GOVERNMENTAL ACCOUNTABILITY IN AUSTRALIA AND THE UNITED KINGDOM: A CONCEPTUAL ANALYSIS OF THE ROLE OF NON-PARLIAMENTARY INSTITUTIONS AND DEVICES

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I. INTRODUCTION

It has become apparent within the Anglo-Australian tradition of responsible government that Parliament alone is incapable of effecting a system of governmental accountability. Indeed, so much has been written on this issue that what was once heterodoxy within the tradition is now orthodoxy.[1] One might understand this to be the consequence of the demise of the central tenet of responsible government in both Australia and the United Kingdom. More profitably, one might view it as realignment of the notion of responsible government which necessarily envisages a broader concept of accountability that

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1 For the sake of brevity, I name here only one recent, representative work: see the illuminating comparative analysis of the enervated role of Parliaments in Australia, Canada, New Zealand and the United Kingdom provided by D Hamer, *Can Responsible Government Survive in Australia?*, University of Canberra (1994), Part II, pp 35-171.

may be effected by institutions and processes beyond Parliament.[2] In either event, the change in nature of the demands for accountable government can be characterised as a paradigm shift. Though perhaps as a result of different forces, the ongoing revision in both Australia and the United Kingdom of the means by which governments can be held to account has produced some common responses and some that are peculiar to either country. The purpose of this article is to examine and compare two specific extra-parliamentary initiatives whose shared impetus - at least upon one reading - is a concern to fill the lacuna of accountability left by the emasculation of Parliament's role in this area. The first of these - the judicial (and quasi-judicial) review of administrative action - has been known for some time, even though its 'modern' form is now more than a decade old in both countries. This development will not be focused upon, not because it is unimportant, but because its impact as a means of exacting government accountability is generally better understood and, in any case, the potential for a *systematic* regime of exacting governmental accountability through the courts and tribunals, though not utterly absent,[3] is not great. What is more, despite acknowledging the existence of scope for expansion in certain areas of curial influence, the judicial review of administrative action is essentially reactive rather than proactive in form. The second initiative and the one discussed here, concerns the rise of so-called 'managerialism' within the bureaucratic arms of governments in both Australia and the United Kingdom and the issues of accountability that attend its incorporation into the theory of responsible government.

It needs to be emphasised at the outset that the concern in this essay with matters of managerialism and judicial review is not only to try to establish what practical effect they might have, but more significantly to construct a conceptual framework within which the future development of these initiatives might be best understood and charted.

At this point, however, an important qualification must be noted. Whilst the argument below is premised on the patent need to investigate and test means of bringing the Executive to account *other* than those emanating from Parliament, that is not to say that Parliament no longer has any role in this field or is incapable of reformulating its role. Rather, it is to say that it cannot be sufficient for Parliament alone to undertake the task of making government accountable. Indeed, even accepting that there is some disagreement over the extent of the influence that initiatives such as the 'new' select committee system in the United Kingdom[4] and the 'new' Standing Committees in both Houses of the Commonwealth Parliament[5]

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2 As I have argued elsewhere: D Kinley, "The Duty to Govern and the Pursuit of Accountable Government in Australia and the United Kingdom" (1995) 21 *Monash University Law Review* 127-32. See also, E Harman, "Accountability and Challenges for Australian Governments" (1994) 29 *Australian Journal of Political Science* 1, especially at 13-16.

3 See D Volker, "Administrative Law: Retrospective and Prospective" (1989) 58 *Canberra Bulletin of Public Administration* 112.

4 On which see, for example, G Drewry, *The New Select Committees*, Clarendon Press (2nd ed, 1989).

5 On which see, in respect of the 25 year-old legislative and general purpose standing committees, Department of the Senate, Papers on Parliament No 12, *Senate Committees and Responsible Government*, 1991, and, in

have brought to bear on their respective executives, the fact that they were introduced and have had *some* effect (whatever the order) indicates the continuing part that Parliament plays.

II. THEORETICAL FRAMEWORK

The concept of responsible government is not simply defined. Within the Westminster system of government, it has traditionally been held to encompass the means by which Parliament brings the Executive to account, or, to put it another way, the Executive's primary responsibility in its prosecution of government is owed to Parliament. In more recent times, however, it has been argued that the notion is capable of least two potentially divergent meanings. In addition to its traditional interpretation, it may be understood to mean that the Executive's responsibility is to govern - that is, the Executive has a *duty* to govern.[6] Adherents to this 'responsibility *for* government' version of responsible government (also referred to as the 'Executive view')[7] invest much less in the orthodox version of 'responsibility *to* Parliament'. Though the two versions are not necessarily mutually exclusive, they are in competition with each other. The concern that arises from this bifurcation of responsibilities is that the need for the Executive to be made accountable may be undermined or even lost through the gap between the two interpretive versions. Executive accountability, it is argued, must be secured, even if it is by way of institutions and devices other than Parliament. This is the challenging objective that the 'new' responsible government sets.

Conceptual guidance, as well as justification, for pursuing this goal can be gleaned from some pertinent features of Harold Laski's notions of state, society, and the law. On the face of it, this might appear to be a surprising source from which to draw ideas of limited government, given Laski's reputation of having been a "staunch constitutional conservative (albeit for good radical reasons)"[8] in his advocacy of 'strong government'. Indeed, it was his conclusion that "[t]o give the [E]xecutive...the initiative in law-making, and to build its life upon the successful use of that initiative in the [L]egislature," was nothing less than "an elementary induction from historical experience".[9] However, as Laski (and Griffith, as discussed below) are prominent exponents of this 'Executive view', what they have to say about the question of making government accountable is of particular relevance to the present argument. Laski, for instance, did not advocate the granting of untrammelled power to the Executive. He was in fact keen to qualify the above statement by adding that, "[n]othing in this implies the mastery

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respect of the committees arising from 1993 initiative, see P O'Keeffe, "The Senate's New Committee System" (1994) 13(28) *House Magazine* 4.

6 For a discussion of this division and its consequences in respect of both the Australian and the United Kingdom's systems of responsible government, see D Kinley, note 2 *supra* at 117.

7 This label reflects the fact that it is a view most frequently expressed by those in government; see, *ibid* at 117-18.

