

**DEVELOPING AN ACCOUNTABILITY FRAMEWORK: POLITICAL ADVISORS IN
THE WESTMINSTER SYSTEM OF GOVERNANCE**

Yee-Fui Ng

Abstract

This paper adopts a comparative approach in analysing the legal and political regulation of political advisors in the Westminster jurisdictions of the United Kingdom, Australia, New Zealand, and Canada. It will develop an accountability framework for regulating political advisors. The paper argues that the traditional Westminster vertical accountability mechanism of ministerial responsibility to Parliament has become less effective in contemporary times. The multi-faceted nature of a Minister's role, combined with a 24-hour news cycle, mean that horizontal accountability mechanisms, such as the Ombudsman, Auditor-General and the media, have become increasingly important.

DEVELOPING AN ACCOUNTABILITY FRAMEWORK: POLITICAL ADVISORS IN THE WESTMINSTER SYSTEM OF GOVERNANCE

Yee-Fui Ng

This paper seeks to outline an accountability framework for political advisors within the Westminster system. I will examine the situation in the United Kingdom, Canada, Australia and the New Zealand: the classic liberal Westminster jurisdictions. The Westminster system refers to a ‘British-inspired version of parliamentarianism’, as opposed to legislative or other presidential systems (Rhodes, Wanna and Weller 2009, p. 2). These jurisdictions were chosen because they share a liberal democratic framework within the common constitutional heritage derived from the Westminster tradition. This study does not include non-liberal, autocratic Westminster countries within its scope, as there are many complicating factors, possibly including corruption, that create accountability issues in those countries, beyond the institution of political advisors within the system of government. The liberal democratic Westminster countries chosen in this study are generally seen as exemplars for the rule of law and have high scores for transparency and lack of corruption.

I argue that in the context of weak vertical or parliamentary accountability, horizontal accountability mechanisms, such as the oversight bodies and the media, have become increasingly important to ensure the accountability of political advisors. Towards this end, the paper will first outline the dimensions of vertical or parliamentary accountability, as expressed by the notions of individual ministerial responsibility. It will examine the theory and practice of ministerial responsibility, how it has evolved following the ‘new public management’ movement, as contrasted with media and public expectations of ministerial responsibility. It will show that the disjuncture between the theory, practice, as well as political and media interpretations of ministerial responsibility leads to a weak form of accountability. Following this, the paper will apply the doctrine of ministerial accountability to political advisors and suggest in what circumstances political advisors should appear before parliamentary committees towards achieving ministerial responsibility. Finally, I argue that due to the weaknesses in vertical accountability in Westminster systems, horizontal accountability mechanisms have

become increasingly important in holding political advisors to account. This includes oversight bodies that scrutinise government actions, as well as the mass media.

Individual Ministerial Responsibility: Theory and Practice

According to the principle of ministerial responsibility, Ministers are responsible to Parliament for the acts of their department (Woodhouse 1994, p. 38). Under this doctrine, the Minister absorbs the mistakes of the public servants. Sir William Armstrong, then Head of the Home Civil Service, penned a memorandum stating that ‘the civil service ... has no constitutional personality or responsibility, separate from the duly elected Government of the day’ (Armstrong Memorandum 1985). This denoted the unity of mind between civil servants and Ministers. Hence civil servants do not have an independent existence and operate as an *alter ego* of their Minister. Christopher Hood and Martin Lodge dub this the ‘directed bargains’; where civil servants have ‘no independent liability or responsibility of their own’ (Hood and Lodge 2006, p. 45). This means that Ministers should take responsibility for all actions of the agent, even those that the Ministers did not authorise. Sir Ivor Jennings wrote that the ‘act of every civil servant is by convention regarded as the act of the Minister’ (Jennings 1938, p. 184), while Lord Morrison said that the ‘Minister is responsible for every stamp stuck on an envelope’ (quoted in Heard 1991, p. 52). Nonetheless, it is doubtful that this principle has ever reflected reality. It is rare for Ministers to accept responsibility for the actions of their department where they were not personally involved (Thompson and Tillotsen 1999; Finer 1989, pp. 124-5).

Further, contrary to the proclamations of civil service indivisibility, all British permanent secretaries of departments are designated as ‘Accounting Officers’, a movement that predates ministerial responsibility, from Gladstone’s time as Chancellor of Exchequer, where he established the powerful and prestigious Public Accounts Committee in 1861, which began to call permanent secretaries as accounting officers in 1870 (Burnham and Horton 2013, p. 231). This concept is now given legislative expression by the *Government Resource and Accounts Act 2000*. The designation of ‘Accounting Officer’ meant that the official has a personal responsibility for the propriety and regularity of departmental finances and is directly answerable

to Parliament and parliamentary committees for areas of their responsibility (Franks 2004, pp. 3-4).

The convention of ministerial responsibility developed at a time in the nineteenth century when the role of government was limited and departmental sizes were small; meaning that a competent Minister could be assumed to have personal control of a department (Gay and Powell 2004, p. 7). In that context, demanding the resignation of a Minister for faults in a department is reasonable. However, as the administrative state increased in size, scale and complexity in each jurisdiction, and the bureaucracy became vast and entrenched, with hundreds of thousands of staff, it became less feasible for a Minister to be abreast of all actions of the department. As Margaret Hodge MP, then chair of the House of Commons Public Accounts Committee, stated:

When Haldane established the constitutional convention that Ministers are accountable to Parliament and civil servants are accountable to Ministers, there were 28 civil servants in the Home Office. Now, despite the changes and the growth of the Ministry of Justice, there are 34,000. The idea that one Cabinet Minister can be accountable for the actions of some 34,000 people is, I think, mistaken (House of Lords 2012-13).

