

Ministerial Accountability: Lessons of the Scott Report*

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This is a lecture about a recent episode in Britain. But it is also an attempt to explore some common elements in the way Australia and Britain run their affairs and to compare our two models of government.

However, I would like to preface it with a tribute to my Canberra education. I first came here twenty-nine years ago disillusioned with the subject that I had taught for twenty years. I knew quite a lot about Britain and quite a lot about the United States, but the two systems were so deeply different that I could never make comparisons work; neither system seemed to throw light on the other. Coming here in 1967 was like a new dawn. In an attempt to understand Australian government, I asked British questions. As long as I didn't, in some imperialist way, try to impose British answers, I found they were good questions; I was even bold enough to put down what I was told in a book, *The Canberra Model*¹. Since then I have come back time and again, usually to look at elections, but also to take back lessons to my own country.

Let me give three examples. I wish Britain had an equivalent to your admirable Australian Electoral Commission. I wish we had an equivalent to your Senate (especially when it is working at its best). I wish our parliamentary reformers could be bold enough to imitate the new Main Committee of the House of Representatives.

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¹ Cheshire, Melbourne, 1993.

Each country that is governed under the broad rules of Westminster democracy must develop in its own individual way. But each has much to learn from the other. As a fascinated British observer, I want to take this opportunity to say thank you for what I have learnt in this city. I want particularly to express my gratitude to Harry Evans for the opportunity to work in this singular building with its wonderfully helpful staff.

When I was here for the election last February, the Scott Report on Arms to Iraq was making banner headlines in Britain and beyond. Harry suggested that it might provide a theme for this lecture, a peg on which to hang some reflections on ministerial responsibility.

On February 15 this year the House of Commons was presented with a five-volume, 2000-page report prepared by a senior British Judge, Sir Richard Scott.² He had been asked, three years earlier, to explore the way in which arms or machine tools had gone from Britain to Iraq in the period before the Gulf War. At first it seemed that his great mountain of a report had produced not even a mouse. No minister felt forced to resign. No civil servant was disciplined. No evidence of corruption or criminal intent emerged. And no arms had ever reached Iraq. What then justifies my taking up your time with a non-event 10,000 miles away?

The Scott Report is important because it represents the most exhaustive study ever produced of one aspect of that key Westminster doctrine, the individual responsibility of ministers. It is also a fascinating document for what it reveals about the working of bureaucracy and the inter-relationship between ministers and civil servants. Sir Richard comments caustically on the difficulty of extracting from departments the 130,000 documents he had to examine, and on the way key letters were lost or received no reply. He shows how Customs could not find out what Ministry of Defence export policy was and how vital intelligence reports were not passed on to those who needed to know. He highlights a notable amount of bureaucratic deviousness and casuistry. As the *Economist* put it, 'Sir Richard exposed an excessively secretive government machine, riddled with incompetence, slippery with the truth and willing to mislead Parliament'. His report will certainly find immortality in scholarly footnotes. It may even bring about improvements in some routine procedures.

One aspect of the whole affair deserves special note. In the Westminster system, governments are seldom keen to explore their own mistakes. In Britain we did have a study of how the Falklands war came about through a rather bland Commission under Lord Franks. But we had no investigation of what went wrong with the poll tax, that most monumental of cock-ups, initiated, implemented and abandoned between 1987 and 1991, bringing down Margaret Thatcher in 1990. There was no official inquiry into Black Wednesday, September 15 1992, when the country was forced out of the European Exchange Rate mechanism in the most humiliating fashion. Sir Richard Scott's Inquiry does at least represent a serious attempt to find out what went wrong—although it has been much criticised for the way it was carried out, in terms both of natural justice and of efficiency. Lord Howe, the former Foreign Secretary, and many others argue vehemently that a lone figure, sitting as investigator, prosecutor, judge and jury, and denying witnesses the right to counsel, is not a good way of arriving at the truth.

² *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions*, HMSO, London, 1996. 6 vols.

In Australia I know that the conflict between the government-dominated lower house and the autonomous Senate can cause great irritation—but at least you can be fairly certain that fiascos like the poll tax or Black Wednesday would be subject to serious scrutiny by a Senate Committee. I listened yesterday to the Senate investigation of the DIFF (Development Import Finance Facility) program which has been causing such trouble to the Minister for Foreign Affairs, Mr Downer. Senate inquiries may not be as exhaustive as Sir Richard Scott's but they probably show greater political understanding.

Let me explain briefly the story behind the Scott Report. It was set up because of the collapse of a trial of three businessmen accused of shipping machine-tools to Iraq in contravention of a set of guidelines regulating such trade. The guidelines had been drawn up in 1984 but only revealed to Parliament a year later; they had been modified in 1989 after the Iran-Iraq cease-fire but Parliament had not been told of the change. Especially after the Iranian *fatwa* against Salman Rushdie, Iraq had been treated more sympathetically than Iran.³

As the trial of the exporters approached, Sir Nicholas Lyell, the Attorney-General (a somewhat different office from the Australian one) had instructed several Ministers to sign Public Interest Immunity (PII) certificates (once known as Crown privilege), denying the defendants access to papers which they claimed would show that they had acted with official approval (indeed, one of the defendants had actually been working for British Intelligence). The case collapsed when that most egregious of ministers, Alan Clark, contradicted his own evidence in the witness box. He made plain that some parts at least of the government had approved the exports; he admitted that he had turned a 'blind eye' and had been 'economical with the actualité'.

