

Ministerial Responsibility in Cases of Serious Policy Failure: The Role of Extra-Parliamentary Inquiry in Upholding Political Legitimacy*

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'I ought to have known.

My advisers ought to have known and I ought to have been told, and I ought to have asked'.

Sir Winston Churchill, *The Hinge of Fate* (1950)

Abstract Cases of serious public harm (defined as policy and administrative failures resulting in fatalities), where there is a direct causal link with ministerial action or inaction, are few. Relevant examples in Australia are the home insulation program (colloquially known as 'the pink batts' case), and the Oakden Older Persons Mental Health Service, and in New Zealand the Cave Creek viewing platform tragedy. Traditional parliamentary scrutiny mechanisms were employed to interrogate the failures that resulted in the home insulation and Cave Creek tragedies. However, the manner in which the full extent of the Oakden scandal was ultimately exposed in South Australia suggests that, in some instances in contemporary Australian politics, only integrity bodies independent of parliament with appropriately legislated powers have any chance of holding individual ministers responsible for public harm caused by serious policy failure and supporting the maintenance of legitimacy of the Westminster political system.

INTRODUCTION

Individual ministerial responsibility is a critical convention in the Westminster system. In many respects the legitimacy of the system hinges upon the leadership shown by

ministers. Arguably, on occasion leadership may need to be demonstrated by acceptance of responsibility for serious policy failures that result in public harm, caused by ministerial actions, inaction or negligence within their portfolio, and resignation from a ministerial role. Ministerial inaction is captured by the notion of 'negative responsibility',¹ and voluntary resignation as both remedy and punishment for perceived wrong doing in the idea of 'vindicative responsibility'.² In the event that a minister does not recognise the seriousness of a policy or administrative failure themselves, or the chief minister does not request their resignation, and the parliament is unable to hold the minister (or the government) to account through any parliamentary mechanism (including scrutiny by parliamentary committees), due to the Opposition not holding a majority in either house, the only remaining option may be to have provision for extra-parliamentary investigation into the matter. The need for the automatic establishment of independent commissions of inquiry to 'support parliament in upholding ministerial responsibility' has been previously raised by Woodhouse.³ As Mulgan notes, the evolution of extra-parliamentary scrutiny mechanisms has also had 'the effect of making public servants more directly accountable to the public'.⁴ This scrutiny has assumed an increasingly critical dimension in an era of growing politicisation of the public service, in contrast to decades past when the public immunity principle was considered critical to protecting public servants in the interests of supporting their provision of full and frank advice to ministers.⁵

However, extra-parliamentary inquiries need to be established with appropriate authority provided by parliament, and have access to relevant documentation, which

¹ D. Woodhouse, 'The Role of Ministerial Responsibility in Motivating Ministers to Morality', in J. Fleming and I. Holland (eds.), *Motivating Ministers to Morality*. Aldershot: Ashgate, 2001, pp. 37-48.

² R. Gregory, 'Political Responsibility for Bureaucratic Incompetence: Tragedy at Cave Creek'. *Public Administration* 76 1998, pp.519-38.

³ Woodhouse, 'The Role of Ministerial Responsibility in Motivating Ministers to Morality', p.47.

⁴ R. Mulgan, 'Assessing Ministerial Responsibility in Australia', in K. Dowding and C. Lewis (eds.), *Ministerial Careers and Accountability in the Australian Commonwealth Government*. Canberra: Australian National University E Press, 2012, p.178.

⁵ R. Mulgan, 'Politicisation of Senior Appointments in the Australian Public Service'. *Australian Journal of Public Administration* 57(3) 1998, pp. 3-14; K. Spooner and A. Haidar, 'Politicians, Public Service Employment Relationships and the Coombs Commission'. *International Journal of Employment Studies* 13(2) 2005, pp. 43-67; R. Mulgan, 'Truth in Government and the Politicization of the Public Service'. *Public Administration* 85(3) 2007, pp. 569-86; A. Podger, 'Bipartisan Politicisation of the Public Service Obscures Debate'. *Australian Financial Review*, 9 January 2007, p. 39.

will inevitably raise conflicts with cabinet and parliamentary privilege. There have been a number of instances over the past forty years in Australia where the matter of access to documents has been tested in parliaments and the courts, and the conclusion of this discussion seeks to summarise the evolving state of play in this regard, in a context where the legitimacy of the political system is under growing pressure.⁶ In this context, the question of Crown and executive immunity is also briefly discussed. This summary is preceded by a brief discussion of the convention of ministerial responsibility in relation to resignation resulting from serious policy and administrative failures, and an outline of the lessons from three case studies – the Cave Creek viewing platform tragedy in New Zealand, the Australian home insulation program, and the Oakden Older Persons Mental Health Service in South Australia – all of which resulted in serious public harm involving fatalities.

MINISTERIAL RESPONSIBILITY AND POLICY FAILURE

Woodhouse has argued that the convention of ministerial responsibility requires ministers to account for their actions in parliament, by informing, explaining and rectifying policy and administrative errors, and that in cases of major failures by their departments ministers should also resign.⁷ The latter notion has been widely confused with the notion of ‘vicarious’ responsibility, that is, taking responsibility for others’ actions whether the minister was aware of them or not, which may be considered negligence. In a later piece, Woodhouse acknowledges the notion of ‘negative responsibility’, where ‘ministers are responsible for failing to act when they should have done so’.⁸ Significantly, the Cave Creek tragedy is cited by Woodhouse as a critical trigger for such consideration:

⁶ H. Hobbs and G. Williams, ‘The Case for a National Whole-of-Government Anti-Corruption Body’. *Alternative Law Journal* 42(3) 2017, pp. 178-83; M. King, ‘Last Gleaming of the Liberal Democratic Age?’. *InDaily*, 8 October 2018 (accessed at: <https://indaily.com.au/opinion/2018/10/08/last-gleaming-of-the-liberal-democratic-age/>); ABC News, ‘Peter Dutton Says Parliament a “Disadvantage” for Government’, 12 December 2018 (accessed at: <https://www.abc.net.au/news/2018-12-12/peter-dutton-says-parliament-a-disadvantage-for-government/10609496>).