In this context, conceptions of ministerial responsibility started to shift. Diana Woodhouse argued that in the United Kingdom, the convention of individual ministerial responsibility requires resignation or ‘sacrificial responsibility’ for personal fault or private indiscretion by the Minister, or departmental fault where the Minister was personally involved or should have known about the issue (Woodhouse 1994, p. 38). However, where there was maladministration within a department that the Minister was unaware of and which could not be attributed to the Minister’s negligence, the Minister’s responsibility is limited to explanatory or amendatory accountability, with no requirement for resignation. Explanatory responsibility requires the Minister to explain or account for his/her own behaviour and the department’s behaviour, and amendatory responsibility involves the Minister making amends for his/her own or departmental failings. Ian Killey found that this approach has also been adopted in Australia; where there is stronger pressure to resign when a Minister is personally culpable for actions within the department, while resignation may not be necessary without ministerial culpability (Killer 2012,

pp. 104-13). David Butler found that from 1901-1996, resignations for personal fault in a public or private capacity amounted to 27 per cent of resignations in the United Kingdom and 40 per cent in Australia, while resignations due to accepting blame for public servants accounted for only five per cent of resignations in the United Kingdom and none in Australia (Butler 1997, p. 6). Similarly Sharon Sutherland found that, out of 150 ministerial resignations in Canada between 1867 to 1990, there were only two ministerial resignations for maladministration in the portfolio (Sutherland 1991, p. 102). In New Zealand, only two resignations out of 23 scandals over the last 40 years was for departmental fault (Farrar 2012). In the NZ Cave Creek scandal, after 14 people were killed by the collapse of a government-built viewing platform, two Ministers resigned from the relevant portfolio for departmental faults but remained Ministers. Thus, ministerial responsibility for faults that occurred within the department has always been weak across all the Westminster jurisdictions in terms of resignations or sacrificial responsibility. There has never been a conventional practice of ministerial resignation for faults within their department where they are not culpable. The only requirement for resignation is where there the Minister is caught in the act with a ‘smoking gun’ in their hand (Thompson and Tillotsen 1999, p. 57). Finer put it more strongly, stating that resignations only occur if ‘the minister is yielding, his Prime Minister unbending, and his party is out for blood’ (Finer 1956).

Ministerial Responsibility in the post-NPM Era

The concept of ministerial responsibility is predicated upon a departmental structure where the Minister has full control over the department and should thus be aware of departmental activities under his or her remit. The Haldane report affirmed that departmental structures with the Minister being solely responsible are the best way to ensure ministerial responsibility, rather than commissioners or administrative boards, where responsibility is dispersed (Haldane Report 1918, p. 11).

The relationship between Ministers and civil servants was fundamentally altered by the ‘New Public Management’ (NPM) movement that swept through the Westminster jurisdictions in the 1980s, premised on a reconceptualisation of the way governments should be managed, with an increased focus on reducing costs, managing programmes more efficiently, and making public

service managers more accountable for results (Hood 1991). New Zealand and the United Kingdom have gone the furthest, with systematic separation between service delivery functions and policy functions within departments, which has produced a large array of executive agencies whose civil service heads work to performance targets framed in contractual language, but which remain subject to the policy direction of Ministers (Daintith and Page 1999, pp. 37-45). In Australia, this NPM-driven division between policy and management functions has found legislative expression in the financial management and public service framework. In relation to the management of personnel, financial and other resources, the most senior public servants, departmental secretaries, are now legally responsible ‘under the Agency Minister ... for managing the Department’ and ‘advise[ing] the Agency Minister in matters relating to the Department’ (*Public Service Act 1999* (Cth), s 57(1)). Under the *Public Governance, Accountability and Performance Act 2013* (Cth), which provides a comprehensive regime for the management of public funds, the Secretary is under a duty to ‘govern’ the Department so as to promote the proper use and management of public resources, the achievement of its purposes, and its financial sustainability (ss 13(2), 15). In contrast to the *Public Service Act*, these are not duties ‘under the Minister’; instead, the Act regulates the obligations of the Secretary in relation to communications with the Minister (s 19). This, the Finance Minister assured Parliament, ‘reflects notions of responsible government as a Minister must be able to know what is occurring in his or her portfolio given he or she will be held accountable in Parliament’ (*Public Finance, Governance and Accountability Bill 2013 Explanatory Memorandum*, para 153). In the United Kingdom, senior civil servants are designated as ‘Accounting Officers’, denoting a personal responsibility to account directly to Parliament for departmental spending, while Accounting Officers in Canada have a duty to account to Parliament but responsibility still ultimately lies with the Minister. Thus, civil servants appear before public accounts committees in the United Kingdom and Canada. In Australia and New Zealand, the equivalent practice has developed of public servants appearing before estimates committees to give an account of departmental expenditure. Similar to Canada, under this conception of ministerial responsibility, the public servant’s role is to account for their actions, while Ministers retain the ultimate responsibility (Senate Finance and Public Administration References Committee 2003).

NPM fractures the traditional relationship between Ministers and civil servants and delineates different areas of responsibility for each party, making responsibility more diffuse and amorphous. In this new division of responsibilities, civil servants take on additional areas of responsibility, such as the responsibility for departmental finance and management of their departments. This is embodied by the ‘Accounting Officer’ model introduced in Canada, where civil servants are explicitly made responsible for departmental spending (*Financial Administration Act* R.S.C., 1985, c. F-11 (Canada) s 16.4). In the United Kingdom, the Accounting Officer concept has a longer provenance before NPM, where senior civil servants have a specific area of personal responsibility to Parliament for the propriety and regularity of the public finances. The Haldane report in 1918 affirmed that Ministers and departmental officers should appear before parliamentary committees that scrutinise the activities of departments to explain and defend the acts for which they are responsible (Haldane Report 1918, p. 15). The appearance of civil servants before parliamentary committees increases explanatory accountability, as they are able to explain technical details and departmental spending decisions.

This idea of a division of responsibility within departments between Ministers and senior civil servants clearly prevails today in executive practice and indeed is reflected in legislation. There is a marked contrast here with the older notion, which received judicial endorsement in the *Carltona* case in 1943, that decision-making public servants acted as the *alter ego* of their Minister, but the Ministers retained legal and political responsibility for those decisions (*Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560, 563). Ministers, the court said, may have agents who are authorised to carry out certain tasks without having a formal delegation to do so. The agent’s decision is deemed to be the Minister’s decision. The Ministers remain responsible and answerable to Parliament for anything their officials have done under the Ministers’ authority; thus, responsible government is maintained. The *Carltona* principle was a pragmatic recognition by the judiciary of the need for efficiency in the functioning of the State by means of comprehensive informal delegation of decision-making power.