Sir Richard Scott identified three main causes for democratic concern. I want to describe these and to ask how far they find an echo on this side of the globe. If your system proves to have better safeguards than ours, it is worth identifying them.

Sir Richard's first worry lies in the legislation under which these exporters were charged. The *Import, Export and Customs Powers (Defence) Act 1939*, was hastily passed at the outbreak of the Second World War. It provided that, while the emergency lasted, the government could issue regulations which were not subject to affirmative or negative resolutions in Parliament. These regulations could make it a criminal offence to export particular goods to particular countries. As an emergency measure the Act should, of course, have lapsed in 1945 but somehow it continued for fifty years.

Sir Richard Scott was attacked by Lord Tebbit, a Thatcherite ex-minister, for describing such an Act as 'totalitarian'. Let me quote Scott's rejoinder:

I can think of no more apt adjective to describe powers that permit the executive to impose at will, and without any necessity to obtain the approval of, or even to inform, the elected legislature, whatever import or export restrictions it wishes and that permit the executive to prescribe whatever penalties for these offences it wishes.

³ A chronology outlining the major events behind the Scott Inquiry is given at the end of this article.

It is plain that, if MPs are not told what is happening and are not allowed to get answers to questions (or, as happened in this case, if they get disingenuous answers), something is very wrong with parliamentary democracy. Sir Richard quotes John Locke, writing in 1690:

It may be too great a temptation to human frailty ... for the same persons who have the power of making laws, to have also in their hands the power to execute them.

Sir Richard also quotes Montesquieu, who, in the 1730s, became the first publicist for the separation of powers. Sir Richard seems blissfully unaware that, since Bentham criticised and Bagehot demolished Montesquieu and his prophet Blackstone in the 19th century, it has generally been argued that the Westminster model embodies, through a cabinet of MPs and a disciplined party system, a fusion not a separation of powers.

I have tried to find out if anything comparable has happened in Australian legislation. It has been pointed out to me that far more is done here by primary legislation than by regulation, and that, certainly at least since 1932, regulations have been far more seriously scrutinised, at least by the Senate. The procedures are, I gather, being further tightened up. Some state legislatures may be less scrupulous. But in this area the Deputy Clerk of the Australian Senate, Anne Lynch, assures me that the Canberra model shows up the Westminster model.

Sir Richard's second main concern was with the Public Interest Immunity certificates which caused the initial stir. It appeared that innocent men were in danger of being sent to prison because the government would not allow the defence counsel to see the documents that would exonerate their clients. Some of these documents contained unquestionably secret material, involving the intelligence service. But most of them were only internal departmental exchanges. The Public Interest Immunity certificates were issued explicitly in order to protect the general secrecy of the governmental process; their purpose was to preserve the rules of individual ministerial responsibility under which the anonymity of civil servants is guaranteed, together with the privacy of the minister's private office.

A government lawyer told the Scott Inquiry:

It would be very difficult to distinguish between degrees of policy advice, whether it is of high or medium level ... a cautious approach is followed and all documents are claimed to be within the [high] class. The damage to the public interest if the class did not exist would be the exposure of the decision-making process.

There was a hilarious moment in the Inquiry when a minister who had certified that disclosure of a document would cause 'unquantifiable damage' claimed under questioning that 'unquantifiable damage' might mean not only 'large damage' but also 'small or minuscule damage'. He argued that each document was 'part of the process of giving advice to and implementing policy by ministers and, in my view, all of that is confidential'.

Sir Richard comments:

The government is entirely frank in its desire to continue using ‘class’ claims in order to protect communications between ministers and civil servants from disclosure in litigation. One argument put forward is that, unless these communications are protected, the necessary candour between ministers and civil servants will suffer. I have to say that I regard this ‘candour’ argument ... as unacceptable.

However, on the matter of Public Interest Immunity certificates the government got away with it. Indeed Michael Heseltine, the Deputy Premier, emerged as a mini-hero because he had questioned the advice that he had to sign a Public Interest Immunity certificate. The Attorney-General overruled him. But his colleagues at least exonerated the Attorney-General on the ground that he was only following precedent and that he had not been properly briefed. Sir Richard Scott accepted that Sir Nicholas Lyell had acted in good faith but saw him as clearly at fault; his legal advice was ‘unsound’.

The third main anxiety of Sir Richard was over the general question of ministerial accountability. The learned judge admitted rather charmingly that, before he got involved in this inquiry, he:

... would have associated ministerial accountability with a need for a minister to resign if serious errors had been committed in the department. That ... would be the understanding of most people.

Therefore, before exploring the light thrown on ministerial responsibility by the Scott Report, I must digress to analyse the concept more broadly. For it certainly is not all about resignation—or even primarily so.

The concept of ministerial responsibility is central to British government and to Australian government. But it has caused enormous confusion among the general public and even among those at the heart of affairs.