8 A Wright, "British Socialists and the British Constitution" (1990) 43 *Parliamentary Affairs* 322 at 333.

9 H Laski, *A Grammar of Politics*, Allen & Unwin (4th ed, 1941) p 300.

of the [L]egislature by the [E]xecutive... What, rather, is involved," he added somewhat cryptically, "is the co-ordination of knowledge, so that each aspect of governmental adventure is used to enrich the other".[10] These notions of "knowledge" and "adventure" (which together, in his terms, amount to "experience") are crucial to the Laskian thesis of the state. This view has as its:

> centre of interest...less in the question of those who constitute the source of legal reference in society than in the relations established by them in order to make their decisions the result of the largest empirical induction it is open to them to obtain. It is emphatic that their power must be built from the experience of all persons affected by its exercise. Their authority is limited to the degree that it succeeds in integrating that experience.[11]

Authority is, in this regard, 'federal' in that its use, both in manner and form, is determined by the synthesis of a number of alternative influences. When society is seen "not as a pyramid in which the State sits crowned upon the summit, but as a system of co-operating interests through which, and in which, the individual finds his [or her] scheme of values,"[12] then the governmental actor is in form no different from an individual actor. Laski further argued that the scope of factional experiences within society from which a government should draw ought to be extended beyond "those only whose protest against its action it chooses to deem important".[13] However, in reflection, perhaps of the time of his writing - the 1920s of course heralded not only the modern era of interventionist and proactive government, but also, in the United Kingdom, the first socialist administration - he advocated that a government ought to be compelled only to *consult* with these interests. A combination of the extent of governmental presence in almost every aspect of social life in the 1990s and the poverty of the orthodox notion of limited government through responsibility to Parliament, might, in the alternative, require something more exacting than compulsory consultation. The receipt of different opinions may indeed influence the government, but it is in the nature of consultation that those who do the consulting retain the discretion ultimately to act as they see fit.

Some 50 years after Laski, another advocate of strong government, JAG Griffith, argued that decision-making of this kind constitutes the quintessence of politics. Whilst Griffith based his diatribe against "attempts to write laws [such as a Bill of Rights or to provide for an interventionist and more powerful House of Lords in the United Kingdom] so as to prevent Her Majesty's Government from exercising powers which hitherto that Government has exercised",[14] on the proposition that "law is not and cannot be a substitute for politics",[15] he was nonetheless adamant that institutional change was necessary in certain respects. Like Laski, Griffith targeted the question of the openness of government for

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10 *Ibid.*

11 *Ibid*, p 16.

12 *Ibid.*

13 *Ibid*, p 80.

14 JAG Griffith, "The Political Constitution" (1979) 42 *Modern Law Review* 1. He refers to such initiatives as "nonsense at the very top of a very high ladder" at 11.

15 *Ibid* at 16.

especial attention, though he was a little less forthcoming as to how exactly we might "force Governments out of secrecy and out into the open".[16]

The contemporary need for new and expanded systems of scrutiny and review of the multifarious forms of governmental action and influence has been captured in some more recent observations of Martin Loughlin on the changes to the structure of government and the means of exercise of its power in the United Kingdom over the past decade:

> The recent governmental strategy of seeking to secure economy, efficiency and effectiveness throughout the public sector provides a good illustration of the problem. The strategy has, for example, directly confronted our traditional government structures and has led to major changes in the organizational frameworks of government. It has placed major strains on conventional practices by requiring public objectives to be formally and precisely specified. And it has also led to the recognition of the need to institutionalize systematic mechanisms of review.
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> This strategy is an initiative of major significance. It has, however, been driven and fashioned almost entirely by a political-economic impetus and with virtually no legal or constitutional consciousness. A few illustrations seem in order. The [E]xecutive agencies being carved from the body of central departments might result in the creation of more effective managerial units, but there is little evidence that the impact on the notions of ministerial responsibility and civil service anonymity, let alone broader concerns of public accountability, have been adequately addressed. Even if we accept the view that the privatization of public utilities will produce more efficient and responsive services, these privatization processes were fashioned without any regard to constitutional considerations, and contrary to initial claims, the regulatory structures which have emerged are of inordinate complexity.[17]

It is at least arguable that the same degree of poverty of conceptual analysis has not accompanied the changes wrought on the structure of government in Australia over the last 20 years, but that is not to say that what analysis there has been has been sufficient. In particular, a broad appreciation of the nature of the recent object of reform - that is, the relationship between the political and administrative arms of government - *and* the consequences of these reforms, has yet to be fully developed. John Halligan and John Power have styled the problem in Australia in the following terms:

> These fundamental shifts have been both a response to the rapidly expanding demands on [E]xecutives and a consequence of initiatives by reformist governments to redistribute power within their [E]xecutive branches. As a consequence, traditional modes of operating have been supplanted. At one level there has been a shift from administering to managing within the bureaucracy; and at another, a shift from long-established structures to more fluid ones. These shifts have meant not only a diminution in the influence of administration, but also, alongside the increasing importance of management, the resurgence of the political [E]xecutive and its retinue of advisers vis-à-vis appointed officials.[18]

Whilst recognizing that 'major debates' have in the past accompanied the on-going changes to this relationship, Halligan and Power suggest that there is a current need for adaptation in conceptual thinking based on their observation that there is a:

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16 *Ibid.*

17 M Loughlin, *Public Law and Political Theory*, Clarendon Press (1992) pp 260-1 (footnotes have been omitted).

18 J Halligan, J Power, *Political Management in the 1990s*, Oxford University Press (2nd ed, 1992) p 2.

> new...conjunction of political control and managerial strength within a framework of institutional modernization. This has arisen partly because of the congruence between governments; decremental objectives and managerialist promise of more efficiency.[19]

The thesis of the present article - that there be an appreciation of the roles that must be played by Parliament and non-parliamentary institutions and devices in conjunction (or 'federally', to adopt Laski's terminology) - may be viewed as constituting just such an adaptation in conceptual thinking.

III. JUDICIAL REVIEW OF ADMINISTRATIVE ACTION AND ACCOUNTABLE GOVERNMENT

Perhaps the most conspicuous institution that checks at least some excesses of governmental power is the Judiciary. The achievements, such as they are, of judicial and quasi-judicial (that is, through tribunals) review of administrative action are evidenced by the development of an identifiable corpus of administrative law both in Australia and the United Kingdom.[20] Indeed, it is fair to say that those parts of the Anglo-Australian systems of public law centred on administrative law have evolved largely in response to the almost untrammelled expansion of state activity over the last 50 years.

The jurisprudence upon which they have been built, however, can be viewed as ranging between two poles: namely - to adopt and adapt the Harlow and Rawlings scheme of classification - the views of 'red light theorists' and those of 'green light theorists' (with 'amber light theorists' in between).[21] Both of the opposing sets of

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19 *Ibid*, p 3. They also assert that "[w]hat makes the Australian public sectors of particular interest and potential theoretical significance is that they are a group of large and powerful units of government (the states are arguably the most significant of their type in the world) which have historically balanced not only administrative and political, but large management systems": *ibid*, p 3.