Despite the *Carltona* principle, in all Westminster jurisdictions, there is a continuing trend towards more formal delegation and distribution of departmental powers and functions. Formal legislative delegation provisions can provide Ministers with the ability to delegate their powers,

or specify that a senior civil servant is to exercise powers under statute. Under instruments of delegation, the civil servant exercises power independently on their own behalf, and are not merely acting as the Minister's *alter ego*. It is now evident that the conception that civil servants are merely the extension of the Minister is more tenuous. Their relationship has evolved into what Hood and Lodge call the 'delegated agency bargain', where the political principal and civil servant agree on a framework set by the principal, where the civil servant is given 'a zone of discretion ... in exchange for direct responsibility for outcomes within that zone of discretion' (Hood and Lodge 2006, p. 56). The delegation and financial accountability provisions mark the distance travelled in the last few decades from notion of the civil servant as the mere *alter ego* of an omnipresent Minister to a mode of governance in which the activity of portfolio Ministers is focussed on policy direction, on securing a fair share of legislative and financial resources, and on public and parliamentary representation.

In addition, there have been attempts to codify the responsibility of Ministers and civil servants through various codes of conducts, standards, guides and manuals (Brenton 2014, p. 472). These codes, particularly ministerial codes, are usually vaguely worded, but may seek to delineate the responsibility of Ministers and civil servants to Parliament. On the one hand, the Australian Ministerial Statement of Standards is the sparsest in terms of imposition on Ministers. Although the Standards emphasise that Ministers must accept the full implications of the principle of ministerial responsibility, they only oblige Ministers not to mislead Parliament, which is a rather low bar (Australian Government Statement of Ministerial Standards 2015, cl 5.1). At the other end of the spectrum, the New Zealand Cabinet Manual reiterates the traditional principle of ministerial responsibility, stating that Ministers are responsible for determining and promoting policy, defending policy decisions, and answering in Parliament on both policy and operational matters, while officials are responsible to their Minister (Cabinet Manual 2008, cl 3.5). The concept of individual ministerial responsibility is also further elucidated:

Ministers are accountable to the House for ensuring that the departments for which they are responsible carry out their functions properly and efficiently. On occasion, a Minister may be required to account for the actions of a department when errors are made, even

when the Minister had no knowledge of, or involvement in, those actions (Cabinet Manual 2008, cl 3.21).

This provision obliges Ministers to account for the actions of their department, even when the Minister had no knowledge of these actions.

Similarly, the Canadian Code ‘Open and Accountable Government’ states that Ministers are not required to accept personal responsibility for departmental errors, but stresses the requirement for Ministers to account to Parliament for all departmental actions in terms of explaining matters, responding to questions and undertaking remedial action:

Ministerial accountability to Parliament does not mean that a Minister is presumed to have knowledge of every matter that occurs within his or her department or portfolio, nor that the Minister is necessarily required to accept personal responsibility for every matter. It does require that the Minister attend to all matters in Parliament that concern any organizations for which he or she is responsible, including responding to questions. It further requires that the Minister take appropriate corrective action to address any problems that may have arisen, consistent with the Minister’s role with respect to the organization in question. It is important that Ministers know and respect the parameters of their responsibilities with respect to arm’s-length organizations (Open and Accountable Government 2015, cl 1.3).

Arguably the Canadian position is similar to the New Zealand position, as it requires the Minister to make a full account to Parliament, impliedly including matters where they do not have personal knowledge and responsibility.

The UK Ministerial Code also retains the full responsibility of Ministers to Parliament, even over agencies they do not have direct control over, although there is a devolution of power to civil servants in terms of the Accounting Officer model. The UK Code states that Ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their departments and devolved executive agencies (Ministerial Code 2016, cl 1.2). This echoes a

House of Commons resolution in 1997, which puts the responsibility on Ministers to account to Parliament for actions of departments under their direct control, as well as executive agencies, which are constitutionally, legally and managerially separate from Ministers and not subject to direct ministerial control. In addition, the UK Code states that Ministers should require civil servants who give evidence before parliamentary committees on their behalf and under their direction to be as helpful as possible in providing accurate, truthful and full information (Ministerial Code 2016, cl 1.2). The Code also enshrines the Accounting Officer model, providing for a separate personal accountability by senior civil servants.

Thus, the codes put varying levels of responsibility on Ministers, with the Australian code being the most lax and the New Zealand and Canadian code being the firmest on ministerial responsibility in stating that Ministers remain responsible to account to Parliament even for departmental actions they were not aware of, and the UK code being strong on ministerial responsibility even with the devolved agency structures, but also carving out a separate area of responsibility to civil servants. Despite NPM, ministerial responsibility thus remains the lynchpin of Westminster constitutional systems.

In all jurisdictions, the codes emphasise the pre-eminence of the Prime Minister in determining how ministerial responsibility is to be enforced. This is particularly pronounced in Canada, where power is strongly centralised in the Prime Minister. Canadian departmental heads and political advisors are appointed by their Prime Minister, who also influences their careers. In Canada, therefore, ‘ministerial responsibility can only be understood and appreciated as a ruling concept against the backdrop of prime ministerial government’ (Smith 2006, p. 123).

However, the NPM reforms and codification of responsibilities between Ministers and civil servants have led to disputes about whether accountability can be evaded if it is diffused amongst various actors, or alternatively whether Ministers are able to use the new structures to evade ultimate responsibility for scandals and controversies by blaming their officials and advisors. There have been questions about whether senior departmental figures have become scapegoats and taken the blame for certain incidents. For instance, in the United Kingdom, politicians have sought to delineate between policy and operational matters, and claim that civil servants should

be responsible for operational issues (Gay and Powell 2004, p. 12). Margaret Lodge, former chair of the Public Administration Committee, has advocated strongly for civil servants to appear before parliamentary committees, but has also claimed that civil servants should shoulder increasing responsibility. Hodge stated to the House of Lords Constitution Committee on 23 May 2012 (Gay 2012, pp. 9-10):

I think that you just have to accept the reality that Ministers cannot be accountable for much that happens. To take an example of a procurement decision, the NHS IT system was a complete shambles that cost £6 billion. Can you really say that Ministers were accountable for that? Big procurement decisions are one example. I think that we have to try to move to a definition where Ministers are responsible for policy formulation and there is greater accountability of the civil service for policy implementation. That is difficult and blurred, and there will no doubt be areas where disagreements will arise, but select committees are actually pretty adept at sorting out where responsibility and accountability lie. That is hugely important.