There is first the multi-meaning, punning, quality of the word responsibility: ‘She’s a responsible type’; ‘Are you responsible for this?’; ‘The responsible head’.

Ministerial responsibility is used as a technical term in the Westminster system but it has two quite different connotations. Collective ministerial responsibility is a doctrine that is totally distinct from individual ministerial responsibility. The latter is my theme today, but let us pause for a moment to consider collective responsibility.

It was, allegedly, Sir Robert Walpole in the 1730s who said of his Cabinet ‘We must hang together lest we hang separately’. It was Sir Robert Peel in the 1840s who spelt out formally that every minister shares responsibility for every decision of the Cabinet unless he resigns at once.

There are two key elements to collective ministerial responsibility. The first is that all ministers, whether or not in the cabinet, once they know of a government policy, must defend it—or keep silent about it; otherwise they must resign.

The most common source of British ministerial resignation comes from the application of this principle. Ministers, opposed to some current or anticipated policy decision, or to the prime minister's style of running things, cite their unhappiness in their resignation letters (even though, sometimes, their resignations in fact illustrate the advice 'Jump before you are pushed').

The second element in collective ministerial responsibility is that, if a government is defeated on a vote of confidence, it must recommend a dissolution or it must resign. The most explicit recent example goes back to 1979, when having lost a vote of confidence, by one vote, James Callaghan asked for and was granted a dissolution. But the principle is regularly followed in advance. Politicians obey that most essential of political principles, the law of anticipated reactions. (We may never have been knocked down by a car but the fear of being knocked down regulates our conduct every day of our lives.) Prime ministers resign when they know they cannot get a majority when the House next meets. Wayne Goss showed that in Queensland last February and Paul Keating showed that here last March.

Essentially, collective ministerial responsibility is a wonderfully convenient doctrine for politicians. It offers the main justification for strict party discipline—discipline which is even more absolutely applied in Australia than in Britain. But let us turn back to individual ministerial responsibility. It also has two separate sides. First, there is the personal responsibility of the minister for his own actions. If a minister misbehaves privately in a way that causes disgrace or brings undue embarrassment on the government, he or she must resign. If a minister misbehaves publicly in a ministerial capacity, whether lying to the House or abusing official power, he or she must resign.

Secondly, and much more importantly, a minister must uphold the principle: 'for every action of a servant of the crown a minister is answerable to Parliament'. This is one of the few British constitutional conventions where there is a clear enforcer—the Clerk at the Table. It is the Clerk who decides (subject to the Speaker) whether a question is in order. Is it the responsibility of the minister to whom it is addressed?

In contrast to Australian practice, all House of Commons questions are on notice. In the anarchy of your questions without notice the rule is scarcely enforced (and at Westminster the Speaker has difficulty in controlling the subject matter of supplementary questions). But I gather that Clerks here who deal with questions on notice apply the same rules as their colleagues in London. A minister must respond for everything any public servant does. If a mistake has been made the minister must admit it and, it is hoped, promise an effort to prevent it happening again. The development of executive agencies in both countries has complicated the story, but the essentials remain.

In a 1994 report the Treasury and Civil Service Select Committee pointed out that the system of ministerial accountability:

... depends upon two vital elements: clarity about who can be held to account and held responsible when things go wrong; confidence that Parliament is able to gain the accurate information required to hold the Executive to account and to ascertain where responsibility lies.

Sir Robin Butler, Head of the British Civil Service and Secretary of the Cabinet, gave the Scott Inquiry a somewhat controversial distinction between ‘accountability’ and ‘responsibility’:

Ministerial ‘accountability’ is a constitutional burden that rests on the shoulders of Ministers and cannot be set aside. It does not necessarily ... require blame to be accepted ... A Minister should not be held to blame or required to accept personal criticism unless he has some personal responsibility for or some personal involvement in what has occurred.

Ministers must respond, give an answer. But there is no question of resignation, just because someone down the line was at fault. (We’d be swamped with resignations if that became the custom.)

Of course, there are always demands for ministers to go when there is a serious administrative blunder. ‘Resign! Resign!’ cry the Opposition; so do the media. But ministers never do resign, and there was never once a golden age when they did resign for the failure of their subordinates. As the Senate Committee on Pay TV commented in 1993 ‘The operation of ministerial responsibility is too often seen in terms of a minister’s resignation or dismissal’.⁴

Nonetheless the largest cause of popular cynicism about ministerial responsibility comes from the absence of resignations when things go wrong. I have examined all the ministerial resignations in Britain and in Australia this century. There have been plenty of resignations by British and Australian ministers but, it can be argued, almost none that can be attributed to ministers taking the blame for the faults of their public servants.

There are only three instances which can be seriously claimed to fall into that category and they are all from Britain. In 1954 Sir Thomas Dugdale resigned as Minister of Agriculture because there had been serious mismanagement over the sale of some Crown lands; but Sir Thomas had in fact been personally involved and he was in any event near the end of his career; he chose to resign but it seems clear that he could have stayed. In 1982 Lord Carrington and his junior ministers at the Foreign Office resigned because of the invasion of the Falklands. As Foreign Secretary, he had been responsible for the lowering of Britain’s guard against the Argentine dictators. Again he was not forced to go. He resigned, like a gallant gentleman, in order to take the heat off the government. The only clear-cut case goes back to 1917 when the upright Austen Chamberlain resigned as Secretary of State for India because of a foul-up in Mesopotamia, which he could not have known about but for which he was the responsible minister. (Lord Beaverbrook once commented ‘Austen always plays the game and always loses.’)