⁷ D. Woodhouse, *Ministers and Parliament: Accountability in Theory and Practice*. Oxford: Clarendon Press, 1994.

⁸ Woodhouse, ‘The Role of Ministerial Responsibility in Motivating Ministers to Morality’, p.40.

Failing to exert the appropriate level of supervisory authority is a breach of [ministerial] duties. Thus not knowing that something is happening may not be a good defence if it is felt that the Minister should have known. This was evident after 14 people died when a viewing platform collapsed at Cave Creek, New Zealand, in 1995.⁹

Mulgan summarises the debate around ministerial responsibility and resignation in cases of policy and administrative failure, noting that ministers ‘frequently face calls for resignation for departmental failure when they can be said to share at least some of the blame’.¹⁰ However, in Australia at least, no minister has ever resigned for this reason.¹¹ Mulgan argues that all such cases where ministerial resignations have been called for involve claims that the minister in question has some level of personal responsibility for the failure, including ‘negligence or incompetence or through their responsibility for the general policy and budgetary settings within which the failure occurred’.¹² The inclusion of negligence in this description embeds the notion of ‘negative responsibility’. Mulgan further argues that:

The complete lack of observance of this principle, however, does not necessarily invalidate it: ministers *ought* to resign for presiding over departmental failure to which they have contributed personally.¹³

Woodhouse takes a similar view, suggesting that:

There needs to be a public expectation that ministers will resign not only when their personal behaviour falls below the accepted standard but also

⁹ Woodhouse, ‘The Role of Ministerial Responsibility in Motivating Ministers to Morality’, p. 40.

¹⁰ Mulgan, ‘Assessing Ministerial Responsibility in Australia’, p. 181.

¹¹ B. Page, ‘Ministerial Resignation and Individual Ministerial Responsibility in Australia 1976-1989’. *Journal of Commonwealth and Comparative Politics* 28(2) 1990, 141-61; E. Thompson and G. Tillotsen, ‘Caught in the Act: The Smoking Gun View of Ministerial Responsibility’ *Australian Journal of Public Administration*, 58(1) 1999, pp. 48-57; Woodhouse, ‘The Role of Ministerial Responsibility in Motivating Ministers to Morality’; R. Mulgan, ‘On Ministerial Resignations (and Lack Thereof)’. *Australian Journal of Public Administration* 61(1) 2002, pp. 121-27; I. Killey, *Constitutional Conventions in Australia: An Introduction to the Unwritten Rules of Australia’s Constitutions*. Melbourne: Australian Scholarly Publishing, 2009; K. Dowding, C. Lewis and A. Packer, ‘The Pattern of Forced Exits from the Ministry’, in K. Dowding and C. Lewis (eds.), *Ministerial Careers and Accountability in the Australian Commonwealth Government*. Canberra: Australian National University E Press 2012; Mulgan, ‘Assessing Ministerial Responsibility in Australia’.

¹² Mulgan, ‘Assessing Ministerial Responsibility in Australia’, p. 180.

¹³ Mulgan, ‘Assessing Ministerial Responsibility in Australia’, p. 181.

when they are implicated in serious departmental fault or have failed to supervise their departments adequately.¹⁴

This has been described as the notion of 'vindictive' responsibility by Gregory, in which the notion of voluntary punishment (that is, resignation), is viewed as critical to the maintenance of the integrity and legitimacy of the political system.¹⁵ Gregory's assessment of the Cave Creek viewing platform tragedy, in which fourteen people died, gave rise to his view that 'exceptional cases [involving fatalities directly caused by policy and administrative failure] require exceptional responses'.¹⁶ The comment that responses need to be 'exceptional' acknowledges that historically ministers have not resigned as a result of policy and administrative failures in their portfolios in most Westminster jurisdictions. However, departing from Bagehot's traditional view that ministerial dismissal is only punishment, not remedy, Gregory claims that in such cases ministerial resignations are both 'punishment and remedy'.¹⁷

Arguably, the more serious the failure, the greater the obligation on the minister responsible to resign. Referencing the Cave Creek tragedy, Woodhouse reinforces this view on the grounds that resignation in such circumstances is needed 'not only to restore the government's political reputation but also to restore confidence in the system'.¹⁸ This suggests that adherence to this convention by ministers is critical to the integrity and legitimacy of the Westminster political system. Even so, resignation alone may be insufficient remedy in cases of potential criminal liability. Regardless, failure to resign in circumstances where ministerial action or inaction has resulted in serious public harm sorely tests the political legitimacy of a government, and history shows that punishment and remedy have results at the ballot box.¹⁹ Fortunately, cases of serious public harm (defined as policy and administrative failures causing fatalities),

¹⁴ Woodhouse, 'The Role of Ministerial Responsibility in Motivating Ministers to Morality', p. 48.

¹⁵ Gregory, 'Political Responsibility for Bureaucratic Incompetence'.

¹⁶ Gregory, 'Political Responsibility for Bureaucratic Incompetence', p.535.

¹⁷ Gregory, 'Political Responsibility for Bureaucratic Incompetence', p. 534.

¹⁸ Woodhouse, 'The Role of Ministerial Responsibility in Motivating Ministers to Morality', p.40.

¹⁹ Woodhouse, 'The Role of Ministerial Responsibility in Motivating Ministers to Morality', p.48. Changes in government followed all three cases referenced in the present discussion. However, this occurred for a wide range of reasons, which would confound any attempt to draw a direct causal link between these cases and the election losses.

where there is a direct causal link with ministerial action or inaction, are few. Three case studies are discussed below.