These opportunistic positions, given the difficulties in separating between policy and administration, have led to British Ministers blaming civil servants for operational failures, such as Ministers blaming prison escapes on the operational failings of the Prison Service, rather than their policy decisions for which they can be held responsible (Gay and Powell 2004, pp. 21-5; Barker 1998, p. 1). These actions are consistent with ‘public choice’ theory, which predicts that politicians have the incentive to deflect all the blame that comes in their direction, while accepting the credit for anything that goes right towards achieving ‘the political nirvana of a system of executive government in which blame flows downwards in the bureaucracy while credit flows upwards to ministers’ (Hood and Lodge 2006, p. 59). Of course there are exceptions where Ministers have exceptionally high personal ethics and integrity; however by and large Ministers have the overriding incentive to shift blame to another locus.

The Media and Public Expectations for Ministerial Responsibility

In the constitutional vacuum left by Ministers being held to account, the mass media have become a potent force in enforcing ministerial responsibility. This may signal a shift in the location of accountability, away from politicians and Parliament, to the media (Woodhouse 2004 p. 16). If an embattled Minister is on the front pages of the newspapers for a prolonged period, sucking up political oxygen, and loses the support of the Prime Minister, the Minister will ultimately resign. Brazier states that the media can be seen as possessing a unique capacity to enforce ministerial responsibility:

For Parliament cannot collectively remove an erring Minister (for when did a Minister last resign at the clear behest of Parliament?), nor can the ranks of the Opposition do so (for it is the job of the Opposition to criticize, and its criticisms can be discounted as partisan; even when the attack had merit, the Government's Commons majority will beat off the attack). Nor can the courts police the doctrine of ministerial responsibility, for the fitness for office of a Minister is not a justiciable issue. To the extent that some Ministers, in effect, have been forced from office by the media, the media can claim that they have moved into a constitutional lacuna and have fulfilled a useful public service (Brazier 1997, p. 271).

The media's definition of ministerial responsibility is usually more stringent than self-enforced ministerial codes of conduct, where sometimes explanatory responsibility or amendatory responsibility is sufficient. The media often demand the Minister's scalp:

Resignation is the measure and the meaning of ministerial responsibility – to the media, who need only to fix their focus on an individual, and to the public, who take their understanding of ministerial responsibility largely from the media (Smith 2006, p. 107).

Thus, the media and the public still demand ministerial resignation to satisfy a metaphorical 'public hanging' or 'shooting gallery mentality' (Smith 2006, p. 107); a symbolic gesture of the person at the top taking ultimate blame.

There is thus a disjuncture between the theory, practice, reality, codification and public expectations in terms of ministerial responsibility. The theory suggests a strong form of ministerial responsibility where Ministers take responsibility for the actions of their department and advisors, even those they did not authorise. The practice indicates that Ministers only resign over events where they are personally culpable. Some ministerial codes suggest an increasing division between what Ministers and their department are responsible for. Nevertheless, public expectations reinforced by the media are that Ministers resign over departmental blunders, with other gestures seen as too weak. As a convention, ministerial responsibility is easily malleable, and cynically circumvented by politicians towards achieving short-term political ends. There is no wonder why the doctrine has become so confused and easily manipulated over time.

Political Advisors and Parliamentary Accountability

So, how does the concept of ministerial responsibility apply to political advisors? As an extension of the concept of ministerial responsibility, Ministers should also technically take responsibility for the actions of advisors in their own offices, who are at an even higher level of direct control than departments. Even more than civil servants, advisors are seen to be acting as *alter egos* of their Ministers. This means that Ministers should account to Parliament for the actions of their advisors, even those actions they did not authorise. However, the theory of ministerial responsibility has never matched the practice, where Ministers tended only to resign over the actions of their advisors when they are personally culpable.

The next question is: what is the relationship of political advisors to Parliament in upholding the principle of ministerial responsibility? In this respect, an analogy can be made with civil servants appearing before parliamentary committees. Civil servants routinely appear before parliamentary committees. Apart from Accounting Officers in the United Kingdom, who have an independent personal responsibility, the presence of civil servants is to give an account of their actions to Parliament, that is, provide explanatory accountability, while responsibility for their actions falls on their Minister, who may be censured in Parliament (Senate Finance and Public Administration References Committee 2003). The appearance of political advisors before parliamentary committees would be similarly to provide an account of their actions, while the Minister would

remain answerable to Parliament for any remedial action and subject to any sanctions by Parliament.

Civil servants do exercise statutory power and manage the expenditure of public funds, while political advisors in general do not. This justifies the attendance of civil servants at estimates committees for the expenditure of public funds. Nevertheless, where there is a controversy and it is necessary to work out relevant factual information, political advisors and public servants occupy the same position in relation to Ministers through the principle of responsible government. Yet civil servants appear before parliamentary committees, while political advisors sometimes resist. There is little rationale for political advisors not appearing, as there is no reason to distinguish political advisors from public servants in establishing factual information regarding controversies.

In the United Kingdom, it is clear that special advisors can be called to appear before parliamentary committees according to the Osmotherly Rules, which were revised in 2005 to create a presumption that where a parliamentary committee called a named official, including a special advisor, the named official will appear where possible (Cabinet Office cl 44). However, the Minister is given ultimate discretion to decide who should ultimately appear, including an alternate civil servant, or the Minister is able to appear themselves. This reinforces the Minister's ultimate responsibility, but facilitates the committees' inquiries to obtain factual information as needed. There is no such explicit acknowledgement of the responsibility of political advisors to Parliament in other jurisdictions.

The latest ministerial codes are generally silent about the responsibility of Ministers for the actions of their personal staff, apart from a previous incarnation of the Australian ministerial code, the Howard Government's 1996 Guide on Key Elements on Ministerial Responsibility, which states:

Ministers' direct responsibility for actions of their personal staff is, of necessity, greater than it is for their departments. Ministers have closer day-to-day contact with, and direction of the work of, members of their staff. Furthermore ministerial staff do not give

evidence to parliamentary committees, their actions are not reported in departmental annual reports, and they are not normally subject to other forms of external scrutiny, such as administrative tribunals ... Ultimately, however, ministers cannot delegate to members of their personal staff their constitutional, legal or accountability responsibilities. Ministers therefore need to make careful judgments about the extent to which they authorise staff to act on their behalf in dealings with departments.