20 The statutorily established Australian scheme of administrative law (by way of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth)), however, is the more extensive. Informally - that is, in the absence of the formal label of 'administrative law' in both jurisdictions - the realities of judicially imposed limitations on the excesses of the Executive have long been recognised, if not always accepted, by the Judiciary. For example, compare *Dyson v Attorney-General* [1911] KB 410 at 424, in which Farwell LJ makes clear his view that in the face of the weakness of ministerial responsibility, the only institutions left defending the "liberty of the subject against departmental aggression" are the courts, with the assertion by Duffy CJ and Starke J in *Victorian Stevedoring & General Contracting Co v Dignan* (1931) 46 CLR 73 at 84 that where regulation-making power delegated to the Executive "has been abused or misused, the only remedy is by political action and not by appeal to the courts of law".

21 See C Harlow, R Rawlings, *Law and Administration*, Weidenfeld & Nicolson (1984) chapters 1 and 2. This metaphorical theme echoes that chosen by Cecil Carr back in 1941 when referring to the very same issue: "[o]n the one side...those who want to step on the accelerator, on the other those who want to apply the brake" in C Carr, *Concerning English Administrative Law*, Oxford University Press (1941) p 11. In choosing typologies for use as analytic tools, I was at first tempted to use the products of Martin Loughlin's stimulating study of two ideal types of public law thought: normativism, which is "rooted in a belief in the ideal of the separation of powers and in the need to subordinate government to law...[and which]...highlights law's adjudicative and control functions...", and functionalism, which "by contrast views law as part of the apparatus of government. Its focus is upon law's regulatory and facilitative functions..." in note 17 *supra*, p 60. Whilst on the face of it these styles of thought may not be dissimilar to those adopted by Harlow and Rawlings (see text following this note), on closer inspection they carry much more theoretical baggage. Loughlin apparently ascribes to normativism on the one hand, the additional characteristic view-points of basic natural law theory, minimal state intervention and an atomistic interpretation of the relationship

'traffic light theorists' express their views in terms of the development of public law as it has been and is applied to the development of the state, that is, both as in terms of the review of executive discretion (administrative law) and legislative power (constitutional review). The 'reds' see the law as a check on the state's incursions into our individual spheres of freedom, whilst the 'greens' see the law as facilitating or legitimating state initiatives for greater social integration. The development so far of administrative law and its accompanying apparatus within the Anglo-Australian tradition might be considered to be red in hue, concerned as it *primarily* is with the limitations of state activity. It is restricted, however, to the curtailment of Executive discretion according to fairly narrowly defined rules of statutory interpretation and fairness, and even then only in response to litigation.[22] In Australia, furthermore, it has been suggested that even when a court does invalidate a specific Government decision or practice, the department concerned may not comply with the ruling. According to a recent former Commonwealth Ombudsman, during his time in office he "encountered circumstances in which an agency was not prepared to adhere to judicial rulings or was prepared to ignore opinions about the effect of the law that were inconvenient to it. "I saw," he continued:

> that the 'law' was not always thought to be something that had to be followed because it was often considered that those stating the law did not understand the position of the Executive and the obligations that it had to meet in the running of the country.[23]

In respect of the United Kingdom, it might be considered apposite to refer here to the relatively recent House of Lords' decision *In Re M*[24] to uphold a finding of contempt on the part of the Home Secretary for failing to comply with a High Court injunction as indicative of the potential dangers for the Executive of defying judicial rulings. Equally, however, by virtue of the tortuous route by which such sanction is brought to bear, this particular example reveals the limitations of judicial review of administrative action as a systematic means of keeping the Executive in check. It is in reference to circumstances such as these that JAG Griffith so vilifies the efficacy and legitimacy of using law as a decision-making means in the face of political action.[25]

In respect of the broad concern of the Judiciary's power of constitutional review which is almost unknown to British law,[26] but which is embraced by the Australian

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between the individual and the state, and to functionalism on the other, a crude form of legal positivism, significant state intervention and an organic conception of the individual/state relationship; note 17 *supra*, pp 60-1, and further, pp 63-137. To so load just two polar ideal types with such broad bands of mutually exclusive properties is, at least for my present purpose, to stretch their usefulness as analytical tools to an untenable degree.

22 It is possible to view the apparatus of tribunal dispute settlement in both countries as an attempt to loose these tight chains of judicial adjudication. Tribunals in this view, however, have as much facilitated the Executive and Government Departments in their supervision of the proper implementation of the government policies as complainants in their claims that such implementation must be legally sanctioned.

23 D Pearce, "Executive Versus Judiciary" (1991) 2 *Public Law Review* 179, 190.

24 [1994] 1 AC 377.

25 Note 14 *supra* at 16.

26 With the possible exception of the review of subsequent legislation for compliance with the demands of European Community law under s 2(1) of the European Communities Act 1972. The House of Lords

Constitution, one might discern a potentially more powerful (and more deeply 'red') method of checking the power wielded by government through its dominance of the Legislature.[27] And yet, perversely, the exercise of this power of review by the *apparently* 'green' (at least until very recently)[28] Australian High Court in an almost unbroken trend since the 1920 *Engineers'* case,[29] has provided the very vehicle by which the powers of the Commonwealth Parliament and Executive[30] have increased enormously, even if this has been at the expense of the State Parliaments and Executives.[31]

The last point notwithstanding, the courts clearly possess the *potential* to be powerful actors in the arena of extra-parliamentary means seeking to ensure accountable government. In Australia, for example, the courts form the cutting-edge of the provisions (some extant, others proposed)[32] for encouraging public servants to reveal illegal governmental activity by implementing the statutory protection for 'whistleblowers', both in terms of upholding such protection for the whistleblower and prosecuting those responsible for illegal action thereby

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ultimate conclusion in *R v Secretary of State for Transport, ex parte Factortame & Others (No 2)* [1992] 3 WLR 818, provides a manifest illustration of the impact which that section has.

27 For further discussion, see D Kinley, "Constitutional Brokerage in Australia: Constitutions and the Doctrines of Parliamentary Supremacy and the Rule of Law" (1994) 22 *Federal Law Review* 194.

28 Peter Bailey has argued that amongst the most recent decisions of the High Court there is a batch of (at least) six which may be viewed as retarding Commonwealth attempts to expand its power base in P Bailey, "Australia - How Are You Going Mate Without a Bill of Rights? or Righting the Constitution" (1993) 5 *Canterbury Law Review* 251 at 252.

