/national-affairs/david-cappelletto-quits-role-with-sa-government-to-take-position-in-canberra/story-fn59niix-1226130925036>>.

questioned the level of influence Cappelletti actually had, with his position being described as 'window dressing'.<sup>149</sup>

At a broader level, the nature of the appointments, and the fact that they were not subject to questioning in Parliament, meant that Parliament was unable to hold de Crespigny or Cappelletti to account for their performance and conduct. This became particularly pertinent when Cappelletti was embroiled in a 'spending scandal' in June 2011 related to his expenditure on travel.<sup>150</sup> This had serious implications for responsible government given the level of influence de Crespigny and Cappelletti had over government policy. By creating a 'fall-back position' that avoided the constitutional limitations on external ministerial appointments, South Australian governance also became less accountable to the electorate.

Despite these challenges and limitations, Rann's appointments from outside Parliament have generally been viewed as a success in political circles. In 2006, NSW Premier Morris Iemma announced that he, too, would appoint two key business figures to a new Cabinet Standing Committee on State Plan Performance.<sup>151</sup> In November 2006, John Stuckey, the former head of McKinsey Consulting, and Professor Brian McCaughan, a cardiothoracic surgeon, were appointed to the Committee.<sup>152</sup> Nothing has been reported about the record and effectiveness of these appointees, with the government refusing requests for such information on the basis of Cabinet confidentiality.<sup>153</sup> In this case again, government became less transparent and accountable as a result of the appointments.

### 3 *Potential Australian constitutional practice*

The potential to draw on external ministerial expertise may be particularly attractive in Tasmania and the self-governing Territories given the small size of their Parliaments. This is especially pertinent in the Australian Capital Territory, which has a Legislative Assembly of 17 members and no upper house. A majority government in that Territory could have as few as nine members from which to form a ministry. The current minority government, which is more typical given the Australian Capital Territory's multi-member electorates, has only seven members. At the same time, an Australian Capital Territory government must manage most of the same portfolios as a State government. As a result, five of the seven members of the current Gallagher Labor government must, as Ministers, cover the following portfolios:

<sup>149</sup> Letters to the Editor, above n 145; Bryan Little, 'Cappelletti Vows to Get Jobs Done', *The Advertiser* (Adelaide), 8 September 2011, 13.

<sup>150</sup> David Nankervis, 'Social Inclusion Commissioner Monsignor David Cappelletti in Spending Scandal', *The Advertiser* (online), 18 June 2011 <<http://www.adelaidenow.com.au/news/south-australia/high-priest-of-airline-travel/story-e6frea83-1226077685794>>.

<sup>151</sup> Imre Salusinszky, 'Iemma joins Rann to Build Kitchen Cabinet', *The Australian* (Sydney), 14 November 2006, 6; NSW Government, *NSW State Plan: A New Direction for NSW* (November 2006), 142 <[http://web.archive.org/web/20070207162458/http://www.nsw.gov.au/StatePlan/pdf/State\\_Plan\\_complete.pdf](http://web.archive.org/web/20070207162458/http://www.nsw.gov.au/StatePlan/pdf/State_Plan_complete.pdf)>.

<sup>152</sup> Letter from Graeme Head to Russel Keith, 14 July 2008 <[http://www.parliament.nsw.gov.au/prod/parlament/committee.nsf/0/38a29e3a87e02709ca2574030003c49a/\\$FILE/Follow-up%20response%20fm%20Dept%20of%20Premier%20&%20Cabinet.pdf](http://www.parliament.nsw.gov.au/prod/parlament/committee.nsf/0/38a29e3a87e02709ca2574030003c49a/$FILE/Follow-up%20response%20fm%20Dept%20of%20Premier%20&%20Cabinet.pdf)>.