THE HOME INSULATION PROGRAM (THE 'PINK BATTS' CASE)

The \$2.45 billion Home Insulation Program (HIP) was intended to provide economic stimulus during the Global Financial Crisis, while also supporting improved environmental outcomes (better insulated homes with lower power demands for heating and cooling). Fiscal stimulus promoted by speed of implementation was the over-riding goal of the program, with the Government halving the recommended roll-out time from five years to two and half.²⁰ Perhaps oddly, given it was primarily a building construction project (albeit with favourable environmental outcomes), implementation of the program was allocated to the Department of Environment, Water, Heritage and the Arts (DEWHA). Disaster struck early, with the deaths of four young labourers working on separate installations within the first twelve months (the first within six months of the project's commencement), and two hundred and two fire incidents resulting from unsafe installations. Following sustained attack on the Government in the Parliament, the program was cancelled in April 2010, only eleven months after it commenced.²¹

As Mulgan notes, 'all available parliamentary weapons' were marshalled by the then Opposition to attack the HIP and the Minister responsible. The deaths and administration of the program were raised as a 'matter of public importance' by the Shadow Minister in the House of Representatives, and sustained use of question time was made in both the House and the Senate, which in turn generated significant media attention on the program and the Minister.²² The convention of ministerial responsibility received specific attention in the debate. The Opposition avoided the notion of vicarious responsibility, arguing instead that:

²⁰ C. Lewis, 'A Recent Scandal: The Home Insulation Program', in K. Dowding and C. Lewis (eds.), *Ministerial Careers and Accountability in the Australian Commonwealth Government*. Canberra: Australian National University E Press 2012, p.155.

²¹ Lewis, 'A Recent Scandal', p.153.

²² Mulgan, 'Assessing Ministerial Responsibility in Australia', pp. 184-85.

...the minister was personally negligent and blameworthy for not doing more to ensure tighter safety standards after he had personally received a series of warnings about safety issues....[and his]...apparently passive reliance on official advice suggested a lack of responsible leadership.²³

The Minister's negligence was in his apparent failure to heed advice provided to him, and then to actively inquire as to the details supporting concerns raised. This was a case of 'negative responsibility', where the Minister failed to act when the moral imperative to prevent harm arising from implementation of the program suggested that action to follow up serious safety concerns was warranted.

Further parliamentary scrutiny of the program was undertaken by the Senate Standing Committee on Environment, Communications and Arts. The Department of Prime Minister and Cabinet commissioned an external administrative review of the program, and the Auditor-General was asked to audit the program.²⁴ The Minister did not resign, but the program was removed from his portfolio. All of the installers involved in the deaths were deregistered by DEWHA, and state agencies in Queensland and New South Wales investigated the installers. This resulted in one being prosecuted and two fined in Queensland.²⁵ A subsequent Royal Commission into the program led by Ian Hangar AM QC did not pursue the matter of individual ministerial responsibility, as this was beyond the terms of reference.²⁶ Nor did it interrogate comments made by the former Prime Minister and relevant Ministers, as the Commissioner sought to ensure that 'the processes of the inquiry did not infringe the privilege of the Parliament'.²⁷

The extensive scrutiny applied to the program ultimately found that the most critical issues were the untenable timeframe applied to implementation of the program (driven by the Department of Prime Minister and Cabinet), and the lack of capability

²³ Mulgan, 'Assessing Ministerial Responsibility in Australia', 186-87.

²⁴ Australian National Audit Office, *Home Insulation Program: Department of the Environment, Water, Heritage and the Arts, Department of Climate Change and Energy Efficient, Medicare Australia*. The Auditor-General Audit Report No. 12 2010-11. Performance Audit. Canberra: Commonwealth of Australia, 2010.

²⁵ Royal Commission into the Home Insulation Program, *Report of the Royal Commission into the Home Insulation Program*, Ian Hangar AM QC. Canberra: Attorney-General's Department, 2014.

²⁶ Royal Commission into the Home Insulation Program, *Report*, p. 9.

²⁷ Royal Commission into the Home Insulation Program, *Report*, p. 16.

and capacity within DEWHA to deliver it.²⁸ Commissioner Hangar also made particular note in his report of the imperative for provision of frank and fearless advice from the public service, commenting that:

...Ministers and Department heads might procure written briefings that contain only information which supports a particular result... to act in this manner threatens the independence of the public service....²⁹

He argued that, on the contrary, 'officers must be supported to engage with personal risk when giving advice, rather than to remain complicit with a particular approach thought to be favoured by the Minister or a political adviser...', and neither should Ministers or their advisers 'by subtle suggestion or otherwise, dictate what advice they receive'.³⁰ The Commissioner's focus on this issue betrayed a concern that Ministers may direct the content of advice supplied to them to deliberately avoid documentation of information that could confer responsibility upon them for poor outcomes.

THE CAVE CREEK VIEWING PLATFORM COLLAPSE

A tragic incident which shares several similarities with the HIP occurred in New Zealand on 28 April 1995, when a viewing platform built by the Department of Conservation at Cave Creek collapsed, with eighteen people on it falling forty metres. Fourteen people died, and four were seriously injured as a result.³¹ On 8 May 1995, the New Zealand Parliament resolved to appoint an external Commission of Inquiry to investigate the causes of the tragedy and related matters.³² The terms of reference for the Inquiry were initially focused on the events that led to the collapse, and during the course of hearings, were expanded to include matters consequent upon the collapse. Commissioner Noble found that:

²⁸ Mulgan, 'Assessing Ministerial Responsibility in Australia', p. 188; Australian National Audit Office, *Home Insulation Program*, pp. 173, 176.

²⁹ Royal Commission into the Home Insulation Program, *Report*, p. 307.

³⁰ Royal Commission into the Home Insulation Program, *Report*, pp. 307-308.