29 (1920) 28 CLR 129. This trend has been marked out by such cases as the two *Uniform Tax* cases ((1942) 65 CLR 373 and (1957) 99 CLR 575 respectively) and, perhaps most notably, *The Commonwealth v Tasmania* (the *Tasmanian Dams* case) (1983) 158 CLR 1 in which the Court validated the Commonwealth Parliament's use of its "external affairs" power (under s 51(xxix) of the Constitution) to legislate in areas not otherwise in its competence. For a survey of these and other relevant cases, including an analysis of the apparent tailing off of the trend since the last mentioned case, see G Lindell, "Recent Developments in the Judicial Interpretation of the Australian Constitution" in G Lindell (ed), *Future Directions in Australian Constitutional Law*, Federation Press (1994) 1.

30 Though it must noted that the High Court has also endorsed purely executive powers of the Commonwealth (that is, those not specifically granted under enactment) that have had the effect of centralising authority; see, for example, *Victoria v Commonwealth & Hayden* (the *Australian Assistance Plan* case) (1975) 134 CLR 338 and *Davis v Commonwealth* (1988) 166 CLR 79. In both of these cases, the Court made express recognition of the inherent powers (to establish, in the instant cases, 'national' programmes or bodies without requiring statutory authority to do so) of the Commonwealth Executive arising from its position as the national and federal government.

31 See further, J Bradsen, "Judicial Review and the Changing Federal Balance of Power" in J Summers, D Woodward, A Parkin (eds), *Government, Politics and Power in Australia* (4th ed, 1990), chapter 5.

32 At the time of writing, only South Australia, the Australian Capital Territory and Queensland have enacted whistleblower legislation: the *Whistleblowers Protection Act* 1993 (SA), the *Public Sector Management Act* 1994 (ACT), Part XII and the *Whistleblower Protection Act* 1995 (Qld), respectively. Still , in the words of John McMillan, "[t]he idea is now accepted in Australia that there should be legal protection for the employee who blows the whistle on unlawful or improper activity occurring in the workplace" in J McMillan "The Whistleblower Versus the Organisation - Who should be Protected?" in T Campbell, W Sadurski (eds), *Freedom of Communication* (1994) at 221. Indeed legislative proposals to this end are currently under consideration in New South Wales, Queensland, Western Australia and at the Commonwealth level; for fuller details see J McMillan, cited above, nn 1-4. See also RG Fox, "Protecting the Whistleblower" (1993) 15 *Adelaide Law Review* 137.

exposed.[33] The courts and tribunals have also been central to Australia's relatively long-standing 'experiment' with freedom of information legislation, which now exists in all states, the Australian Capital Territory and at the Commonwealth level.[34] As one leading commentator has pointed out, such legislation was said to "enable the public to find out what its government has done and furthermore to participate in what it proposes to do".[35] Under the peculiar provisions of the relevant statutes (which are broadly similar), *every* person is granted a limited right of access to all government documents, and it is the courts or tribunals (in five of the eight jurisdictions involved) which are responsible for review of the merits as well as legality of governmental responses to requests for access.[36] However, within the context of access to publicly-held information (especially court-sanctioned access) it is necessary here to enter an important caveat. It has been made clear by the High Court of Australia in the so-called *Cabinet Notebooks* case that the Judiciary is not prepared to elevate the interests of individual litigants who seek access to certain confidential government information above the public interest of the 'proper' working of efficient and effective government.[37]

Despite interest in whistleblower protection legislation and considerable support for freedom of information legislation in the United Kingdom, legislative frameworks in respect of either concern have yet to be established.[38]

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33 In respect of the United Kingdom, the replacement of the old s 2 of the *Official Secrets Act* 1911 (UK) in 1989, appears to offer little protection to those civil servants moved to 'blow the whistle' on decisions or actions taken by government departments. The retention of strict liability criminal sanction for certain unauthorised releases of information in the section, internal disciplinary procedures, and the continuing strength of the common law duty of confidentially remain extremely effective inhibitions to potential whistleblowers. See, further, D Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship*, Open University Press (1991) pp 170-6.

34 For a general discussion, see P Bayne, *Freedom of Information*, Law Book Co (1984).

35 P Bayne, "Freedom of Information and Political Free Speech" in T Campbell, W Sadurski (eds), note 32 *supra* at 201.

36 The efficacy of the legislative schemes has been undermined by a combination of substantial qualifications to the right of access (on grounds, inter alia, of national security; public interest; cabinet secrecy; and the financial interests of the Government) and the perpetual dilemma of not knowing enough to know what information to seek access to.

37 *Commonwealth v Northern Land Council* (1993) 176 CLR 604. The Government argued successfully in this case that the public interest in the preservation of the secrecy of Cabinet deliberations (under the so-called 'candour theory') outweighed the public interest in having the content of the notebooks revealed, even if only to counsel for a party involved in litigation. The notebooks in this case recorded Cabinet discussions concerning an agreement between the Northern Land Council and the Commonwealth on future mining activities in an area of the Northern Territory known as Ranger land.

38 See J McMillan, note 32 *supra* at 168. In respect of the on-going debate in the United Kingdom over the need in a democracy for access to official information, see R Austin, "Freedom of Information: The Constitutional Impact" in D Oliver, J Jowell (eds), *The Changing Constitution*, Clarendon Press (3rd ed, 1994) p 393. The relationship between freedom of information and responsible government is, as Austin points out, frustratingly circular: an "irony, indeed paradox, is that governments justify the secrecy achieved by their exclusive possession of or control over information by reliance upon the very principle which it undermines, namely ministerial responsibility... [S]ince the minister alone has to answer to the House and, where necessary, shoulder the blame, he alone must make, or have control over the making of, all decisions, including decisions as to the disclosure of information" (p 396). The most recent government initiative in this area has been a White Paper: Great Britain House of Commons, *Open Government*, Cm 2290 (1993)

What is clear from this brief survey, is that the courts, no matter how expanded their role might become, are not on their own sufficient. In institutional terms they tend, by necessity, towards the perspective of 'red-light theorists' and their judicial personnel are, in effect, capable only of reacting to particular sets of circumstances as brought before them. It is now argued that initiatives for governmental accountability operating beyond both Parliament and the courts which reflect the view of 'green-light theorists' need to be developed.[39]