Far more impressive than these distant and marginal cases are the precedents for ministers not resigning when their department has goofed. The most notable examples from Britain are provided by John Strachey after the groundnuts fiasco in 1949 and by Jim Prior after the H-Block escape in 1982. Australians might quote Ian Sinclair and the Asia Dairy affair in 1981,

⁴ Senate Select Committee on Matters Arising from Pay Television Tendering Processes. *First Report*. Canberra, 1993.

Peter Durack and the Perth Deputy Crown Solicitor in 1982 and, if I may be so indelicate, Alexander Downer this year.

It seems worthwhile to categorise the ministerial resignations that have occurred in Britain and in Australia since 1901. We have had 109, you have had fifty-seven (but we have much larger ministries in Britain). They fall into four categories: those involving collective responsibility; those involving purely private conduct; those involving personal conduct in a public capacity; and those due to acceptance of responsibility for faults lower down in the department. (I must pay tribute to the work of Margaret Healy and Barbara Page on Australian resignations.)

Ministerial Resignations, 1901–1996, Australia and Britain

When a minister leaves office the nature of the departure is not always clear. This table tries to classify all instances where a reason involving either policy disagreement or personal or administrative fault has been publicly given. These figures are for the total number of individuals involved—in a few cases (e.g. Thorneycroft 1958, Carrington 1982, or Higgs 1916) several ministers resigned together over the same issue.

		Australia	UK
Collective	Disagreement with policy or style of government	34	75
Private	Conduct in a private capacity	7	13
Public	Conduct in a ministerial capacity	16	16
Departmental	Accepting blame for public servants	0	5
Total		57	109

Collective responsibility, policy disagreement, accounts for 69 percent of the resignations in Britain and 60 percent of the resignations in Australia. Personal conduct in a private capacity accounts for 12 percent of the resignations in both countries. Personal fault in a public capacity accounts for 28 percent of Australian resignations but only 15 percent in Britain. Resignation for the fault of underlings, on a generous interpretation, accounts for 5 percent of British resignations but for none in Australia.

It is worth noting that at least eight of the private conduct resignations in Britain seem to involve sexual matters of one sort or another but that there are no such cases in the Australian list. Happily, it is beyond the scope of this lecture to explore the reasons for this difference.

Ministerial responsibility of any sort necessarily requires some disingenuousness. There was an Oxford exam question: ‘Which involves the greater hypocrisy, collective ministerial responsibility or individual ministerial responsibility?’ To suggest that two dozen Cabinet members agree on everything is absurd—yet they have to pretend that they do. The charade is made plain by the leaks that reveal their divisions. Equally to suggest that a minister is in command of everything that happens in his department is just as absurd. Again, the charade is made plain by leaks from below and scape-goating from above.

Yet, because there are so many breaches of the pure theory both of collective and individual ministerial responsibility, that does not mean that the doctrines do not work. They are, I contend, absolutely central to the operation of government in Westminster and in Canberra. At the collective level prime ministers expect loyalty; they punish disloyalty—and not only when reshuffles take place but in day-to-day decisions over prominence and policy. At the individual level ministers do answer to Parliament and public servants do stay silent. (I must admit to some doubt about how strictly the principles are maintained in some state governments.)

The decision as to whether a minister must resign rests ultimately with the prime minister. He will let a weak minister go but he often intervenes to save a valued colleague. Need I mention Paul Keating's defence of Carmen Lawrence? In May 1992 John Major saved David Mellor when under challenge for a highly publicised sex scandal—but four months later he had to let him go when stories about an unwise holiday at Arab expense emerged.

Here the Senate Committee looking into the Pay TV case in 1993 provided the most official Australian study of ministerial accountability. Its report offers a nice list of factors which determine whether a resignation is appropriate.⁵ They are:

- The minister's moral values
- Political ethics
- Parliamentary pressure
- Peer pressure
- Party sentiment
- Community standards
- Community reaction
- Media reaction
- Precedent

I leave you to savour that mixture of moralism and *realpolitik*. John Cain, the Premier of Victoria, once said:

What will be seen as the severity of a Minister's sins are a matter of how the government is travelling and how the Minister is travelling. It is all politics, nothing else.

Neville Wran put it more crudely when he remarked:

The test of resignation is whether you want to go into the next election with a smelly bag of dead fish in the cart.

⁵ Senate Select Committee on Matters Arising from Pay Television Tendering Processes, op. cit.