³¹ Gregory, 'Political Responsibility for Bureaucratic Incompetence', p. 519.

³² The Department of Internal Affairs, *Commission of Inquiry into the Collapse of a Viewing Platform at Cave Creek Near Punakaiki on the West Coast*, Wellington: The Department of Internal Affairs, 1995.

...the root causes of the collapse lie in a combined systemic failure against the background of an underfunded and under resourced department employing (at least at grassroots level) a band of enthusiasts prepared to turn their hands to any task.³³

In his epilogue in the Inquiry Report, the Commissioner commented that faults in the processes of government reforms, and the failure of government to provide sufficient resources for the Department to undertake its functions, were fundamental causes of the catastrophe.³⁴ The Inquiry found that warnings of the consequences of under-resourcing had been provided to the Minister for five years prior to the incident by the Department's Chief Executive, a statutory authority and advisory boards.³⁵ Once again, this is an apparent case of 'negative responsibility', in which the Minister's failure to act upon the gravity of the warnings provided ultimately became a critical contributing factor in the disaster.

The Minister responsible did not resign at the time, nor did the chief executive of the Department of Conservation. As in the HIP case, the Minister did ultimately resign the portfolio (a year later, and just several months before a general election), but remained in Cabinet in another portfolio. Gregory notes that both the minister and the chief executive of the responsible agency argued that 'the doctrine of ministerial responsibility required them to stay in their jobs to see that managerial systems, and funding levels, were improved lest such a disaster recur'.³⁶ Rhodes and Wanna suggested that in so doing, the Minister invented a new convention in this regard, quoting him as saying: 'I gave a commitment to implement ministerial responsibility rather than shrink from it by resigning'.³⁷ They go on to comment that the Cave Creek tragedy highlighted situations 'where responsibility for policy in complex organisations is shared and it is correspondingly difficult to find out who is responsible'.³⁸ While the Minister was responsible for adequately resourcing the agency, the tasks of ensuring

³³ Department of Internal Affairs, *Commission of Inquiry*, p. 112.

³⁴ Department of Internal Affairs, *Commission of Inquiry*, p. 93.

³⁵ Department of Internal Affairs, *Commission of Inquiry*, pp. 45-51.

³⁶ Gregory, 'Political Responsibility for Bureaucratic Incompetence', p. 523.

³⁷ Cited in R.A.W. Rhodes and J. Wanna, 'Bringing the Politics Back In: Public Value in Westminster Parliamentary Government'. *Public Administration* 87(2) 2009, p. 179.

³⁸ Rhodes and Wanna, 'Bringing the Politics Back In', p. 179.

appropriate management systems were in place and staff were adequately qualified and experienced to undertake their roles rested with the Department.

THE OAKDEN OLDER PERSONS MENTAL HEALTH SERVICE

The third case of serious policy failure considered here dramatically underlines the concerns regarding the observance of the convention of ministerial responsibility outlined in the Cave Creek and HIP cases, and arguably takes them to another level. A range of significant issues regarding the ongoing operation of the Oakden Older Persons Mental Health Service were raised by the executive director with the then Minister for Health in 2002, including its recommended closure at that time.³⁹ However, it took a further 15 years before the facility was finally closed, in April 2017, after the adult children of residents who had suffered extended periods of significant abuse and in some cases died as a result, pursued complaints regarding their treatment through all available avenues, including the media.

The full extent of the issues at Oakden were exposed by a self-initiated maladministration inquiry conducted by the South Australian Independent Commissioner Against Corruption, announced on 25 May 2017. The Commissioner's 312-page report, released on 28 February 2018, documented a litany of horrendous policy and administrative failures over the fifteen year period.⁴⁰ During that time, five ministers of the same Government held the mental health portfolio, multiple reviews were undertaken, and over 400 complaints were received regarding the facility.⁴¹ The Commissioner, the Hon. Bruce Lander QC, initiated his investigation following the release of a damning report on the Oakden facility by the Chief Psychiatrist in April 2017.⁴² In describing how his investigation came about, the Commissioner commented on the Chief Psychiatrist's report:

I was shocked at its content.

³⁹ Independent Commissioner Against Corruption, *Oakden: A Shameful Chapter in South Australia's History*. Adelaide: ICAC, 2018, p.65.

⁴⁰ Independent Commissioner Against Corruption, *Oakden*.

⁴¹ Independent Commissioner Against Corruption, *Oakden*, Appendix 10.

⁴² A. Groves, *The Oakden Report (The Report of the Oakden Review)*. Department for Health and Ageing, Government of South Australia, 2017.

I listened intently to commentary following the release of the report, and in particular the government's response to its findings.

I was concerned that notwithstanding the very serious findings and recommendations of the review panel no one appeared to be accepting responsibility for the manner in which the consumers at the Oakden facility had been housed and for the standard of care they received.⁴³

Echoing the minister in the Cave Creek case, the then Minister for Mental Health rejected calls for her resignation at the time, claiming that now she was aware of the issues 'all the more reasons [*sic*] why I am going to remain the minister and clean this mess up'.⁴⁴ After seeking to prevent the findings in the ICAC report regarding her involvement in the Oakden matter being made public,⁴⁵ the Minister did subsequently leave the cabinet in September 2017. She then resigned from Parliament a fortnight prior to the release of the ICAC report, simultaneously removing her candidacy for the Legislative Council four weeks prior to the 2018 South Australian state election. Five ministers were implicated in the findings of the Oakden report, with four acknowledging that they had not taken the matter as seriously as they should have done and accepting degrees of responsibility for their failure to act. The Commissioner found that, had the senior administrators in the Department not acted of their own volition in relation to matters raised, the fifth minister would have been likely to be guilty of maladministration 'due to her inactivity'.⁴⁶

Oakden was unlike the Cave Creek and HIP tragedies, which were investigated by traditional parliamentary scrutiny mechanisms (in the case of Cave Creek, an independent Commission of Inquiry established by resolution of Parliament). Attempts by the then Opposition to establish a parliamentary select committee on the matter in 2017 were unsuccessful, as they did not hold in a majority in either house. The Government at the time amended the terms of reference of an existing Joint Committee inquiring into elder abuse to include the Oakden matter but made only brief

⁴³ Independent Commissioner Against Corruption, *Oakden*, p.22.