IV. THE BUREAUCRACY AND ACCOUNTABLE GOVERNMENT

The attention thus far in the quest to secure some measure of governmental accountability in the 'new order' (that is the revamped, Executive view of responsible government) has focused on the newest areas of development in both countries, as indicated in the above two quoted extracts from the works of Louglin, and Halligan and Power.[40] These are the 'Next Steps' programme in the United Kingdom and the self-reflective exercise undertaken by the Australian Commonwealth public service, commonly referred to as 'new managerialism'. This 'new managerialism' has been an effort, in part, to establish mechanisms by which to identify more clearly and to strengthen the lines of public service accountability. It is unsurprising that developments in both countries have been in the bureaucratic or administrative arm of government, rather than the political arm. This is because it is clear that whilst various governments have been the architects of the expansion of state action, it has been the administration which actually has had to expand or adapt so as to put the design into practice. In consequence, the already strained credibility of ministers being responsible for the actions of civil/public servants operating at the extremities of the command hierarchy has been brought to the point of collapse. "Ministers, by themselves," as Gavin Drewry and Tony Butcher have noted, "are manifestly too narrow a conduit through which to secure adequate public accountability for large and complex government departments".[41] Even Barbara Page's optimistic conclusion in respect of Australia that "while the doctrine of ministerial responsibility, as practised in Australia, may not lead directly to ministerial resignations, it does result in

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which comprises a set of proposals which though legislative or quasi-legislative in nature falls short of a Freedom of Information Bill.

39 Despite my earlier qualifications to his typologies (Loughlin, note 21 *supra*), I understand Martin Loughlin to be arguing for much the same thing when he writes that, "[i]n seeking a style [that is, a theoretical model of public law] appropriate for our times we should turn to the functionalist approach. The functionalist style in public law more readily accords with contemporary experience of law. It also more closely connects with our legal traditions," (note 17 *supra*, p 244).

40 See accompanying text to notes 17 and 18 *supra* on p 413.

41 G Drewry, T Butcher, *The Civil Service Today*, Blackwell (2nd ed, 1991) p 219. Furthermore, in respect of Australia, Elizabeth Harman has argued that although the primacy of the institutional line of accountability within Westminster systems of responsible government - from bureaucracy through Ministers to Parliament - remains unchallenged, it is open to question "whether this chain is all that we need be concerned with, and whether the chain of links is unbroken" in E Harman, note 2 *supra* at 14.

ministerial examination, explanation and correction",[42] is premised on a recognition of the marginal efficacy of the doctrine as a mechanism for the *systematic* scrutiny of the Executive.[43] Clearly, the actions of members of the administration, even those at senior levels, cannot be effectively scrutinised by way simply of the responsible minister being available for questioning before Parliament. The question remains, therefore, how such scrutiny can be established. It is claimed of the recent developments, both in Australia and the United Kingdom, that some measure of *direct* accountability of public/civil servants has been introduced. The need for realignment of accountability measures for the bureaucracy is further heightened if one to any degree accepts the sentiments wryly expressed in Lynn and Jay's *Yes, Minister* caricature, or as more sombrely asserted by the former British Labour Minister, Tony Benn - that is, that civil (or public) services have their own institutionalised agendas which are pitted with frequent success against the desires or policies of their political superiors.[44]

In the United Kingdom there has been an on-going process of review (commonly referred to as 'New Public Management') of the means by which the civil service is to operate and to be made accountable. The most significant structural reform to have evolved from this process has been the institution of the Next Steps Agencies.[45] The creation of these agencies, which although formally extensions of government departments, nevertheless operate to a certain extent independently of them, is intended to make more effective and efficient the delivery of a wide range of public services. In terms of scope and penetration, much is expected of the initiative. "In a nutshell," to adopt the words of Gavin Drewry:

> the Next Steps Programme promises eventually to transfer most of the 'executive' functions of government departments that involve delivering services to the public (as distinct from the Higher Civil Service's functions of policy-making and ministerial advice) to semi-autonomous departmental agencies.[46]

It was argued at its inception that such an alteration to the structure of government was necessary if the increased demands made of it were to be met.

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42 B Page, "Ministerial Resignation and Individual Ministerial Responsibility in Australia 1976-1989" (1990) 28 *Journal of Commonwealth and Comparative Politics* 141 at 157.

43 "Parliament's ability to be succinctly informed about ministers' acts and policies to be able to monitor them effectively has declined with increasing government size and greater variety and technical complexity of the issues with which modern governments are concerned" in note 41 *supra*, p 142.

44 In the words of Tony Benn: "the civil service sees itself as being above the party battle with a political position of its own to defend against all-comers, including in-coming governments armed with their philosophy and programme" quoted by G Drewry and T Butcher who refer to such a view as a "conspiracy theory", note 41 *supra*, p 159.

45 The initiative was intended to build on the foundations of the ultimately unsuccessful Financial Management Initiative that preceded it; see further, S Zifcak, *New Managerialism: Administrative Reforms in Whitehall and Canberra*, Open University Press (1994) chapters 2, 3 and 4.

46 G Drewry, "Revolution in Whitehall: The Next Steps and Beyond" in D Oliver, J Jowell, note 38 *supra* at 157. This ambitious target is already well on the way to being met: "[i]t is envisaged that about three-quarters of the Civil Service will be working in agencies by mid-1995. By mid 1994 - six years after the launching of the programme - some sixty per cent of all civil servants were working in Next Steps agencies" in G Drewry, "Revolution in Whitehall", cited above at 157. The total number of agencies now stands at 92. The growth of the new agencies has accelerated in recent years: 18 were established in 1993, *ibid*, following 30 in 1992: Great Britain House of Commons, *The Next Steps Agencies, Review*, Cm 2111 (1993) at 6.

Framework documents have been produced outlining how the agencies are to function. A feature common to all of these documents is the declaration that the status of agency will provide each with greater managerial freedom.[47] This characterisation gives the impression that, in terms of structural control, the agencies would be to some extent distanced from ministerial and Treasury[48] instruction. In this case, therefore, there had to be some method by which the Chief Executives of the agencies could be brought to account. Flexibility, it was felt, must not be attained at the expense of accountability. The recognition of this fact notwithstanding, the Government maintained that the creation of agencies would in no manner impair the principle of ministerial responsibility.[49] Rather, what was to be established was a supplementary (as opposed to replacement) level of accountability. "[O]n the issue of parliamentary questions," Patricia Greer points out:

> the framework documents are all very clear; ministers will reply on matters concerning policy or where Members of Parliament specifically seek a ministerial reply, and chief executives will reply on matters concerning the day-to-day operations of the agency.[50]

In reality, however, Greer adds, "'policy' issues are likely to push down into administrative issues so as to avoid contentious questions being raised in the House and published in *Hansard*".[51] In any case, it has been argued that even parliamentary review of the agencies' policy initiatives will be ineffectual as a consequence of the marginalisation of the Departmental Select Committees from the activities of the agencies.[52]

There can be no doubt that the striking of a balance between the competing goals of managerial flexibility and parliamentary accountability within the new structure of agencies will be problematic, perhaps even counter-productive. Anne Davies and John Willman, for example, have argued that:

> Departmental officials will understandably be reluctant to account to Ministers for actions they feel they know nothing about and have no control over and Ministers will feel the same in the discharge of their responsibility to Parliament. It follows that departments will seek to remain fully informed and in control of what happens in Agencies. The long term effect of this will be to thwart the entire purpose of Next Steps...[53]

Whilst one might take issue with their claim that departments will in effect allow the agencies little independence *because of the demands of ministerial*

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47 P Greer, "The Next Steps Initiative: An Examination of the Agency Framework Documents" (1992) 70 *Public Administration* 89 at 91.