Thus, the previous Australian code provided that Ministers had a higher direct responsibility for ministerial advisors compared to their department due to the higher level of direct control. The code also stated that advisors should not be subject to external accountability mechanisms, such as parliamentary committees and administrative tribunals. The code suggests that Ministers should restrain the level of responsibility given to their staff, which has arguably not eventuated in practice, given the dramatic expansion of the roles of advisors over time. This provision was later removed, meaning that there is no longer any clarity on that issue.

In most Westminster jurisdictions, there has been some level of intransigence against advisors appearing before parliamentary committees. In the United Kingdom, a number of Margaret Thatcher's and Tony Blair's advisors refused to appear before committees (Public Administration Select Committee 2007, p. 39), although this practice changed over time to political advisors appearing before various large-scale inquiries such as on the British participation in the Iraq War (FAC 2003). In Canada, the government issued a new policy in 2010 that political staff should not testify before committees and that Ministers should attend on their behalf (House of Commons Standing Committee on Access to Information, Privacy and Ethics 2010). Nevertheless, the Canadian position reinforces the traditional view of ministerial responsibility where Ministers appear before parliamentary committees to account for the actions of their advisors. Even after the change in government policy, an advisor appeared before a parliamentary committee (Standing Committee on Access to Information, Privacy and Ethics 2011). This can be contrasted with the complete lack of accountability in Australia, where in the 'Children Overboard' incident, a constitutional convention was claimed that political advisors do not appear before parliamentary committees, as well as one that Ministers do not appear before parliamentary committees where they are not a member of that House (Senate Select Committee

2002). In the Australian system, Ministers tend to be in the Lower House, while parliamentary committees are, as a rule, only active in the Upper House where the government rarely holds the majority due to proportional representation. As a result of these claimed conventions, neither Ministers nor advisors appeared before the Senate committee to provide explanation, accept a sanction or undertake remedial action. Australia has the weakest system of parliamentary accountability as, in the United Kingdom and Canada, Ministers routinely appear before parliamentary committees for issues of controversy, even when they are not compelled to do so. On the other end of the spectrum, there has not been any outcry about political advisors and parliamentary committees in New Zealand, with an advisor appearing before a parliamentary committee in 2013 (New Zealand Privileges Committee 2013). Although New Zealand has a single house of Parliament, the introduction of mixed member proportional representation has meant that parliamentary committees have become more active.

Thus, at differing points, there have been varying interpretations of how ministerial responsibility should operate in the context of political advisors appearing before parliamentary committees, with the United Kingdom and New Zealand being the most permissive, Canada being more obstructive but still maintaining ministerial responsibility, while Australia has subverted the notion of ministerial responsibility by allowing both Ministers and political advisors to completely escape accountability.

I will now consider in what circumstances political advisors should appear before parliamentary committees. Where Ministers accept responsibility for their actions or those of their advisors by explanatory and amendatory accountability, it is unnecessary for political advisors to appear before parliamentary committees. This is satisfied where Ministers explain the situation to Parliament, accept any sanction by Parliament, and undertake remedial action (Woodhouse 1994, p. 28–38). So for instance, in the Canadian example, where the Minister appears instead of their advisor, this is satisfied. Conversely, where Ministers try to avoid their responsibility to Parliament, additional accountability mechanisms are required. Accordingly, I argue that political advisors should be required to appear before parliamentary committees under summons where it facilitates the Minister's accountability to Parliament.

The Senate Committee on ministerial staff following the Australian ‘Children Overboard’ incident identified situations where ministerial advisors should appear, including where there are administrative problems, such as information not passing from the advisor to the Minister or the advisor acting without the Minister’s authority, as well as situations where the Minister has not assumed responsibility, such as by refusing to appear before committees or distancing themselves from the actions of their advisors (Senate Finance and Public Administration References Committee 2003). In 2004, the Labor and Democrats Senators called on the Liberal government to implement the Committee’s recommendation that ministerial staff be required to appear before parliamentary committees where important information has emanated from a Minister’s office but not from the Minister (Journals of the Senate No 138 2004).

In addition, if the political advisor engages in some form of illegal or improper conduct, this should be scrutinised by a parliamentary committee. For example, if a political advisor made a policy recommendation where they had a personal financial conflict of interest, this would be a matter that should be scrutinised. More broadly, if there was any suggestion of improper behaviour by the Minister or their advisor, this may necessitate questions being asked although policy issues are involved. For instance, it is improper to run a sham public consultation as it is a fraud on those participating in it and a waste of taxpayer money to run a consultation process when the outcome has already been decided. Further, there may be situations where the facts on significant issues are only within the knowledge of the ministerial advisor. For example, in the Australian ‘Hotel Windsor’ incident, only the political advisor herself could confirm if she was acting on instruction of her minister, the Premier, or the Premier’s chief media advisor.

Accordingly, political advisors should appear before parliamentary committees in at least the following situations:

- where a Minister has renounced a political advisor’s action or refused to appear to answer questions regarding the conduct of their advisor;
- where critical information has been received in a Minister’s office but is not communicated to a Minister;
- where critical instructions have emanated from a Minister’s office and not the Minister;
- where a government program is administered to a significant extent by a political advisor;

- where there are facts within the personal knowledge of only the political advisor that are relevant to a significant issue; or
- where advice by the political advisor involves some form of illegal or improper conduct, including policy advice.

If neither Ministers nor their advisors appear before parliamentary committees in these circumstances, Ministers are able to escape scrutiny for their actions and deny responsibility for events or policies. This creates an accountability deficit where no one takes explanatory or amendatory responsibility for public controversies. Consequently, the basic tenet of responsible government that seeks to ensure Executive accountability is undermined. This is a failure at a systemic level, where Ministers are able to utilise political advisors to avoid their own responsibility to Parliament.

Towards a New Accountability Framework: Vertical and Horizontal Accountability

The Decline of Vertical Accountability

The traditional conception of ministerial responsibility under which Ministers answer to Parliament for all actions of their department implies a strong hierarchical structure where control over all decisions can if necessary be exercised at the top and the relevant information can be readily transmitted up and down. The idea that responsibility implies ministerial resignation in the case of departmental errors, including those that Ministers did not authorise or of which they were not personally aware has never held sway in the United Kingdom, Canada, Australia and New Zealand.