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

**Table 5: Responsibilities of the Australian Capital Territory Ministry<sup>154</sup>**

Minister	Ministerial Portfolios
Katy Gallagher	Chief Minister Minister for Health Minister for Territory and Municipal Services
Andrew Barr	Deputy Chief Minister Treasurer Minister for Economic Development Minister for Tourism, Sport and Recreation
Simon Corbell	Attorney General Minister for Police and Emergency Services Minister for the Environment and Sustainable Development
Joy Burch	Minister for Community Services Minister for Ageing Minister for Multicultural Affairs Minister for Women Minister for the Arts
Chris Bourke	Minister for Gaming and Racing Minister for Education and Training Minister for Industrial Relations Minister for Corrections Minister for Aboriginal and Torres Strait Islander Affairs

The challenge is even starker for the Australian Capital Territory opposition, which has even fewer members to cover these same portfolios. The extent of these multiple demands means that some areas are inevitably afforded less weight and may not be provided with sufficient ministerial attention.<sup>155</sup> Further, in a government of seven members, with five Ministers, there is little or no backbench to provide future ministerial talent or, in the event a Minister fails to perform or resigns, to fill an empty ministerial role.<sup>156</sup>

These issues are even more pertinent in the case of Norfolk Island, where the Legislative Assembly consists of only nine members, three of which hold positions on the Executive Council.<sup>157</sup> Given the Legislative Assembly's wide-ranging powers to make laws under the *Norfolk Island Act 1979* (Cth), the small size of the Legislative Assembly places significant pressure on the time and expertise of existing members. In

<sup>154</sup> *Ministerial Responsibilities - Seventh Assembly* (22 November 2011) ACT Legislative Assembly <<http://www.legassembly.act.gov.au/downloads/ministry.pdf>>.

<sup>155</sup> See, eg, George Williams, 'Time for New Numbers for the ACT', *The Canberra Times* (Canberra), 8 November 2008, B02.

<sup>156</sup> Ibid.

<sup>157</sup> The Legislative Assembly of Norfolk Island, *Executive Council (the Norfolk Island Government)* <<http://www.norfolkislandgovernment.com/assemblymembers/governmentministers.html>>.

these contexts, external Ministers might play a useful role in supplementing the pool of ministerial talent.

## V REFORM OPTIONS

The foregoing analysis has demonstrated that external Ministers are a viable and potentially useful addition to the Australian political landscape, particularly in the Territories where there are few parliamentary members. Further, the Carr appointment demonstrates how Australian governments may seek access to expertise beyond existing ministerial talent. As a result, it is worthwhile to consider how an Australian jurisdiction, if minded to adopt external ministerial appointments, might proceed to do so. This section examines the processes and limitations that could be applied to ensure the effective accountability of external Ministers. We initially focus on the States and Territories, given the greater ease with which such appointments may be introduced in those jurisdictions, and then consider the federal case.

### A States and Territories

#### 1 *Appointment and removal*

At the State level, Ministers are appointed by the Governor on the advice of the Premier. Ministers then hold office until a change of government or removal by the Governor on the Premier's advice.<sup>158</sup> Similarly, in the Northern Territory and Norfolk Island, Ministers are appointed and dismissed by the Administrator (by convention, acting on the advice of the Chief Minister).<sup>159</sup> In the Australian Capital Territory, which lacks a Governor or Administrator, Ministers are appointed and dismissed directly by the Chief Minister.<sup>160</sup>

External ministerial appointments are likely to be made to meet skill and expertise gaps in government. The person likely to have the best understanding of these gaps is the Premier or Chief Minister. The most appropriate appointment process for external Ministers would continue to give the Premier or Chief Minister ultimate control over external ministerial appointments. Consequently, external Ministers should be appointed in the same way as other Ministers according to the established processes in each State and Territory. The Premier or Chief Minister will also be in the best position to determine whether a Minister warrants removal from their position. Hence, the existing removal processes for Ministers are also appropriate for external Ministers.

#### 2 *Accountability*

The core tenet of responsible government is that there exists a line of accountability from the people (who elect Members of Parliament) to the Executive (which holds office for so long as it retains the confidence of Parliament).<sup>161</sup> Ministers who sit in Parliament are made accountable through participation in question time,

<sup>158</sup> See, eg, *Constitution Act 1975* (Vic) s 87B; *Constitution Act 1902* (NSW) ss 35C, 35E; *Constitution of Queensland 2001* (Qld) s 43; *Constitution Act 1934* (SA) s 65; *Constitution Acts Amendment Act 1899* (WA) s 43.

<sup>159</sup> *Norfolk Island Act 1979* (Cth) s 13; *Northern Territory (Self-Government) Act 1978* (Cth) s 36.

<sup>160</sup> *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 41.