That splendid public servant, Sir Geoffrey Yeend, whom I miss so much on this visit, wrote a surprising letter to *The Canberra Times* three years ago:

It is not for Parliament to determine the penalty for any ministerial shortcoming—and certainly not a chamber divided on party lines. But the parliamentary process can expose a minister and enable the electorate, ministerial colleagues or the Prime Minister to make judgments about efficiency, competence and honesty. In Australia we have a long line of ministers and ex-ministers who have suffered from this exposure, ultimately if not immediately.⁶

The first article I ever wrote about Australian politics was provoked by the VIP planes affair of 1967 and the non-resignation of Peter Howson. It ended:

What emerges from this case is surely that resignation must almost always be regarded as primarily a political matter. In cases where there has been a gross breach of convention a minister must go because the political price of letting him stay would be prohibitive. But there are no absolute constitutional rules ... the decision whether a minister should go or stay must depend upon political judgments, first on how valuable he is to his colleagues and, second, on the way in which his departure will be interpreted.⁷

But, even if I downplay resignation, I am not a cynic. In Australia, as in Britain, I have yet to meet a minister who doubts the extent to which his life is regulated by collective responsibility. I have yet to meet a senior official who denies the centrality of individual ministerial responsibility in everyday bureaucratic life.

Now let me turn back to the light that Scott throws on individual ministerial responsibility. Sir Richard declined to say whether any ministers should resign. But the Opposition demanded two scalps. The first was that of Sir Nicholas Lyell, the Attorney-General, for his mishandling of the Public Interest Immunity certificates. They did not get it. Nor did they get the second scalp, that of William Waldegrave. As Minister at the Foreign Office he had in twenty-seven letters to MPs and in nineteen parliamentary questions denied the 1989 relaxation of the export guidelines which had allowed machine tools to go to Iraq. It was generally accepted that Waldegrave was an honourable man but he had certainly misled the House. He had, on departmental advice and with the best of intentions, been 'economical with the truth', 'designedly uninformative'.

Sir Richard comments:

The obligation of Ministers to be forthcoming with information in answer to PQs about their departments' activities lies, in my opinion, at the heart of the important constitutional principle of Ministerial accountability ... In circumstances where disclosure might be

⁶ *Canberra Times*, 2 June 1993, p. 12.

⁷ *Australian Quarterly*, vol. xxxix, no. 4, December 1967; reprinted in *The Canberra Model*, op. cit.

politically or administerably inconvenient, the balance struck by the Government comes down, time and time again, against full disclosure. The answers to PQs ... failed to inform Parliament of the current state of government policy ... That failure was deliberate.

A senior Foreign Office official told the Scott Inquiry that in 1988–89 three ministers agreed to change the guidelines, but they:

made a conscious decision ... not to make any announcement. Their reasoning appears to have been that any announcement, however carefully drafted, would upset somebody. Arguably this was not misleading Parliament but it may be represented as culpably failing to inform Parliament of a significant change ...

There is a handbook, once a secret but now in the public domain, called *Questions of Procedure for Ministers*. One paragraph in the latest issue reads:

Ministers must not knowingly mislead Parliament and the public and should correct any inadvertent errors at the earliest opportunity. They must be as open as possible with Parliament and the public, withholding information only when disclosure would not be in the public interest, which should be decided in accordance with established parliamentary convention, the law and any relevant Government Code of Practice.

Sir Richard commented that Mr Waldegrave ‘consistently failed to comply with the standard set’ by the government’s own document *Questions of Procedure for Ministers* and, more importantly, failed to discharge the obligations imposed by the constitutional principle of Ministerial accountability.

Out of evil cometh good. The Scott Report has a legacy. The Commons Select Committee on the Public Service has produced a bi-partisan report which recommends that the House of Commons establish a code of conduct covering ministerial accountability. The report argues that Parliament itself should define what is required from ministers in answering questions:

... must ... provide information that is full and accurate ... and must, in their dealings with Parliament, conduct themselves frankly and with candour ... The House will expect Ministers who ... knowingly mislead it to resign.⁸

The report wants MPs to complain to the Ombudsman when departments withhold information and wants it to become standard practice for the Government to explain the grounds on which information has been withheld.

The Conservative Party majority on the Committee would not go so far as to recommend a Freedom of Information Act or a parliamentary officer to investigate breaches of the new

⁸ *Ministerial Accountability and Responsibility: Report*, Public Service Committee, House of Commons, HMSO, London, 1996.

code. But the report does suggest special parliamentary commissions to establish the facts on complex subjects, like the Arms-for-Iraq affair.

All this is progress—a hopeful direct reaction to the Scott Report. It may go nowhere. Here the Senate Committee on Pay TV in 1993 recommended a Code of Conduct for Ministers. Alas, it was not followed up.⁹

However, constitutional change is in the air in Britain. The Labour Party and the Liberal Democrats are very explicitly committed to it. Labour may well lose its enthusiasm, after, as it seems likely, it wins a majority next May. Oppositions love to devise reform proposals, but once in power other priorities come to the fore. Debates over procedural change are time-consuming and the rewards of change are long term, not immediate. If the Select Committee report **is** implemented we may come to think that, because of Sir Richard Scott's revelations, individual ministerial responsibility will be more faithfully honoured in the future.

All governments of whatever party, and all people in executive positions are impatient with parliamentarians, prying, embarrassing, delaying the smooth implementation of their policies. Often parliamentary questioning is tiresome and unhelpful. But often it is well judged. Governments are very far from infallible and it is healthy to have a critical Opposition (and still more to have critical friends within the majority party) to publicise objections to past policies, to present administration and to future proposals.