48 Some have been designated "self-funding", see *ibid* at 92.

49 See Great Britain House of Commons, *Progress in the Next Steps Initiatives*, Cm 1263 (1990) at 13.

50 Note 47 *supra* at 90.

51 *Ibid.* For an interesting hypothetical example of how this division may be readily crossed see G Drewry, note 46 *supra* at 169.

52 N Lewis, "Reviewing Change in Government: New Public Management and Next Steps" [1994] *Public Law* 105 at 107. If the original Ibbs Report on Next Steps had ever been made public and had been acted upon, the agencies might have been even further removed from parliamentary scrutiny, as Lewis highlights in a leaked passage from the Report in which it is recommended that the "fiction" of ministerial responsibility be quashed (at 106).

53 A Davies, J Willman, *What Next? Agencies, Departments and the Civil Service*, London: Institute for Public Policy Research (1991) p 25.

responsibility (which is surely to over-estimate the authority of that principle), it is not hard to agree with the authors' conclusion that, "[o]ther means of public accountability are needed which would allow the separation of Agency and Department to work to good effect".[54]

The developments in Australia, at least at the level of the Commonwealth public service, have been both reactive and pre-emptive. In the face of the increased demands being made of the public service on account of the general expansion of governmental activity, and the service's acute awareness of the increased use of the now established avenue of public servants being more directly answerable to Parliament for the decisions and actions they take,[55] attention has been turned to the prospect of establishing alternative or restated means of accountability. The pursuit has been undertaken in the context of an increasing concern, first articulated in the 1976 Royal Commission on Australian Government,[56] to manage better the relationship between the political and administrative arms of government. In consequence, it is claimed:

> ...managerial principles have permeated the thinking of the political executives. Where the political executive has more enthusiastically embraced managerialism, the management systems have made their greatest advances in relation to administrative systems.[57]

In terms of nature, there is a similarity between the encroaching managerialism in Australian governmental structures and the New Public Management in the United Kingdom which yielded the 'Next Steps' programme, even if the political incentives for the two are different.[58]

Though the Commonwealth public service has by no means monopolised the debate of these topics in Australia, it has been largely responsible for the instigation of the present focus of debate by its Management Advisory Board (MAB)[59] deciding to produce in 1991 a draft exposure document outlining the direction in which it believed the search for new measures of accountability ought to head.[60] Perhaps the single most controversial statement in the document was where the MAB attempted to argue that the recent re-characterisation of those

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54 *Ibid.*

55 See J Uhr, "Rethinking Public Accountability", presented at RIPAA National Conference on Fraud, Ethics and Accountability, Sydney, 28-29 November 1991, p 9. The Commonwealth Public Service's Management Advisory Board (MAB) has recently pointed out that the information available to Parliament relating to the operation of the administration, "...is prepared, for the most part, by officials under ministerial authority". In which case "[i]t is not surprising...that it has increasingly become the role of officials to give evidence directly to the Parliament, acting through its various committees": see MAB Report No 11, *Accountability in the Commonwealth Public Sector*, June 1993 at 7.

56 In his submission to the Royal Commission, HV Emy introduced a notion which he termed "accountable management", Royal Commission on Australian Government Administration, *Report*, 1976, Appendix, Volume 1 at 47-52.

57 Note 18 *supra*, p 15.

58 S Zifcak, note 45 *supra*, pp 19-20.

59 Which, in its own words, "is charged under the Public Service Act with advising the Commonwealth Government, through the Prime Minister, on significant issues on the Management of the Australian Public Service".

60 MAB/MIAC, *Accountability in the Commonwealth Public Sector: An Exposure Draft*, June 1991. See further MAB, MIAC Paper 14, *Legal Issues - A Guide for Policy Development and Administration*, December 1994.

whom the public service serve from being referred to merely as "the public" to "clients" (or even "customers") does not alter the existing hierarchy of responsibility:

> Public servants dealing directly with the clients of government programs are obliged, indeed *accountable* to their superiors, to be responsive to client needs and to provide the highest quality service to clients within their means. Public servants are not, however, accountable to their clients - they are accountable only to their team leaders/supervisors, or some higher authority as defined by their delegation.[61]

This, however, was to grasp entirely the wrong end of the stick. As John Uhr, one of the many critics of the draft exposure, argued in response:

> the correct constitutional doctrine goes in the other direction, suggesting that public accountability concerns obligations owed by the powerholders to the powerless - ie by the bureaucracy to the community through parliament as the arena of accountability.[62]

Such critical views were apparently heeded by MAB, for in its resultant report published in June 1993, stress was laid on the position occupied by the 'clientele' in the structure of accountability mechanisms. "Officials are," it claimed, "accountable to government for [*inter alia*] the quality of their dealings with clients" and, therefore, they:

> should see their accountability obligations as including ensuring that relevant views of clients, as well as advice about possible improvements to policy or difficulties with its application, are brought to the attention of decision-makers.[63]

It remains possible, however, for these sentiments to be inferred to mean different things to different people. The Prime Minister, when speaking upon the occasion of the report's publication, made it clear just how he saw this degree of accountability to clients was to be met - namely, by way exclusively of their elected representatives in Parliament *who comprise the Government.*[64]

In the context of this debate emphasising *public* accountability (even if channelled mainly through Parliament), it is apposite to relay Uhr's further observation that the matter has a distinctively Australian accent. Indeed, the choice of nomenclature - 'public' rather than 'civil' servants - represented as much a recognition of the essential differences in function of the Australian, as opposed to British, state officials as an expression of independence upon the granting of 'responsible' (that is autonomous) government to the colonies in the 19th century.[65] "The rhetoric of responsible government," Uhr reminds his readers:

> promised community control of public affairs through an elected legislative assembly. The name change from 'civil' to 'public' was part of a package of practices for more responsible government, including the concept of public accountability. The rationale

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61 *Ibid* at 6.