<sup>161</sup> Galligan, above n 10, 103. See also Hamer, above n 9, 6.

parliamentary debates and committees and the potential for no-confidence motions. To ensure consistency with the conventions of responsible government, it is essential to establish accountability mechanisms to ensure proper oversight of external Ministers.

International experience reveals a number of potential models for ensuring proper accountability of Ministers appointed from outside Parliament. In the UK and Canada, external Ministers may be appointed to the upper house of Parliament, thereby becoming subject to the same accountability mechanisms as other members of Parliament.<sup>162</sup> While this ensures accountability for external Ministers, it relies upon the existence of an unelected second chamber.<sup>163</sup> Until recently, this arrangement would not have been considered in the Australian context. However, the Carr appointment has flagged the potential for governments to make greater use of casual vacancies to appoint external Ministers to an upper house. The States and Territories that use an appointment process to fill casual vacancies, and thus where this approach might be an option, are New South Wales, Victoria, South Australia and, in exceptional circumstances, the Legislative Assembly of the Australian Capital Territory.<sup>164</sup> While casual vacancies could be used to appoint external Ministers, this relies on a vacancy becoming available, which is not a regular or predictable occurrence. Further, the requirement that vacating members be replaced by someone from the same political party<sup>165</sup> limits the scope for this type of procedure to be used by governments. Finally, it is possible that this option would not be popular with the Australian electorate: using an appointment process to select members of Parliament sits uneasily with Australia's democratic traditions and heritage. While an occasional external appointment via a casual vacancy might not meet with public disapproval, it is likely to cause some consternation if it becomes a regular occurrence. As a result, it is worthwhile to consider other models of accountability.

In contrast to the model in the UK and Canada, external Ministers in Scotland are members of the Executive<sup>166</sup> and are considered to have the same status as members of Parliament. As a result, they may exercise any of the functions of Scottish Ministers<sup>167</sup> and may participate in parliamentary proceedings, but cannot vote.<sup>168</sup> Through their participation in parliamentary proceedings, external Ministers may be questioned about the exercise of their functions and can inform Parliament about developments in their portfolio, ensuring a level of accountability. This model is more suited to the Australian context as it allows external Ministers to be accountable to Parliament while not actually requiring their appointment to that body. It is also consistent with the models separately proposed by Hawker and former Prime Minister Bob Hawke.<sup>169</sup> In

<sup>162</sup> Public Administration Select Committee, *Goats and Tsars*, above n 2, 22.

<sup>163</sup> Yong and Hazell, above n 2, 7.

<sup>164</sup> *Constitution Act 1902* (NSW) s 22D; *Constitution Act 1934* (SA) s 13; *Constitution Act 1975* (Vic) s 27A. In the Australian Capital Territory, if a vote recount is not possible, the vacancy will be filled by a person from the same political party as the vacating Member, as selected by the Legislative Assembly: *Electoral Act 1992* (ACT) s 195.

<sup>165</sup> *Constitution Act 1934* (SA) s 13(5); *Constitution Act 1975* (Vic) s 27A(3)–(4); *Constitution Act 1902* (NSW) s 22D(4).

<sup>166</sup> *Scotland Act 1998* (UK) c 44(1)(c), 46.

<sup>167</sup> *Ibid* c 52(3)–(4).

<sup>168</sup> *Ibid* c 27.

<sup>169</sup> Hawke, above n 3, 24; Hawker, above n 4, 10–11.

their models, external Ministers would also be subject to ministerial codes of conduct, thereby providing a further form of accountability and scrutiny.<sup>170</sup>

The Scottish legislature is unicameral. In the Australian setting, bicameral legislatures (except in Queensland and the self-governing Territories) complicate the issue of accountability. Traditional models of responsible government suggest that Ministers should generally reside in the lower (elected) house of Parliament. However, there is now clear recognition and practice that Ministers may also sit in an elected upper house.<sup>171</sup> Further, there has been judicial acknowledgement of the role of the upper house in securing government accountability.<sup>172</sup>

In the Australian setting, it may be useful for external Ministers to be appointed as 'floating' Ministers with the ability to speak and participate in both houses of Parliament but holding membership of neither house.<sup>173</sup> This would allow external Ministers to be accountable to both houses and to contribute their expertise to hearings in both arenas. In the event Parliament or a parliamentary committee wished an external Minister to answer questions or contribute to discussion, it could request their attendance at question time or during debate. Similarly, the Minister themselves could attend Parliament of their own initiative. It has been argued in the UK that Ministers need to be 'rooted somewhere' to become integrated into the ministerial team.<sup>174</sup> If Australia were to adopt a model of 'floating' Ministers, governments would need to be mindful to ensure that sufficient support structures were in place to integrate external Ministers into the executive team.