⁴⁴ ABC News, 'Oakden Nursing Home Closure: Former Mental Health Minister Told of Concerns in 2013', 21 April, 2017. Accessed at: <https://www.abc.net.au/news/2017-04-21/oakden-nursing-home-leesa-vlahos-vows-to-clean-up-mess/8460302>.

⁴⁵ Independent Commissioner Against Corruption, *Oakden*, pp.40-41.

⁴⁶ Independent Commissioner Against Corruption, *Oakden*, p.253.

reference to it in the final report, on the basis that it was being investigated elsewhere by that stage.⁴⁷ As noted above, it was ultimately a self-initiated investigation into potential maladministration in public administration undertaken by the Independent Commissioner Against Corruption (the first of its kind held in South Australia) that pursued the full extent of the matter. Other than sustained use of question time by the Opposition, which did generate significant media attention, in this instance usual parliamentary scrutiny mechanisms were not enacted as non-Government members could not command a majority in either house.

The Commissioner found maladministration by five administrators and clinicians, and the local health network responsible for the Oakden facility, but not by any of the ministers or agency chief executives. The view of ministerial responsibility taken by the Commissioner in the investigation did attract some controversy.⁴⁸ Although satisfied that his findings reflected the evidence before him, the Commissioner expressed his discomfort with the outcomes of the investigation, on the basis that ministers and senior executives 'ought to have known', and that each of the ministers and chief executives were responsible for the failures. He noted that, 'All but one minister who had responsibility for the Oakden facility over the past decade accepted some measure of responsibility for what occurred. [The remaining minister] sought to deflect responsibility'.⁴⁹

It is critical to note that the Commissioner did not have access to Cabinet documents during the investigation, and the legislation under which he operated prevented hearings being held in public. Both points are referenced throughout his report in relation to numerous matters which could not be corroborated on the available evidence.⁵⁰

Notwithstanding the comments noted above regarding the Commissioner's recognition of the notion of negative responsibility in stating that the ministers were

⁴⁷ House of Assembly, *Final Report of the Joint Committee on Matters Relating to Elder Abuse*. Adelaide: Parliament of South Australia, 2017.

⁴⁸ B. Siebert, 'What if ICAC Got it Wrong on Oakden?' *InDaily*, 16 March 2018. Accessed at: <https://indaily.com.au/opinion/2018/03/16/what-if-icac-got-it-wrong-on-oakden/>.

⁴⁹ Independent Commissioner Against Corruption, *Oakden*, p. 17.

⁵⁰ In his report the Commissioner outlined at some length the legislative framework he utilised to undertake the investigation and the complexities this involved relating to his jurisdiction, access to cabinet documentation, and the lack of public hearings. These legislative matters will not be addressed in the present discussion.

responsible for the failure to act, the view of ministerial responsibility articulated in his report was substantially based upon two elements. The first was the majority view in the *Egan* cases, and the second a (possibly misinterpreted) view that Ministers are not expected to resign in circumstances where they had no knowledge of a failure, for which Mulgan is cited.⁵¹ The matters relating to the interpretation of case law regarding access to cabinet documentation will be canvassed further below. However, it is noted that the Mulgan article cited by the Commissioner specifically refers to responsibility attaching to 'negligence or incompetence or through their responsibility for the general policy and budgetary settings within which the failure occurred'.⁵² Indeed, these were precisely the concerns identified by the Law Society of South Australia, which first publicly raised the proposal of the ICAC Commissioner undertaking a maladministration investigation in relation to Oakden:

'There has been reference to [the minister] having been notified a couple of years ago about the potential for neglect occurring at this particular facility,' Mr Rossi said.

One of the questions that has been raised generally, is the extent to which the minister should have acted. Did she act in a neglectful way herself?

Was she negligent? Was she competent?⁵³

However, in the absence of access to Cabinet documentation, it was always going to be very difficult for the Commissioner to find maladministration by any minister, as he himself stated in the report, deferring that matter to Parliament:

While the evidence does not permit a finding of maladministration against any of the Ministers, it remains the fact that they were, as Ministers, responsible for the Oakden Facility and for the care provided there during the time they were Ministers.

⁵¹ Independent Commissioner Against Corruption, *Oakden*, pp.251-253.

⁵² Mulgan, 'Assessing Ministerial Responsibility in Australia', p. 180.

⁵³ I. Dayman, 'Oakden Scandal Could Lead to ICAC Investigation against SA Minister Leesa Vlahos, Law Society Says', 8 May 2017. Accessed at: <http://www.abc.net.au/news/2017-05-08/leesa-vlahos-could-be-investigated-by-icac/8505934>.

That, however, seems to me to be a matter between the Minister and Parliament.⁵⁴

The extent to which staff and senior officers involved in the management of the Oakden facility sought to cover up what was occurring there was also fully exposed by the Commissioner's report, which reinforced in significant detail many similar findings from the Chief Psychiatrist's report. The extra-parliamentary nature of the investigation and, specifically, its independent non-political nature, was critical to facilitating this exposure and the apportionment of responsibility for policy and administration.