The traditional Westminster accountability framework is predicated on ministerial responsibility and responsible government: a form of *vertical* accountability, that is, a top-down hierarchical accountability of Ministers to Parliament to answer for their actions and decisions. The role of advisors and civil servants in this context is generally to give an account for their actions, while responsibility for their actions rests with the Minister. However, particularly in Australia, this vertical accountability mechanism focussing on accountability of Ministers to Parliament has

been undermined by party politics and the self-interested actions of politicians. Due to the partial fusion of the Executive and Legislature in Westminster systems, the Executive often has the majority to block inconvenient parliamentary scrutiny. In addition, Parliament is often hamstrung when dealing with political advisors who refuse to appear before parliamentary committees at the instruction of their employer, the Minister. Although Parliament has strong powers to punish those who do not comply, it is rather harsh to imprison a person who is following the directions of their employer. Parliamentary accountability in all Westminster jurisdictions has been unreliable at best. In instances where the Minister is not directly culpable, parliamentary accountability has never really existed. Thus, vertical accountability has always been weak and may be declining with the addition of political advisors within the Westminster system.

The Rise of Horizontal Accountability

As such, we now have to look to *horizontal* accountability mechanisms, that is broadly parallel institutions, to capture the actions of advisors (Scott 2000, p. 42). These include traditional public law oversight mechanisms such as the Ombudsman and Auditor-General, but also the media.

1 Oversight Bodies

The rise of the administrative state in the 1970s has seen the proliferation of a plethora of oversight bodies or office-holders to monitor the Executive, variously called ombudsmen, auditors, commissions and tribunals; or what Hood et al colourfully called the ‘waste watchers, quality police and sleaze busters’ (Hood et al 1999, p. 11). Within their legislative mandate, these watchdog bodies have a continuing function of review or enquiry in relation to particular aspects of executive activity. They often have a high level of independence from the Executive, sometimes achieved through a relationship with the Legislature, and significant coercive powers to enter premises of public organisations, question witnesses under oath and compel the production of documents. Among these the longest established and most indispensable are the Auditors-General, whose audits of departmental and agency spending, encompassing both regularity and quality of performance, are an essential support for parliamentary supervision of

public finance. Ombudsmen have also become a permanent point of resort for citizens complaining of maladministration, and may have systemic investigatory powers, either instigated on their own motion or by government. Information Commissioners have been introduced more recently to police freedom of information regimes. Although these bodies lack the coercive power to change governmental practices, the publicity of their reports may encourage government agencies to respond in a positive and productive way. Thus, regulatory powers are deliberately divided between different bodies, with regulatory agencies exercising restricted powers focussed on monitoring and initiating enforcement actions, with only advisory roles in relation to rule-making, which is the preserve of legislatures or Ministers exercising delegated powers (Scott 2014, p. 359). These arms-length scrutineers insulate regulatory decision-making from both self-interested structures of self-regulation inside government, as well as self-interested structures of politics (Scott 2014 p. 357).

Oversight bodies subvert the Westminster tradition of secrecy within government. The growth of these bodies can be attributed to the rise of 'new public management' with its diffusion of power, increased demands for government accountability and transparency, as well as the rise of quality assurance models of organisational control (Power 2000, p. 111). The audit explosion was thus 'not only the explosion of concrete practices, it was also and necessarily the growth and intensification of an idea about audit in a number of spheres' (Power 2000, p. 112).

The introduction of the administrative state was met with equal measures of celebration and derision. For example, in Australia, where a package of administrative law mechanisms was introduced in the 1970s, including statutory judicial review, a generalist merits review tribunal, the ombudsman and freedom of information, Dennis Pearce hailed the new system as the 'vision splendid' of the means by which an affected citizen should be able to test Commonwealth government decisions (Pearce 1987, p. 15). Many bureaucrats predictably reacted with hostility. In 1993, the then Secretary of the Commonwealth Department of Veterans' Affairs stated that administrative law had done its job and its practitioners should be searching for a new role (Woodward 1993, pp. 49-50).

The growth in oversight bodies as part of the ‘audit explosion’ (Power 1997) was paradoxically accompanied by the ‘new public management’ destabilisation and reduction in numbers of the bureaucracy. In the United Kingdom, for example, the drastic cuts to the civil service were accompanied by dramatic increases in the budget of oversight agencies. Between 1976 and 1995, staffing in the British civil service was cut by 30%, while the staffing in public sector regulators grew by 90% (Hood et al 1999, pp. 29-31). Over time, the oversight bodies grew in reputation, stature and public recognition, and are now a well-established feature of liberal democratic regimes.

The oversight bodies have become an increasingly effective force in holding political advisors to account. Where parliamentary committees have failed, independent scrutineers have succeeded. For instance, in the Australian State ‘Hotel Windsor’ incident, where the ministerial advisor accidentally sent an e-mail to a journalist at the ABC stating that the Minister intended to run a sham public consultation for the redevelopment of the Hotel Windsor, the parliamentary committee failed to compel the ministerial advisor to appear due to government intransigence. At this point, the committee referred the matter to the Victorian Ombudsman, who stepped in to investigate the matter. Using his strong legislative coercive powers, the Ombudsman was able to interview the Minister, ministerial advisors and public servants, as well as discover all relevant e-mails, where the parliamentary committee failed to do so (Ombudsman Victoria 2011, p. 19). It is paradoxical that although Parliament is the supreme law-making body and has strong coercive powers, the Ombudsman, who is an officer created by the Victorian Parliament, was able to gain better access to ministerial advisors than the parliamentary committee itself.

Likewise, in Canada, the Information Commissioner has been active in inquiring into the actions of ministerial staff. The Commissioner investigated the handling of access to information requests in the Department of Public Works. In the course of the investigation, the Commissioner summoned witnesses to give evidence, including political staff who refused to give evidence before a parliamentary committee on the same issue, Jillian Andrews and Sébastien Tognéri. The Commissioner concluded that there was systemic interference by political staff into departmental processing of Access to Information files and that civil servants were swayed from performing

their legislative duties to please ministerial staff (Office of the Information Commissioner of Canada 2011 p. 15).

There are several reasons why oversight bodies have proved to be more effective than parliamentary committees in uncovering issues relating to advisors. For one, these monitoring bodies are seen to be more impartial than a parliamentary committee, and more likely to treat people with fairness. By contrast, parliamentary committees are highly partisan avenues of conflict and drama, where each parliamentarian tries to grandstand, score points and get media coverage for their own benefit. Another reason why political advisors have been more willing to be interviewed under oath by the oversight bodies is because the questioning of these scrutineers is not in the public forum, compared to appearances before parliamentary committees, where a single slip of the tongue can be pounced upon by the media. Although the final report of these oversight bodies is usually made public, the finer details of the questioning are not.