A further mechanism for ensuring the accountability of external Ministers would be to subject potential appointees to pre-appointment hearings in Parliament. Pre-appointment hearings could allow for scrutiny of the ministerial candidate and their suitability for the position<sup>175</sup> and ensure parliamentary participation in the process of external appointments.<sup>176</sup> Pre-appointment hearings have been introduced in the UK for senior public service appointments. Hearings are conducted by the relevant departmental Select Committee in the House of Commons and culminate in a report either endorsing or expressing reservations about the appointment. The Select Committee does not have the ability to vote on or veto an appointment and the government retains the ability to make the appointment despite a negative report.<sup>177</sup> However, the hearings are influential with evidence from the UK suggesting that most candidates would not accept an appointment following a negative report.<sup>178</sup>

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<sup>170</sup> See, eg, Hawker, above n 4, 10–11.

<sup>171</sup> Cf Yong and Hazell, above n 2, 19–20.

<sup>172</sup> *Egan v Willis* (1998) 195 CLR 424; *Egan v Willis* (1996) 40 NSWLR 650.

<sup>173</sup> Yong and Hazell, above n 2, 45; Public Administration Select Committee, *Goats and Tsars*, above n 2, 22.

<sup>174</sup> Yong and Hazell, above n 2, 45.

<sup>175</sup> *Ibid* 20, 44.

<sup>176</sup> See, eg, Public Administration Select Committee, *Goats and Tsars*, above n 2, 16.

<sup>177</sup> See Yong and Hazell, above n 2, 20.

<sup>178</sup> *Ibid*.

The UK Cameron government has rejected extending pre-appointment hearings to external Ministers.<sup>179</sup> This may reflect concerns regarding the operation of pre-appointment hearings, including that they could limit the discretion of the government to choose its own Cabinet.<sup>180</sup> Further, pre-appointment hearings could become an arena for political point scoring and grandstanding, rather than an effective accountability mechanism. Indeed, there is some concern that good candidates for external ministerial positions would be unwilling to subject themselves to a pre-appointment hearing, thereby depriving governments of the very expertise that the position is intended to provide.<sup>181</sup> The controversy and politicisation generated by pre-appointment hearings in the United States for executive and judicial members also suggests that pre-appointment hearings are unlikely to be a beneficial scrutiny mechanism in Australia for external ministerial appointments.

### 3 Limitations

It is also important to consider what limitations, if any, should be placed on external ministerial appointments. First, should the number of external Ministers be capped?<sup>182</sup> Hawker proposes that external Ministers should be limited to 20% of a ministry.<sup>183</sup> Similarly, Hawke advocates a 25% cap.<sup>184</sup> Imposing an upper limit on the number of external Ministers would ensure that Cabinet is still predominately drawn from parliamentary members, thereby maintaining the representative nature of the body and a clear link to an electoral mandate for its decisions. However, specifying caps or quotas may impose an arbitrary limit on the number of external Ministers that would not necessarily represent or accommodate the specific needs of the government at the time.

Given the need to maintain representative and responsible government, a cap or quota is desirable. If Hawker's quota were adopted, six external Ministers could be appointed in a ministry with 30 members (the size of the current Federal ministry). At the other end of the spectrum, this would allow for one external Minister to be appointed in the current ACT ministry. Whether a particular cap is appropriate will depend on the size of the government and purposes for which the appointments are being made.

It is also possible to limit external ministerial appointments to positions that require specialist expertise, as is the case in Scotland. However, this assumes that it is possible to predict the forms of expertise required by successive governments. It seems likely that the challenges facing modern governments will continue to evolve, posing a need for new areas of expertise. Further, it is impossible to predict what skills and

<sup>179</sup> Ibid; Public Administration Select Committee, *Government Responses to the Committee's Eighth and Ninth Reports of Session 2009–10: Goats and Tsars: Ministerial and Other Appointments from Outside Parliament and Too Many Ministers?*, House of Commons Paper No 150, Session 2010–11 (2010) 5.