62 Note 55 *supra* at 7. For further recognition of this 'external accountability' of the public service (even if it is closely related to its 'internal accountability') see, D Fuller, B Roffey "Improving Public Sector Accountability and Strategic Decision-Making" (1993) 52 *Australian Journal of Public Administration* 149 at 151-2.

63 Note 55 *supra* at 11-12.

64 Mr Keating further proclaimed that "[c]entral to our reforms of the Public Service was the desire to ensure that the government of the country belonged to the elected politicians": Statement by the Prime Minister, Press Release, 1 July 1993, p 1.

65 Public Policy Program, the Australian National University, Discussion Paper, *Ethics in Government: Public Service Issues*, June 1990 at 8-10.

> of the name-change runs as follows: where 'civil' servants regarded themselves as responsible for *civil* administration and accountable to the Crown through the government of the day, 'public' servants would be responsible for *public* administration and accountable to the public through the newly constituted institution of government - the legislative assembly.[66]

It has been with this notion of public duty very much in mind that Queensland's now disbanded Electoral and Administrative Review Council (EARC) produced a significant report supporting the argument for establishing a code of conduct for public officials. Central to the Commission's concern to see established "a Code of Ethics that provides a general statement of 'fundamental values' supporting the structure of government and administration and the general ethical duties of public officials",[67] was a recommendation for a draft Public Sector Ethics Bill. Included in the draft Bill were two detailed codes of ethics (based on a common set of five ethical principles): one for elected public officials and the other for appointed public officials.[68] In the resultant Act - *Public Sector Ethics Act 1994* (Qld) - the five principles have been retained,[69] but they apply only to *appointed* public officials (referred to simply as "public officials" in the Act). "The main objective of the [Act]," in the words of Premier, Wayne Goss who presented the Bill's second reading speech:

> is to declare the fundamental ethical obligations of public officials as the basis of good public administration, and to provide for agency-based codes of conduct, effective implementation, including training in the implementation of such codes, and related administrative mechanisms, including sanctions for breaches of codes.[70]

The ACT's Legislative Assembly was in fact faster than the Queensland Parliament in passing legislation incorporating what is, in effect, a code of ethics.[71] Though the principles contained in the ACT Act differ somewhat from those in the Queensland statute,[72] the catalyst for reform in both jurisdictions was the EARC report. Indeed, as the EARC report, together with the responding Parliamentary Committee's report are the most substantial documents yet produced on this topic in Australia, they are sure to provide the basis for the continuing

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66 *Ibid* at 9-10.

67 Parliamentary Committee for Electoral and Administrative Review, *Codes of Conduct for Public Officials*, May 1993 at [4.4.1] (being the Parliamentary Committee's Report on EARC's Report on the Review of Codes of Conduct for Public Officials - which it endorsed - May 1992).

68 *Ibid* at Appendix L. The five principles are: (i) respect for the law and system of government; (ii) respect for persons; (iii) integrity; (iv) diligence; and (v) economy and efficiency.

69 Sections 7-11 of the Act. For further details relating to each principle, see Explanatory Notes appended to the Act.

70 Queensland Parliament, 19 October 1994, Queensland Parliamentary Debates, No 30 (1994) p 9688. An Office for Public Sector Ethics (OPSE), with overarching responsibility for supervising the implementation of the stated ethical principles, is shortly to be established within the state public service.

71 *Public Sector Management Act* 1994 (ACT), s 6.

72 The five principles in the ACT statute are: (a) service to the public; (b) responsiveness to the requirements of the government and the needs of the public; (c) accountability to the government for the ways in which functions are performed; (d) fairness and integrity; and (e) efficiency and effectiveness: *ibid.* See further, s 7: "General principles of public administration"; and s 8: "General principles of management in employment matters"; s 9: "General obligations of public employees. Note also s 11, which expressly provides that none of the principles in ss 6-9 create legal rights; they are, in effect, non-justiciable.

Commonwealth debate on the matter as well as for those specific to Queensland and the ACT, and possibly also in other states and territories.[73]

In the United Kingdom, it would appear from the terms employed in, for instance, the notorious "Sir Robert Armstrong' Memorandum"[74] (which are as yet little altered by the Next Steps initiative) that the civil service continues to owe its primary duty to the Government of the day. That is, despite recognition of the fact that in the face of the structural changes to the civil service borne of the New Public Management and the absence of any statutory provisions relating to the civil service,[75] there is now, more than ever, a "need for a more rigorous and systematic approach to ethics".[76] The maintenance of such a position has serious implications in terms of the accountability of modern government, buoyed as it is by a large and potentially politically significant bureaucracy. Not only does the development of the 'responsible *for*' version of the concept of responsible government tend to occur at the expense of the orthodox 'responsibility *to*' (Parliament) version, but, in respect of the United Kingdom there is also an apparently less developed sense of the need to make the administrative arm of government accountable to the community at large.[77] Australia and the United Kingdom will, if nothing else, continue to inform each others' debates on this matter.

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73 For a brief history of the debate on public sector ethics and the analysis of the implications of the present debate, see H Whitton, "The Rediscovery of Professional Ethics for Public Officials: an Australian Review" in N Preston (ed), *Ethics for the Public Sector*, Federation Press (1994) p 39.

74 Memorandum on the Duties and Responsibilities of Civil Servants in relation to Ministers (Great Britain, House of Commons, 26 February 1985, Debates, vol 74, cols 130-2 (w), where it is stated that "[t]he civil service as such has no constitutional personality or responsibility separate from the duly elected Government of the day". It is conceded, however, that in Australia the same sentiment has been echoed in Prime Minister Keating's statement, quoted note 64 *supra*.

75 There is in the United Kingdom no equivalent to the *Public Service Act* 1922 (Cth). Indeed, the principle means by which the civil service is regulated - certainly in respect of its relationship with ministers and Parliament - is by royal prerogative as supported by a number of significant internal memorandums: see N Lewis, D Longley, "Ethics and Public Service" [1994] *Public Law* 596.

76 *Ibid* at 597. The authors examine the prospects and desirability of instituting a code of ethics in the United Kingdom's civil service at 605-8.

77 It might be argued that Prime Minister Major's Citizen's Charters initiative (launched in 1991) goes some way to meeting this need by recouching the relationship between the state and the citizen in purely economic terms - that is, as provider and consumer. But as the various Charters, relating a number of significant public services (such as health care, road, rail and air travel, and social security) merely articulate the 'rights' and expectations already inhering in consumers/citizens and no specific grievance-handling procedures have been added to existing ones, the case has yet to be made for viewing the whole programme as anything other than a grand cosmetic distraction. It might be said that the experience of the initiative thus far provides an illustration of the difficulties in translating public choice theory into practice. On the development of the Citizen's Charters see further, A Barron, C Scott, "The Citizen's Charter Programme" (1992) 55 *Modern Law Review* 526; and G Drewry, "Mr Major's Charter: Empowering the Consumer" [1993] *Public Law* 248.