I have learnt in the past few weeks to admire much of what the Australian Senate does to scrutinise and improve the work of Labor and of Coalition governments, to make them more responsible. In the current ferment over constitutional reform in Britain I am clear that we have a lot to learn from Australia. But I must not end on too humble a note. Your system is not perfect. You in your turn have things to learn from Britain, even from the sour report of Sir Richard Scott.

Questioner — I am a bit disturbed about the suggestion that Australia could teach the British anything—I don't believe that is correct. We have much to learn from Britain. It is the other way about. In particular, I refer you to today's paper. In the remarks you finished with, you said 'the Senate shows the way in making government in the Westminster system more accountable'. I would suggest to you that the Senate is a denial of the supremacy of the representative House. It is the denial of the primacy of the representative House. It is an undemocratic body, and it is a cancellation of the Westminster system. It is the death certificate of the Westminster system, and there is no doubt about it.

Dr Butler — Well, I would say that the Senate is a great deal more democratic than the House of Lords, first, and second, my point is not actually to argue about the supremacy of either Chamber, but I do think—I am certainly conscious having lived the last four weeks on the Senate side of this building—that there is a sense of genuine, I think honourable, pride among people working in the Senate committees, that they are doing a useful job in drawing attention to various matters.

I have not gone into the question of delaying or refusing supply or amending budgets, which are obviously arguable questions, and I would not want to give necessarily a clean bill of

⁹ Senate Select Committee on Matters Arising from Pay Television Tendering Processes, op. cit.,

health to the *status quo* in that area. But I have no shadow of doubt that a large amount of useful criticism of government is done by the Senate, and that the Senate has, on many areas, exercised a thoroughly healthy restraint on what can be too arbitrary a government when you have the absolute authority of a disciplined party in a single chamber situation, or in a bi-cameral situation where you have total party discipline in both places. I do not want a second chamber that is a rubber stamp of the first chamber, and therefore I have, I think, increasingly over the thirty years I have been coming to this country, come to think that the Senate, not a panacea, not a solution to everything, is an extraordinarily healthy influence and on the whole has been a much healthier influence in the period since the government lost its majority in the Senate.

Questioner — As another personal opinion, I most strongly disagree with the former speaker, but what I would like to ask you Sir, is whether you think the proposed New Zealand system, I think it is called the MMP system, will be an improvement in getting a representative Parliament?

Dr Butler — Well I think it is a nice paradox. The New Zealand situation is fascinating, and you will watch what happens on October 12 when New Zealand has this election. It is worth reminding you, because it does have a parallel interest for Australia, that both parties were getting pretty unpopular—they made promises then seemed to renege on them in the 1980s. One promise was they would set up a commission to look into the New Zealand electoral system—a judge and an academic and a couple of other people that used to report—which recommended something, it was called MMP, but it was more or less the same as the West German system, where half the seats are single member seats as now, and the other half of the seats are elected proportionally to produce a proportionally representative House. Now, they had a referendum which voted 84 percent for a change in the system, and 70 percent for a change to this particular MMP system, which was then confirmed three years later by a referendum which voted something like 54–46 in favour of a change of system. It was so much the law of unintended consequences. The public was cross with the politicians so they forced on them a system which the politicians disapproved of. Both the great bulk of the Labour Party and the National Party disapproved of the change—which, in fact, is going to enormously enhance the amount of party politicking because no party will ever again in New Zealand get a clear majority under this system. So, the rules of the game of New Zealand politics are being absolutely and fundamentally changed by this exercise in mass democracy. Now why I say I thought it had an interesting Australian parallel, if I may touch on delicate contemporary matters, is when you come to the republic question. There is no doubt from the opinion polls that the mass of the Australian people when asked a simple question, want a directly elected president, but the politicians, if you are to move to a republic, want a president elected by a two-thirds majority of the two Houses sitting together, or some variant of that with states being involved, which would guarantee that whoever was nominated would be acceptable to majority and minority parties. Some sort of compromise figure would emerge. Now, if you actually have a direct election, I cannot conceive that you would get anybody other than a politician elected. There is nobody else who could run a nationwide campaign, and you would have a battle which would necessarily be, to a large extent, in party terms. And that is not the best way to get a neutral umpire. I am quite sure that the politicians are right in saying that if you want to more or less preserve the Westminster model with the head of state being a neutral umpire, you certainly want to have somebody who is seen as acceptable to both sides, and who does not have the bogus legitimacy of having been elected

by a popular vote, perhaps more recently than the government was elected, and feels he has a moral authority to challenge it.

So, there again, if you gave the Australian public what at the moment they tell the polls they want, they would find a boomerang, just as the New Zealanders have found a boomerang. By asking the New Zealand people what they wanted, they got themselves landed with a system which will be more party political, involve more cynicism, more activity in Wellington, which will make people more cynical about the political process, than was the case before.

Questioner — When you started talking about the Scott Report, you indicated that one of the things encountered along the way was a concerted attempt to conceal certain government decisions which would otherwise justify what had happened. I was going to ask you what is it that is different in Australia that would not allow this to happen. Then I remembered Midford Paramount, which, whether you are aware of it or not, was a fairly recent exercise in which, again, certain actions were taken, certain people were prosecuted, and agencies allegedly went to a lot of effort to conceal certain not-well-known government decisions which would have justified the activities the firm had undertaken.