Even apart from parliamentary processes, monitoring bodies have been active in pursuing the actions of political advisors, including the Canadian Conflict of Interest and Ethics Commissioner, who found that several ministerial staff breached the *Conflict of Interest Act* (Office of the Conflict of Interest and Ethics Commissioner 2015), as well as the New Zealand Inspector-General of Intelligence and Security, who made findings about the actions of ministerial staff in leaking information to a private blogger to smear the Opposition (Office of the Inspector-General of Intelligence and Security 2014). Thus, oversight bodies have proven to be very effective in holding political advisors to account and are likely to become increasingly important in the future.

2 *Media*

The mass media are another form of horizontal accountability that has become a potent force in holding government to account, through the medium of broadcast, print and online journalism, particularly television, radio, and print and online outlets. Unlike oversight bodies, who have a direct accountability relationship with government, the media is a more diffuse mechanism of achieving accountability through the broader political process. Despite this, much of political

activity, such as legislative debate, is conducted with the hope that the media will report on it to achieve a wider public audience. Reports of oversight bodies condemning government practices may achieve greater outcomes through media publicity leading to public outrage, particularly since these bodies are unable to compel changes in government agencies.

The media is both a *vehicle* and a *player* in the public policy space. The media is used by politicians and their media advisors strategically through ‘spin’ and leaking documents to gauge public reactions. Public servants and political advisors may leak information on an ad hoc basis. Leaking by public servants is seen to be a deviation from proper process and is thus uncontrolled, unsanctioned and disapproved of within the bureaucracy. Lobby groups use the media as a platform for debate and public awareness. But the media are not just a conduit for other groups; rather the media have their own agenda and run campaigns against politicians and political regimes, which may lead to Ministers resigning or a change in government. The media have thus become an independent political player and agent of accountability in its role as the ‘fourth estate’ (Mulgan 1998, p. 68).

Specialised journalists report on politics and government, called the lobby in the United Kingdom and the press gallery in Australia, New Zealand and Canada, in addition to journalists who specialise in particular policy issues. Media coverage tends to be on what would appeal to a broad audience, with a preference for sensationalism, rather than subtlety or complexity. As such, political reporting tends to focus on ‘conflict rather than cooperation and scandals rather than abstract issues and general policies’ (Mulgan 1998, p. 71). Nevertheless, free and independent media are crucial towards achieving government accountability in criticising governmental actions, policies and incompetence and increasing public awareness and mobilisation on contentious issues.

As noted above, the media is able to promote ministerial responsibility by pressuring for Ministers or advisors to resign over major scandals, as resignation is the measure of ministerial responsibility to the media. However, the further we stray from conventional public law mechanisms to ensure accountability, the more issues develop. For instance, the media can promote accountability by enhancing transparency about any problematic issues with advisors.

Public outrage may lead to the resignation of Ministers or their advisors. At the same time, the media can be a tool for advisors to try to take down their political opponents, through damaging leaks and ‘off the record’ briefings, some of which may be fabricated (or in the more contemporary parlance: ‘fake news’ or ‘alternate facts’). The completely unregulated domain of social media and blogs can be avenues for fake news. Damian McBride is a salutary example, as a special advisor who plotted to create a private blog that would fabricate sexual rumours to smear British Opposition MPs (McBride 2013). In New Zealand, the Prime Minister’s senior advisor channelled sensitive governmental information damaging to the Opposition to a private blogger (Hager 2014). Similarly, Dominic Cummings and Henry De Zoete, special advisors to the British Education Minister, used an anonymous Twitter account to attack the Opposition. Thus, the media is an important, if imperfect, mechanism of horizontal accountability for advisors.

Summary: Accountability Framework

Parliamentary accountability represents a linear form of accountability based on a chain of hierarchy based on the answerability of civil servants to their Minister, and Ministers’ accountability to Parliament. This is based on the traditional Westminster concept of ministerial responsibility, which is highly variable in theory, practice, political and media interpretations. As a result, parliamentary or vertical accountability has been traditionally weak in Westminster jurisdictions.

In a Westminster system of weakened parliamentary accountability, horizontal accountability mechanisms have become important to provide a framework of accountability for political advisors. The emphasis on horizontal accountability reflects a move from traditional hierarchical models to polycentric network-based modes of governance and accountability. It is also a shift from internal hierarchical bureaucratic line management to supervision by arms-length scrutineers: regulation inside government (Hood et al 1999). Regulation through the broader political process, such as the media, is an important tool for government accountability, but is not without its problems.

In a nutshell, in modern Westminster systems, parliamentary accountability is not sufficient to hold political advisors to account. Rather, a better framework for accountability includes a combination of vertical and horizontal accountability mechanisms operating in a complex network of governance. It is only through these dynamics that political advisors, as relatively new actors in government compared to Ministers and public servants, may be held to account.

References

Armstrong Memorandum. 1985. HC Deb Vol 74, cols 128-30 (WA), 26 February 1985, revised HC Deb Vol 123, cols 572-5 (WA), 2 December 1985.

Australia, Senate Select Committee, Parliament of Australia, A Certain Maritime Incident (2002).

Barker, A. 1998. 'Political Responsibility for UK Prison Security: Ministers Escape Again' 76(1) *Public Administration* 1.

Brazier, Rodney. 1991. *Ministers of the Crown* (Oxford, Clarendon Press).

Brenton, Scott. 2014. 'Ministerial Accountability for Departmental Actions Across Westminster Parliamentary Democracies' 73(4) *Australian Journal of Public Administration* 467.

Burnham, June, and Sylvia Horton. 2013. *Public Management in the United Kingdom: A New Introduction* (Basingstoke, Palgrave Macmillan).

Butler, David. 1997. 'Ministerial Accountability: Lessons of the Scott Report' (Papers on Parliament No 29).

Cabinet Office. (2005) *Departmental Evidence and Response to Select Committees*.

Canada, House of Commons Standing Committee on Access to Information, Privacy and Ethics, Parliament of Canada, *Evidence*, 21 March 2011, No 51, 3rd Session, 40th Parliament. 2010.

Canada, House of Commons, Standing Committee on Access to Information, Privacy and Ethics, Parliament of Canada, *Evidence*, 25 May 2010, No 16, 3rd Session, 40th Parliament. 2011.