<sup>180</sup> Public Administration Select Committee, *Government Responses*, above n 179, 5.

<sup>181</sup> Professor King quoted in Public Administration Select Committee, *Goats and Tsars*, above n 2, Ev 14.

<sup>182</sup> See, eg, Hawke, above n 3; Hawker, above n 4, 10–11.

<sup>183</sup> Hawker, above n 4, 10–11.

<sup>184</sup> Hawke, above n 3, 24.

experience will be possessed by future Cabinets. As a result, this does not appear to be a practicable or sensible limitation in the Australian context.

#### 4 Summary

If external ministerial appointments were to be adopted in the Australian States and Territories, we propose a model based upon the following principles:

- Appointment and removal processes consistent with existing ministerial appointments;
- External Ministers to have the same status as members of Parliament, with the ability to participate in parliamentary proceedings in both houses, but unable to vote;
- External Ministers to be subject to ministerial codes of conduct; and
- The number of external Ministers to be limited in number relative to the size of the ministry.

While this could be institutionalised through constitutional reform (via an Act of Parliament in the States or an Act of Federal Parliament in the Territories), it could equally be adopted without legal change in New South Wales, Queensland and Western Australia, where Ministers are not expressly required to be members of Parliament. While it is not strictly necessary for the model to be included in a constitution, doing so will increase accountability and transparency in the appointment process. As a result, some degree of institutionalisation and formal written adoption is desirable.

#### B Commonwealth

The model we propose for the States and Territories could apply equally at the federal level. However, given the relative inflexibility of the *Commonwealth Constitution*, and the requirement under s 64 that federal Ministers sit in Parliament, the adoption of this model would be difficult, if not near impossible.

Despite the challenges associated with introducing a comprehensive model, it may still be possible to appoint external Ministers at the federal level. The Carr appointment has raised the possibility of appointing external Ministers to the Senate using a casual vacancy. Using this process, external Ministers become subject to the same accountability mechanisms as other members of Parliament, thereby protecting the integrity of responsible government. However, as noted above, this process relies on a vacancy becoming available. Further, if vacancies started to be 'manufacture[d] ... to accommodate [a] new entrant',<sup>185</sup> this would have serious and negative implications for representative government. While the use of genuine casual vacancies has the potential to allow more external Ministers to be appointed at the federal level, it is a development that needs to be closely monitored to ensure it does not undermine the democratic ideals of Australian government.

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<sup>185</sup> Costello, above n 137, 9.

## VI CONCLUSION

External ministerial appointments have the potential to bring desirable specialist expertise into Australian governments and to help forge stronger linkages between government and sectors such as business. As governmental responsibilities continue to increase in diversity and complexity, external Ministers with specific expertise are likely to become more attractive, as demonstrated by the appointment of Bob Carr from outside Parliament as Australia's Minister for Foreign Affairs.

While Australian governments have only limited experience in appointing external Ministers, this may be attributable to the absence of any urgent need for reform and legal and political uncertainty surrounding such appointments. In relation to the legal questions, it is clear that ministerial appointments from outside Parliament are constitutionally possible in the States and Territories, at most requiring legislative amendment to effect the necessary changes. Even at the federal level, despite the provisions of s 64, it is possible to appoint external Ministers via a Senate casual vacancy, as occurred with Carr's appointment.

While there are few insuperable constitutional limitations to the appointment of external Ministers, it is essential that such appointments are made in a strategic and principled manner. Comparative experience in the UK, Scotland and Canada demonstrates that external ministerial appointments can be politically and practically challenging and are not always well received by the electorate. Further, external Ministers can pose significant challenges to long held conventions of responsible government. Drawing on these comparative experiences, we propose a model of external ministerial appointments that builds upon existing appointment and termination processes for Ministers and includes specific accountability measures to ensure the responsibility of external Ministers to Parliament and compliance with ministerial codes of conduct. We also propose that the number of external Ministers be capped to ensure that they do not compromise Australia's representative system of government.

This model would allow external ministerial appointments within a framework of responsible government. It reflects a recognition that understandings of responsible government must evolve to fit contemporary circumstances. As governments internationally continue to experiment with new ways of improving governance, so too can Australia play a role in these debates through trialling new models and processes for the appointment of Ministers from outside of Parliament.