That happened in Australia, notwithstanding what I understand is a much more highly developed administrative law system than in Britain. So my question is, if administrative law is not helping, has anything come out of the Scott Inquiry and Report which is leading to a re-assessment of the doctrine of public interest immunity?

Dr Butler — Well, certainly the government—I am not fully briefed on this, I am not a lawyer—has said they are going to look into it again. It is interesting, the public interest immunity does not actually loom very large. I confess that I was virtually unaware of it until the Scott Report came up. I knew of administrative privilege vaguely. It is not a very widely generalisable thing. I do not want to get too excited about this particular abuse, but certainly the government has given guarantees that they will not do this particular thing again.

There is the issue which comes so fully with freedom of information and the like; the right to privacy and the right to know are in conflict not only in litigation but in all sorts of other aspects of government activity. I possibly was not candid enough in what I said, but I am in an ambivalent position about what the public's right to know is. I, on the whole, believe that Australian and British government will work better if the Cabinet deliberations are not televised, if ministers talking in their private offices with colleagues or their permanent secretary or their private people, feel that there is a wall of silence around this; that, on the whole, they are not going to have headlines tomorrow morning of something they said just in the ordinary playing around with ideas. I think that government does have to be conducted quite largely in private to be efficient. Otherwise, people just do not put things down on paper, or people go and talk in secret places where they cannot be bugged and heard saying things, and you lose control of the whole process of government, and the process of decision-making.

So, I am not actually speaking here as an open government man. I think that there is certainly a compromise between a totally secret government and a totally open government, and it is a very delicate line to be drawn—where you say this should go into the public domain and this should not. In the Scott case, it became a legal case where people were in danger of being sent

to prison. Somebody was trying to impose this principle that communications within the government machine were privileged, and if you saw some of it, you would see all of it.

I certainly have moved a long way towards open government. I used to believe the logic which was very firmly promulgated by the British Cabinet Office, and to some extent, I believe, by Sir John Bunting and others here, that Cabinet committees should not be revealed because there was collective responsibility, and that if major decisions of policy are being made by a known sub-group of ministers, then the other ministers can shrug their shoulders and say 'Well, I wasn't on that committee', and defuse the thing.

Now, we know perfectly well that a very large amount of government decision-making, much more in Britain than in Australia, is done by sub-committees of Cabinet. Cabinet does not even necessarily go through the procedure of rubber-stamping the committee's decisions, and yet collective responsibility sweeps over the whole ministerial team for a decision that is made, quite often by five or six ministers meeting together. We actually switched, and we started letting people know about Cabinet committees. First in New Zealand and then in Australia and now in Britain, there is a fairly full statement of what the government machine is, and I do not think anything significant has been lost. I do not think collective responsibility has been significantly watered down by the public acknowledgment of the structures of committees under the Cabinet, so you can open up a lot more than I used to think you could open up. I was half convinced by the bureaucratic argument of collective responsibility involved in this kind of secret solidarity, and I am not quite sure how far you can go.

The issue comes up about civil servants giving evidence to parliamentary committees—Senate or House committees, and on the whole we have something called the Osmotherly rules—for the civil servant who drew them up—and you have public service Code of Conduct rules about what a public servant can properly say when he is asked awkward questions which get near the nub of 'did he disagree with his minister?'; 'did his minister act against public service advice?'. On the whole it has been accepted in both countries that civil servants are not forced; parliamentarians show self-restraint in forcing civil servants to give evidence against their political masters, and, on the whole, I think we are probably getting nearer to a reasonable balance there. But it is not at all an easy thing. I am sure that many people in this room will know more about it than I, and have actually experienced the problem of what you say when you are under questioning in that way. So there is no easy answer there, I am afraid, to your question.

Questioner — My question relates to something you wrote, I think, early in 1973, entitled 'The Tragedy of Gaining Power', when the Whitlam government came in after twenty-three years in the wilderness. I was wondering if you see any similar, small or large, tragedies arising out of the present governmental situation in Australia?

Dr Butler — I am very glad you asked that, because while I have been here over the last four weeks, I have not only been working on this lecture, but I have also been working with John Nethercote on an article on the transfer of power, because I think it is a very high probability we are going to have a transfer of power in England next year, and people in England have become interested in 'what are the rules of the game'. So I have spent quite a lot of the last few weeks talking to veteran public servants about what they remember of 1949 or 1972 or 1983 and what the caretaker rules have been about how you transfer, and also what party preparations have been for the transfer of power. How much have the parties got ready. One

of the things that has been said to us (and we haven't completed our interviews and I don't know what the answer is, but I put it forward) that this year you are having the least prepared transfer of power. If John Hewson had won in 1993, he had done an enormous amount. I have just been handed this morning a book which the Labor Party prepared, (Gareth Evans and others), before the 1983 election, which is quite thick—one volume of Scott so to speak—which does actually illustrate detailed preparations and some thinking about departmental structures and some thinking about what happens on day one, day two, day three of the transfer of power.