V. CONCLUSION

It is, in conclusion, possible to separate into three categories the initiatives adopted to varying degrees in Australia and the United Kingdom in efforts to assert some level of governmental accountability. The first category comprises those that seek to bolster the authority of Parliament in its role as a watch-dog of the government. In the second category are those that seek to bolster the means by which the other arm of government - the administration - might be made more accountable. The third grouping is centred on the role played, or to be played, by the courts and tribunals within the broad field of judicial and quasi-judicial review of administrative action and in relation to more specific initiatives such as the supervision of statutory provisions for access to governmental information and the protection of whistleblowers in Australia.

The operational strategy for the first of these categories has been concerned with the scope for scrutiny through the political or executive arm of government. To this end there have been modifications to the apparatus of parliaments themselves - specifically, the strengthening of committee scrutiny. In addition, specific extra-parliamentary review bodies, such as the offices of Auditors-General;[78] the New South Wales' Independent Commission Against Corruption, Queensland's former EARC and (albeit *ad hoc*) Western Australia's iconoclastic recent Royal Commission into Commercial Activities of Government and Other Matters,[79] have been established which, in reporting to their respective Parliaments, enable the Parliaments to draw upon a wider range of more specialized sources of information to assist them in their scrutinizing assignment. Whilst these developments have been novel and to some extent rewarding they are nonetheless pandering to the mythical liberalist understanding of responsible government, that government itself accepts that its principal responsibility is to make itself accountable to Parliament - even if it chooses to be difficult over making itself amenable in practice. Where the prevailing understanding of the notion (or at least that prevailing in ministerial offices) is that the government's primary responsibility is to govern, then relying on the Parliament alone to ensure accountability is simply inadequate.[80] The endeavour in this paper has been essentially to conceptualise alternative or supplementary means of bringing the Executive to account as grouped under the second and third named categories. In respect of the latter, it may be observed that whilst the courts and, to a lesser extent, the tribunals comprise the most independent (of government) forms of

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78 See, for example the Electoral and Administrative Review Commission, *Report on Review of Public Sector Auditing in Queensland*, 1991; and the Auditor-General Bill 1994 (Cth) currently before the Commonwealth Parliament. It must be noted, in respect of the latter, that there is little likelihood of the new legislation strengthening the independence and powers of the Auditor-General vis-à-vis the Executive. Tellingly, the significant amendments that the Senate made to the Bill earlier this year in order to bolster the Auditor-General's position were forthrightly rejected by the House of Representatives when the Bill returned to it. For one view of the dire consequences of this dilution of the Bill, see J Taylor (who stood down as Commonwealth Auditor-General in early 1995), "Five Victims of the Arrogant Junta" *The Canberra Times*, 2 April 1995, p 9.

79 On which, in this context, see D Kinley, note 2 *supra* at 128-31.

80 *Ibid* at 131-2.

review, their use is also the least systematic and ultimately least effective manner in which to proceed towards making government accountable. In respect of the initiatives from within the bureaucracy, the conclusions are more positive. The New Public Management and the Next Steps programme in the United Kingdom, alongside the increased accent on managerialism within the Australian public service and the concomitant development of the notion of 'public trust',[81] clearly offer some scope for increased governmental accountability.

At a broad comparative level and in terms both of practical responses and theoretical justification, the Australian progression towards alternative means of bringing accountability to governmental practice appears to be further advanced than in the United Kingdom.[82] At the very least, it is more adventurous. Though this may be explained in part by the experience gleaned from the existence of more levels of government in Australia's federal system and by the absence of a tradition of statutory intervention in the United Kingdom in the structure and operation of the civil service, the current intent within reform in the United Kingdom is concerned with repairing that which is arguably irreparable. It centres too much on how ministerial responsibility - that is, responsible government orthodoxy - might be made once again to work. That is, whether it be by arming Parliament with a new set of select committees, or through the (now shelved) proposal for the establishment of Special Standing Committees.[83] Alternatively, ministers might be freed from responsibility for operational decisions taken within the new departmental agencies, whilst retaining their responsibility for all policy decisions.

The prospects in both countries for (re)establishing means by which to make accountable the 'Leviathan at the centre',[84] will continue, significantly, to embrace extra-parliamentary sources of executive supervision. Admittedly, Parliament will continue to play an important role in this respect, but crucially, it cannot and will not be the *only* player. Whilst its primary task might remain within the broad remit of demanding governmental accountability, such a task must now be met more by way of its *design* of the means through which accountability is effectively demanded, rather than by itself constituting the principal or lone accountant.[85] Ultimately, however, the most effective control on government will be a self-

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81 In the pursuit of which the writing of Paul Finn has been prominent; see *ibid* at 128-31.

82 See S Zifcak, note 45 *supra*, p 26. The author also tellingly notes that in terms of style and sensitivity, the managerialist revolution was undertaken quite differently in the two bureaucracies. Whereas the onset of the reforms largely antagonised the civil service in the United Kingdom (pp 10-17), the reform process in Australia, though not free from criticism, was implemented in a more sophisticated and sympathetic manner (p 21).

83 See The Working of the Select Committee System HC Paper 19-II, *Second Report of the Select Committee on Procedure*, 1989-90, especially lxvii; and the Government's response to this Report: Great Britain House of Commons, *Government Response to the Second Report of the House of Commons Select Committee on Procedure*, Cm 1532 (1991), especially at 23.

84 To adopt Nevil Johnson's term, N Johnson, *In Search of the Constitution*, Pergamon (1977) p 80.

85 It has been proclaimed on this point that "the processes of making and implementing public decisions in modern Britain [as also in Australia] are now so diffuse and complex that, just as Parliament does not and cannot govern, neither should it seek to perform the activity of scrutiny directly. Rather, it should ensure that scrutiny takes place"; I Harden, N Lewis, *The Noble Lie*, Hutchinson (1986) p 88; for a detailed discussion, see chapter 8.

denying ordinance; that is, coming from within government itself. A sincere appreciation and acceptance of the fact that the broad power of, or responsibility *for*, government is conferred on the understanding that those who wield it shall be held to account by *whatever* institutions or mechanisms represent the public trust will always yield more than any scheme foisted on an unwilling or uncomprehending government.