CASE STUDIES: DISCUSSION

The fatalities resulting from the Cave Creek, Home Insulation Program and Oakden policy and administrative failures drew strong responses from commentators and the public that ministers 'ought to have known' and acted, which is captured by the notion of 'negative responsibility', and that they should therefore resign. Resignation in these instances was viewed as 'vindication': an ultimate acceptance of responsibility and a punishment for perceived wrong doing. The initial failure of ministers to resign in each case had a significant negative impact on the reputation of the individuals and the political legitimacy of the governments, all of which lost office at elections following the scandals. As Gregory states:

When all is said and done the manifest integrity of governmental systems can be sustained only by the sense of responsibility displayed by those officials, elected and appointed, who lead them.⁵⁵

Worse, the Oakden case suggested that extra-parliamentary scrutiny mechanisms may be the only option to hold ministers responsible in some instances, particularly where parliament is unable to enforce scrutiny of a majority government. It also highlighted (not for the first time), the limitations of such investigations where they do not have access to cabinet documentation, and confront conflicts with conventions of cabinet responsibility, confidentiality and parliamentary privilege.

⁵⁴ Independent Commissioner Against Corruption, *Oakden*, pp. 253-254.

⁵⁵ Gregory, 'Political Responsibility for Bureaucratic Incompetence', p.533.

Woodhouse describes the ‘failure of parliament’ occurring where majority governments and party politics dominate proceedings to the detriment of Westminster conventions, including ministerial responsibility.⁵⁶ Arguably, Oakden was one such case where parliament failed to institute effective internal scrutiny. The Cave Creek and Home Insulation Program cases provide an instructive contrast in this regard, as although the individual ministers in question did not initially resign, majority Governments in both cases submitted to forms of inquiry initiated and implemented by parliament. Of the case studies, Cave Creek is perhaps the best example of parliament exercising its ability to remedy policy failure. One of the key reforms of the New Zealand Parliament resulting from the Cave Creek Commission of Inquiry was the creation of new legislation, entitled the *Crown Organisations (Criminal Liability) Act 2002*, which was designed:

...to protect society and the individual from harm or danger arising from the actions of the Crown by ensuring that there are mechanisms to hold the Crown responsible and accountable for its actions [and to] meet the principle that the Crown should in general be subject to the law and the same legal processes as everyone else.⁵⁷

In the Oakden matter only one of the five ministers in question resigned (and then under significant duress following release of the ICAC report), and the majority Government refused to submit to parliamentary inquiry. While individual ministers need to assume responsibility for their actions and inaction, the legitimacy of responsible government is even more fundamentally challenged when the parliament fails to uphold convention and is unable to enforce scrutiny of the executive. It is in this context that extra-parliamentary scrutiny can play a critical role in upholding political legitimacy.

The concluding section of this discussion considers the importance of extra-parliamentary scrutiny and summarises some of the debates regarding access to

⁵⁶ Woodhouse, ‘The Role of Ministerial Responsibility in Motivating Ministers to Morality’, p.43.

⁵⁷ New Zealand House of Representatives, *Parliamentary Debates (Hansard)*. Wellington: House of Representatives New Zealand, 3 May 2001.

privileged documentation to support the investigation of ministers where serious policy and administrative failure has occurred in their portfolios.

CHALLENGES FOR EXTRA-PARLIAMENTARY SCRUTINY

There are many matters to consider in designing approaches to effective extra-parliamentary scrutiny, and models vary around Australian jurisdictions. However, in the context of the present discussion arguably the most critical element to be addressed to enable effective extra-parliamentary scrutiny of ministerial action or inaction is the waiver or limitation of parliamentary privilege, including as it attends to Cabinet confidentiality. This conclusion is drawn from the ICAC Commissioners' experience in the Oakden case, where the unavailability of Cabinet documentation to the ICAC investigation arguably compromised the Commissioners' ability to make findings of fact regarding the existence or otherwise of maladministration by the ministers involved.⁵⁸ The Royal Commissioner into the HIP also noted the limitations parliamentary privilege placed on his ability to test the conclusions of previous inquiries or evidence supplied (while commenting that he did not intend it to be inferred that he wished to mount any such challenges).⁵⁹

Professor Anne Twomey noted in her evidence to the Senate Select Committee on a National Integrity Commission in 2017: 'Parliamentary privilege of itself should not be a get-out-of-jail clause for people who are behaving in a criminal or corrupt way'.⁶⁰ Twomey's comment was made in the context of reflecting on the conflict between parliamentary privilege and investigation by extra-parliamentary bodies, particularly where the actions of ministers are involved. The reflex political response to any challenge to parliamentary privilege is generally to protect it in the strong terms of its derivation from Article 9 of the *Bill of Rights* 1689 (Eng.): 'That freedom of speech or

⁵⁸ It is noted that the *Independent Commissioner Against Corruption Act 2012* (SA) includes 'failure to act' in the definition of 'conduct' (s.5(c)).

⁵⁹ Royal Commission into the Home Insulation Program, *Report*, 16.

⁶⁰ Commonwealth of Australia. *Official Committee Hansard: Senate Select Committee on a National Integrity Commission*, 12 May 2017, p. 15. Accessed at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommsen%2Ff253b3da-ecda-4a0f-8884-a9eab3b9a546%2F0000%22>.

debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament'.⁶¹

However, dissenting views have long existed in the Australian judiciary and among eminent constitutional lawyers, providing a basis for challenging the abuse of parliamentary privilege in cases where its limitation would enable disclosure of evidence to support holding ministers responsible for their actions or inaction, including Cabinet documentation.