Now, it has widely been said to us that Mr Howard, with some memories of his own experience in 1987 and more sharp memories of what happened in 1993, felt that it was unwise in electoral terms to be arrogantly seeming to prepare for power when you had not yet got it, and therefore there was far less consultation. I think there may have been quite a lot done very privately, but we have not come across traces of it, in the way that it was all over the place when I was here in 1993—people thinking about how power should be transferred. I left on March 3rd last and only came back at the beginning of July so I was not around for the transfer, but there is a sense that only two or three ministers have come through as being seen to be successes, and for others there is suspended judgment. There has been, in some ways, a clumsier transfer of power than in previous times. I don't want to be too hard on the present government, because there is this basic thing that I have observed in my own country and here, that when a party loses power, or a party gains power, there is an awkward period when the outgoing ministers know far more about the business of government and the departmental briefs than the incoming ministers. They can run rings around them and make them look foolish in Parliament, but gradually the good gets worse and the bad gets better. The government ministers learn their job and the ex-ministers' expertise becomes more and more obsolete.

I would expect, if you think the government has done relatively poorly or its parliamentary performance has not been all that good, that that situation will change measurably irrespective of whether they do well or badly in terms of actual substantive policy, by their just learning the job and learning the kinds of expertise which thirteen years in the wilderness deprived them of. I am sure we shall see this much more spectacularly in Britain if Labour gets power next year. That is a seventeen year gap, and there is virtually nobody with past ministerial experience. At least Mr Howard knew quite a lot about how government ran as a minister before he came back as prime minister. I actually gave the 'Tragedy of Gaining Office' lecture to the Melbourne Fabians in October 1972 before Labor got office, saying, 'how hard it is going to be for you, you have all these hopes after twenty-three years in the wilderness, coming back, wonderful dreams that you have, and you have really tried very hard and you deserve victory and so on, and then you will come and you will find the awful reality of the juggernaut of government machines going on, and crises and decisions driving you off course all the time',—and of course that was the case. I mean it was a great turning point, the greatest turning point, I think, in Australian history that I have seen—the election in 1972 and the change of mood it produced—but although it was a great turning point, it obviously was also an enormous disappointment to many dedicated supporters of the ALP.

Questioner — I want to say, I also disagree fundamentally with what was implicitly said by the first questioner. I wonder whether you have had a chance, being in Canberra, to look at the Australian Capital Territory as an institution, where we do have a far better electoral system than applies either to the House of Representatives or to the House of Commons.

Have you had a chance to look at how this has affected questions of ministerial responsibility, and are you aware of a recent seminar of the Study of Parliament group on this and related matters?

Dr Butler — I am afraid I have to plead ignorance here. It is one of the great handicaps of my life, that I do know a certain amount about the United States, a certain amount about Australia, but I am irrevocably somebody brought up in England, and I do not think federally. The automatic federal thinking of a lot of my friends here and my friends in America, is just not part of my thinking, although I logically know what they are up to. I certainly have felt, also, coming here briefly time and again, that I can get a vague idea of what is going on in state governments, but I have never lived anywhere in a sustained way, except in Canberra in Australia, and I have never looked at state government in detail. As far as the ACT is concerned, my friend, Malcolm Mackerras, sent me proudly the ballot form saying it was the longest preferential list he knew of in any public election, (that is, when you were electing your Parliament in the ACT). But I am interested in what you say, I shall follow it up, but I have no wisdom to offer you whatsoever on that subject, I am afraid.

Chronology behind the Scott Inquiry

September '39	Passage of <i>Import, Export and Customs (Powers) Act</i>
September '80	Start of Iraq/Iran war. UK ban on strategic exports
December '84	Howe and Thatcher agree guidelines banning strategic exports
October '85	Guidelines 'trickle out' to Parliament
January '88	Alan Clark supports machine tool traders going to Baghdad Fair
August '88	Iran/Iraq ceasefire
February '89	Iranian <i>fatwa</i> against Salman Rushdie
February '89	Waldegrave denies policy change despite relaxation of guidelines
May '89	Government expresses concern
August '89	Stories about arms exports appear in press
March '90	Customs start questioning machine-tool exports to Iraq
April '90	News of steel tubes exported for Iraq supergun
August '90	Iraq/Iran war ends after Kuwait invasion
October '90	Three Matrix-Churchill directors arrested
November '90	Major succeeds Thatcher as prime minister
2 December '90	<i>Sunday Times</i> says Clark encouraged UK firms to arm Iraq
6 December '90	Import and Export Control Bill enacted with Opposition support
28 February '91	Victory in Iraq/Kuwait war
February '91	Disingenuous answer on trade with Iraq
February '91	Three Matrix-Churchill directors charged
Summer '91	Ministerial arguments over signing PII certificates
October '92	Matrix-Churchill trial starts
October '92	Clark gives evidence and trial collapses
November '92	Inquiry under Sir Richard Scott set up
May '93-May '94	Public hearings of Inquiry much publicised
15 February '96	Scott Report published
26 February '96	Government wins 320-319 on Scott Report debate
28 July '96	Commons Public Service Committee recommends Code of Conduct.