Canada, *Open and Accountable Government*. 2015.

Daintith, Terence, and Alan Page. 1999. *The Executive in the Constitution: Structure, Autonomy, and Internal Control* (Oxford, Oxford University Press).

Farrar, David. 2012. 'Parliamentary Resignations' *New Zealand Herald*, 23 March 2012.

- Finer, S E. 1989. 'The Individual Responsibility of Ministers' in Geoffrey Marshall (ed), *Ministerial Responsibility* (Oxford, Oxford University Press) 115.
- Finer, S E. 1956. 'The Individual Responsibility of Ministers' *Public Administration* 34.
- Foreign Affairs Committee. 2003. *The Decision to go to War in Iraq* (2003) (FAC 2003).
- Franks, CES. 2004. "Accountability to Parliament for Financial Matters in the British System" (unpublished, 8 December 2004), pp. 3-4.
- Gay, Oonagh. 2012. 'Individual ministerial accountability' Parliament and Constitution Centre Standard Note: SN/PC/06467.
- Gay, Oonagh and Thomas Powell. 2004. 'Individual ministerial responsibility – issues and examples' Parliament and Constitution Centre Research Paper 04/31.
- Hager, Nicky. 2014. *Dirty Politics: How attack politics is Poisoning New Zealand's Political Environment* (Nelson: Craig Potton Publishing).
- Haldane Report, Ministry of Reconstruction, Report of the Machinery of Government (HMSO, 1918).
- Heard, A. (1991) *Canadian Constitutional Conventions, The Marriage of Law and Politics* (Toronto, Oxford University Press)
- Hood, Christopher. (1991) 'A Public Management for all Seasons?' *Public Administration* 69(1): 3–19.
- Hood, Christopher, and Martin Lodge. (2006) *The Politics of Public Service Bargains: Reward, Competency, Loyalty—and Blame* (Oxford, Oxford University Press).
- Hood, Christopher et al. (1999) *Regulation inside Government: Waste-watchers, Quality Police, and Sleaze-Busters* (Oxford, Oxford University Press).
- House of Lords. 2012-13. Select Committee on the Constitution, 6th Report of session 2012-13, *The Accountability of Civil Servants*.
- Jennings, W I. 1938. *The Law and the Constitution* (London, University of London Press).
- Killey, Ian. 2012. *Constitutional Conventions in Australia: An Introduction to the Unwritten Rules of Australia's Constitution* (North Melbourne, Australian Scholarly Publishing, 2nd ed).
- Mulgan, Richard. 1998. *Holding Power to Account: Accountability in Modern Democracies* (Basingstoke, Palgrave Macmillan).

McBride, Damian. 2013. *Power Trip: A Decade of Policy, Plots and Spin*. Biteback Publishing.

New Zealand, *Cabinet Manual*. 2008.

New Zealand Privileges Committee. 2013 *Question of privilege regarding use of intrusive powers within the parliamentary precinct Interim report of the Privileges Committee*.

Office of the Conflict of Interest and Ethics Commissioner. 2015. *Referral from the Public Sector Integrity Commissioner: The Bonner Report- made under the Conflict of Interest Act*.

Office of the Information Commissioner of Canada. 2011. *Interference with Access to Information*, Special Report No 1 2011.

Office of the Inspector-General of Intelligence and Security, Report into the release of information by the New Zealand Security Intelligence Service in July and August 2011 (2014) <<http://www.igis.govt.nz/assets/Inquiries/FINAL-REPORT-INTO-THE-RELEASE-OF-INFORMATION-BY-NZSIS-IN-JULY-AND-AUGUST-2.pdf>>.

Ombudsman Victoria, *Ombudsman Investigation into the Probity of the Hotel Windsor Redevelopment* (2011) <<https://www.ombudsman.vic.gov.au/getattachment/753dfb69-1001-4cd6-8b6b-3c9a52f0539f//reports-publications/parliamentary-reports/ombudsman-investigation-into-the-probity-of-the-ho.aspx>>.

Parliament of Australia (Senate). (2003) Senate Finance and Public Administration References Committee, *Staff employed under the Members of Parliament (Staff) Act 1984*.

Parliament of Australia (Senate). 2004. Journals of the Senate No 138. *Australian Federal Police Commissioner: Ministers and ministerial staff*, 24 March, 3216.

Pearce, Dennis. 1987. 'The Fading of the Vision Splendid? Administrative Law: Retrospect and Prospect' *Canberra Bulletin of Public Administration* 15.

Power, Michael. 1994. *The Audit Explosion* (London, Demos).

Power, Michael. 2000. 'The Audit Society: Second Thoughts' *International Journal of Auditing* 4: 111-119.

Rhodes, R A W, John Wanna and Patrick Weller. 2009. *Comparing Westminster* (Oxford, Oxford University Press).

Scott, Colin. 2014. 'Evaluating the Performance and Accountability of Regulators' *Seattle University Law Review* 37: 353-374.

Scott, Colin. 2000. 'Accountability in the Regulatory State' *Law and Society* 27(1): 38-60.

Smith, David E. 2006. 'Clarifying the Doctrine of Ministerial Responsibility as it applies to the Government and Parliament of Canada,' Commission of Inquiry into the Sponsorship Program and Advertising Activities, Research Studies, Volume 1, 101.

Sutherland, Sharon. 1991. 'Responsible Government and Ministerial Responsibility: Every Reform is its Own Problem' *Canadian Journal of Political Science* 24(1): 91.

Thompson, E and G Tillotsen. 1999. 'Caught in the Act: The Smoking Gun View of Ministerial Responsibility' *Australian Journal of Public Administration* 58(1):48-57.

United Kingdom, House of Commons, Public Administration Select Committee, *Politics and Administration: Ministers and Civil Servants*, Third Report of Session 2006-07 (2007).

United Kingdom, *Ministerial Code* (2016).

Woodhouse, Diana. 1994. *Ministers and Parliament: Accountability in Theory and Practice* (Oxford, Clarendon Press).

Woodhouse, Diana. 2004. 'UK Ministerial Responsibility in 2002: The Tale of Two Resignations' *Public Administration* 82(1): 1-19.

Woodward, Lionel. 1993. 'Does Administrative Law expect too much of the Administration?' in Stephen Argument (ed), *Administrative Law and Public Administration: Happily Marries or Living Apart under the Same Roof?* 36-50.