In *Sankey v Whitlam* (1978), the High Court took the view that protection from disclosure of Cabinet documents, where this was in the public interest, 'should not be absolute or eternal'.⁶² However, the judgement also noted that the subject matter of the documentation needed to be considered to make such a determination, signalling that its release was an exceptional circumstance. Subsequent cases, including the majority judgements in *Commonwealth v Northern Land Council* (1993), *Egan v Willis* (1998) and *Egan v Chadwick* (1999) were not supportive of variation of the traditional restrictive view of the convention of cabinet confidentiality.⁶³ *Commonwealth v Northern Land Council*, while not upholding the broad disclosure proposed in *Sankey v Whitlam*, did consider that the content of certain documents may warrant their release:

[We] doubt whether the disclosure of records of Cabinet deliberations upon matters which remain current or controversial would ever be warranted in civil proceedings. The public interest in avoiding serious damage to the proper working of government at the highest level must prevail over the interests of a litigant seeking to vindicate private right. *In criminal proceedings the position may be different.*⁶⁴

⁶¹ Cited in G. Griffith and D. Clune, 'Arena v Nader and the Waiver of Parliamentary Privilege', in G. Winterton (ed.), *State Constitutional Landmarks*. Leichhardt: The Federation Press, 2006, p. 332.

⁶² E. Campbell, 'Parliamentary Inquiries and Executive Privilege'. *Legislative Studies* 1(1) 1986, p. 11.

⁶³ C. Mantziaris, *Egan v Willis and Egan v Chadwick: Responsible Government and Parliamentary Privilege*. Parliamentary Research Paper 12, 1999, pp. 31-33, 34). Accessed at: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9900/2000RP12

⁶⁴ *Commonwealth v Northern Land Council* (1993), cited in S. Ohnesorge and B. Duffy, 'Evading Scrutiny: Orders for Papers and Access to Cabinet Information by the New South Wales Legislative Council'. *Public Law Review* 29 2018, p. 123 (emphasis added).

Although this point will not be pursued in detail in the present discussion, and noting the comment from Twomey cited above, the release of cabinet documents in cases where there is reasonable suspicion of corruption or criminal liability, merits further exploration.

Sir Anthony Mason has argued that the courts have the power to override cabinet conventions in certain circumstances and the exercise of this power should be determined by the courts. Mason has interrogated the points of difference between the majority and minority judgements in the *Egan* cases, which he summarises thus:

the existence of power in the courts to compel production of documents relating to Cabinet deliberations; and, more importantly,

the significance of the doctrine of ministerial responsibility as an obstacle to the existence of the power.⁶⁵

As noted above, it was the majority view in *Egan v Willis* that was cited by Commissioner Lander in support of his view of ministerial responsibility in the Oakden report.⁶⁶ In relation to the first point, Mason argues that the dissenting judgement of Priestley JA in *Egan v Chadwick* was right to uphold the view that courts have the power to order production of cabinet documents, albeit in exceptional cases.⁶⁷ In relation to the second point, regarding ministerial responsibility, Mason, citing the same initial passage as Commissioner Lander in his Oakden report, argues that it makes

...clear that securing the accountability of government activity is the ‘very essence’ of responsible government. If there is to be a collision between the attainment of this object and the preservation of Cabinet confidentiality, then the former must prevail over the latter.⁶⁸

Mason’s footnote to this statement is also important to note, underlining the evolution of policy responsibility and the role of public servants:

As an aside, it should be noted that the preservation of public service confidentiality designed to promote full and frank advice to Ministers,

⁶⁵ A. Mason, ‘The Parliament, The Executive and the Solicitor-General’, in G. Appleby, P. Keyzer and J.M. Williams (eds.), *Public Sentinels: A Comparative Study of Australian Solicitors-General*. Farnham: Ashgate, 2014, p.62.

⁶⁶ Independent Commissioner Against Corruption, *Oakden*, p. 251.

⁶⁷ Mason, ‘The Parliament, The Executive and the Solicitor-General’, p.63.

⁶⁸ Mason, ‘The Parliament, The Executive and the Solicitor-General’, p. 64.

formerly regarded as supporting Crown privilege immunity of documents from production in court, has given way to inspections of the documents by a judge in appropriate cases.⁶⁹

Mason is of the view that 'it is for the courts to determine the existence and scope of the powers and privileges of a House of Parliament', with due regard to 'the context of ministerial responsibility'.⁷⁰ Like Commissioner Lander, Mason ultimately takes the view that the resolution of matters of ministerial responsibility is a political question. However, he also cautions against the majority view in *Egan v Chadwick*, which he notes eschewed reference to the above-mentioned passage regarding responsible government from *Egan v Willis*.⁷¹ Mason disputes the view that operating on the basis that there is inconsistency between the convention of ministerial responsibility (demanding, as it does, Cabinet confidentiality) and the power of the courts to order production of Cabinet documents is a qualification on the power itself.⁷² In his view 'the right of the public to be fully informed about the activities of its government, and have those activities scrutinised by their elected representatives' should prevail.⁷³

The debate outlined above concerns the production of Cabinet documents to the courts. Much discussion surrounds the distinction between the courts and extra-parliamentary integrity bodies, with the latter confined to making findings of fact. However, the point of principle elicited from the above discussion relates to the importance of limiting claims to parliamentary privilege and cabinet confidentiality in matters of critical public interest, such as the serious policy and administrative failures resulting in fatalities discussed earlier. In continuing her evidence to the Senate Select Committee on a National Integrity Commission cited above, Professor Twomey noted the importance of enacting appropriate legislation to determine how such a commission would interact with parliamentary privilege.⁷⁴ As Twomey noted: 'It is a space where parliament can, through its legislation, limit parliamentary privilege and

⁶⁹ Mason, 'The Parliament, The Executive and the Solicitor-General', p.64.

⁷⁰ Mason, 'The Parliament, The Executive and the Solicitor-General', p.64.

⁷¹ Cited in Independent Commissioner Against Corruption, *Oakden*, p. 251.

⁷² Mason, 'The Parliament, The Executive and the Solicitor-General', p.63.

⁷³ Mason, 'The Parliament, The Executive and the Solicitor-General', p.64.

⁷⁴ Commonwealth of Australia. *Official Committee Hansard: Senate Select Committee on a National Integrity Commission*, p.15.

it can refer these issues to outside bodies if it thinks it is appropriate for outside bodies to deal with them'.⁷⁵

As Twomey notes, there is a precedent for such legislation in New South Wales, in the *Special Commissions of Inquiry Amendment Act 1997* (NSW), and although this has never been used in that jurisdiction,⁷⁶ cases such as Oakden reinforce the need for such powers to be legislated.

While enabling full investigation of matters is critical, so is ensuring that remedy before the law can be applied where findings of fact indicate potential criminal liability. As noted above, one of the outcomes of the Cave Creek Commission of Inquiry was the passage of a Bill removing the immunity of the Crown from prosecution under legislation (including under the Building Act and the Health and Safety in Employment Act, in that instance) applicable to the community. In recommending removal of the Crown immunity from liability, the Commissioner in that case noted that after observing the lack of genuine accountability within the Government, 'it is difficult now to see why the Crown should be treated differently from any other organisation'.⁷⁷

The Australian Law Reform Commission (ALRC) has twice reviewed issues of Crown immunity and liability, in 2001 and 2015, but there has been apparently little appetite at the political level in Australia to address this matter.⁷⁸ In its 2001 report on the judicial power of the Commonwealth, the ALRC considered the matter of Crown immunity in some detail, noting: 'The principle is widely accepted that governments, as representatives of the people, should be subject to the same laws as the people, unless Parliament provides otherwise'.⁷⁹

The ALRC further commented that consultations undertaken and submissions received during its review had emphasised that 'this principle is at odds with the traditional common law principle that the executive is generally presumed to be immune from the

⁷⁵ Commonwealth of Australia. *Official Committee Hansard: Senate Select Committee on a National Integrity Commission*, p.15.

⁷⁶ 'Arena v Nader and the Waiver of Parliamentary Privilege', p. 360.

⁷⁷ Department of Internal Affairs, *Commission of Inquiry*, p.138.

⁷⁸ Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (Report No. 92), 2001 (accessed at: <https://www.alrc.gov.au/report-92>); Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (Report No. 129) 2015 (accessed at: <https://www.alrc.gov.au/publications/freedoms-alrc129>).

⁷⁹ Australian Law Reform Commission, *The Judicial Power of the Commonwealth*, p. 410.

operation of the law'.⁸⁰ The ALRC called for blanket removal of Crown immunity and supported the proposition that specific legislation define the extent of any immunities granted.⁸¹ This would remove the (still) existing lack of certainty regarding the status of immunity, cited as a key concern in submissions to the review.

CONCLUSION

As Woodhouse notes, elected members of parliament:

...need to be reminded again and again that our chosen form of liberal democracy, 'the Westminster model' ... is highly vulnerable to abuse and distortion – because of its heavy reliance on conventions or unwritten rules which means dependence on the good faith and integrity of political practitioners.⁸²

The quotation from Sir Winston Churchill at the start of this paper refers to this moral responsibility, and underlines that governance based upon convention is only functional and legitimated when morality is observed in action. Some western polities appear increasingly lacking parliamentary practitioners with respect for liberal democratic conventions, including the concept of ministerial responsibility. The three cases discussed here involving fatalities resulting from serious failures of policy and administration are sad and extreme examples of this apparent lack of respect and demonstrate the need for concept of ministerial responsibility to encapsulate responsibility for failure to act. Gregory's notion of vindicative responsibility as both remedy and punishment for such failure seeks to ensure consequences for ministerial inaction. However, as noted earlier, whether resignation alone is adequate remedy or punishment in cases of potential criminal liability merits further discussion.

There is increasing evidence that the failure by elected representatives to uphold such moral conventions has led to a collapse of public trust in many Westminster

⁸⁰ Australian Law Reform Commission, *The Judicial Power of the Commonwealth*, pp. 410-411.

⁸¹ Australian Law Reform Commission, *The Judicial Power of the Commonwealth*, pp. 411-412.

⁸² Woodhouse, 'The Role of Ministerial Responsibility in Motivating Ministers to Morality', p.48.

democracies, including Australia.⁸³ Arguably this necessitates greater sophistication in enactment of extra-parliamentary scrutiny mechanisms as a means of supporting the retention of political legitimacy where parliamentary mechanisms fail by omission. This includes addressing limitation of parliamentary [and cabinet] privilege in specific circumstances where there is clear evidence of its abuse against the public interest in cases of serious policy and administrative failure. If it is not possible to fully investigate the causes of and responsibility for public harm, it is not possible to make complete findings of fact to support apportionment of responsibility. In addition, there is a need to address Crown and executive immunity from liability to achieve genuine equality before the law, so that remedies can be sought when appropriate. As the ALRC noted in 2001:

The doctrine of immunity of the Crown was developed at a time when governments engaged in only a narrow range of activities, and rarely so in respect of the kinds of activities carried on by ordinary persons or commercial entities. The immunity of the Crown was accepted as a general rule because its impact on citizens was modest. However, the executive government 'carries out in modern times multifarious functions involving the use and occupation of many premises and the possession of many things'. Government entities increasingly affect the lives of citizens through sophisticated administrative functions and government engagement in commercial activities....⁸⁴

The practice of Westminster-derived governance has endured because it has evolved over the centuries. While its attendant moral conventions remain as relevant as ever, processes to uphold their enforcement require urgent modernisation to restore public faith in many western liberal democracies in the face of the complexity of government operations and increasingly disingenuous behaviours by elected representatives.

⁸³ G. Stoker, M. Evans and M. Halupka, *Trust and Democracy in Australia: Democratic Decline and Renewal*. (Report No. 1). Canberra: Museum of Australian Democracy, 2018. Accessed at: <https://www.democracy2025.gov.au/documents/Democracy2025-report1.pdf>

⁸⁴ Australian Law Reform Commission, *The Judicial Power of the Commonwealth*, p. 409, citing *Jacobsen v Rogers* (1995).