The McMullan Principle: Ministerial Advisors & Parliamentary Committees

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> *The information can be provided without calling a member of ministerial staff before the committee. In my view, ministerial staff are accountable to the minister and the minister is accountable to the parliament and, ultimately, the electors.*[1] – Senator McMullan

Abstract

Parliamentary committees play an increasingly important role in ensuring government accountability. A question that has proven controversial in recent times is whether ministerial advisors can be compelled to appear before parliamentary committees. There have been a number of examples in which Government Ministers have invoked the so-called McMullan Principle, claiming that a constitutional convention exists that precludes ministerial advisors from being compelled to appear and give evidence. This paper will consider whether such a convention in fact exists, and will consider recent examples in which the principle has been invoked, such as the Children Overboard incident, Hotel Windsor inquiry and Orange Grove inquiry. It concludes that even if such a convention did exist at one time, the role of a ministerial advisor has now evolved to such an extent that it calls into question the underlying rationale for the McMullan Principle.

I INTRODUCTION

Parliamentary committees are increasingly an 'important vehicle of ministerial accountability'.[2] One of the key powers that parliamentary committees have at both the Commonwealth and State levels is the power to summon witnesses, with the failure to obey a summons potentially leading to a person being held in contempt of Parliament. A question that has proven controversial in recent times is whether ministerial advisors can be compelled to appear before parliamentary committees. There have been a number of examples in which Ministers have invoked the so-called

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1 Commonwealth, *Parliamentary Debates*, Senate, 7 February 1995, 610 (Bob McMullan).

2 Phil Larkin, 'Ministerial Accountability to Parliament' in Keith Dowding and Chris Lewis (eds), *Ministerial Careers and Accountability in the Australian Commonwealth Government* (ANU E Press, 2012) 102.

McMullan Principle, claiming that a constitutional convention exists that precludes ministerial advisors from being compelled to appear.

This paper will consider whether such a constitutional convention in fact exists. It will begin by addressing the preliminary question of what a constitutional convention actually is, and how to determine whether a particular practice has moved into the category of being a constitutional convention. The McMullan Principle will then be specifically considered, with a particular focus on examples in which the principle has been invoked in order to reach a conclusion about whether or not it has moved into the convention category. This paper concludes that the McMullan Principle has not attained the status of an entrenched constitutional convention, but will then go on to consider whether it should be entrenched in the future as an accepted practice.

This final section of the paper involves a consideration of the policy reasons underpinning the McMullan Principle and, in particular, discussion of the evolving role of ministerial advisors and any lessons that can be drawn from the practices that have developed in relation to the appearance of public servants before parliamentary committees. It will be submitted that the role of the ministerial advisor has evolved in a manner that is inconsistent with the policy rationale underpinning the McMullan Principle and that it is not a principle that should therefore be routinely applied. It is important, however, to balance the importance of parliamentary accountability with the importance of confidentiality and trust in the relationship between individual Ministers and their advisors. Given this, it will be suggested that where a ministerial advisor does appear before a parliamentary committee, there are sound policy reasons for applying similar protocols to those which currently apply to public servants in similar circumstances.

II ESTABLISHING A CONSTITUTIONAL CONVENTION

The first preliminary point to consider is what we mean by a constitutional convention and how do we determine whether a particular principle should be accorded this status? A constitutional convention is an unwritten rule or constitutional practice that is consistently acknowledged and routinely followed, despite not being expressly provided for in the text of the Constitution. These unwritten customs 'provide the flesh which clothes the dry bones of the law'.[3] Constitutional conventions are not legally enforceable, but there is a broad expectation that they will be followed and that political consequences will attach to their breach.

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[3] Sir W. Ivor Jennings, *The Law and the Constitution* (University of London Press, 1959).

Indeed, Ian Killey observes that:

> in Westminster-based constitutions, conventions are so important to the system of government that actions inconsistent with these conventions are considered to be just as unconstitutional as they would be if inconsistent with the words of the constitution.[4]

These unwritten principles and practices often govern important aspects of the Australian political system, and have enormous practical significance in the operation of Australia's political institutions. The need for constitutional conventions becomes obvious when we realise that many key offices and institutions are not actually mentioned in the *Australian Constitution*. For example, the offices of the Prime Minister and Leader of the Opposition, the Cabinet and the Council of Australian Governments all play an important role in Australian politics, and yet none are actually mentioned in the *Australian Constitution*. Examples that are frequently cited as constitutional conventions in Australia include the reserve powers of the Crown, ministerial responsibility (both collective and individual) and the caretaker conventions that apply during an election campaign.[5]

How then do you identify a constitutional convention? While there is not a single test that has been uniformly recognised as determinative, there are two key elements that are routinely emphasised as being central to identifying constitutional conventions. These are, firstly, an acknowledgement or acceptance by participants of the existence of a convention and, secondly, acceptance of the practice as binding.[6] The first element of acknowledgment refers to a general understanding by the group of political participants as a whole that the convention exists. That is, 'the terms of conventions are what the actors believe them to be'.[7] In effect, this means that a principle will only be accorded the elevated status of a convention if the relevant actors consent to this understanding. The second element distinguishes conventions from political practices which are followed for some other reasons (such as, for example, political expediency

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4 Ian Killey, *Constitutional Conventions in Australia: An Introduction to the Unwritten Rules of Australia's Constitutions* (Australian Scholarly Publishing, 2009) 4.

5 For a full discussion on each of these see Killey, above n 4.

6 Ibid; Brian Galligan and Scott Brenton (eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press, 2015). It is important to note that these are not the only elements that have been identified as relevant, although they are uniformly identified as key considerations when identifying constitutional conventions. For example, some commentators have suggested that the existence of a sound constitutional rationale underpinning the constitutional convention is an essential element of its existence, although there is debate as to exactly how this consideration should be approached in practice. Compare, for example, Richard McGarvie, *Democracy, Choosing Australia's Republic* (Melbourne University Press, 1999), 54–5 and Michael Coper, Australian Constitutional Convention Standing Committee D, *The Senate and Supply: Special Report to Working Committee* (Australian Government Printer, 1977) 103, 110.

7 Andrew Heard, *Canadian Constitutional Conventions, The Marriage of Law and Politics* (Oxford University Press, 2nd ed, 2014) 12.

or popularity). Constitutional conventions are consistently followed and applied because participants feel bound to do so, despite conventions not being legally enforceable.

Therefore, when considering whether the McMullan Principle should be accorded the status of an established constitutional convention, the key factors to consider are whether the principle is consistently acknowledged and accepted by political participants, and whether they consider the practice to be binding. An examination of recent examples in which the McMullan Principle has been invoked will be insightful in relation to both of these factors. However, before examining these recent examples, it will be useful to consider what the McMullan Principle actually is, its history and its underlying rationale in order to provide the necessary surrounding context within which to consider the debates that have recently occurred about its application in practice.

III THE MCMULLAN PRINCIPLE

The origins of the name, the McMullan Principle, stem from the debate surrounding a motion moved in the Australian Senate in 1995. Amongst other things, the motion highlighted the decision of the Minister for Finance to refuse to allow the Director of the National Media Liaison Service – a Ministerial staff member – to appear before the Finance and Public Administration Legislation Committee during its estimates hearings. During the course of debate, then-Senator McMullan (who, it should be pointed out, was *not* the individual Minister responsible for originally refusing permission to allow the Ministerial staff member to appear before the Committee) sought to justify the refusal by claiming that requiring ministerial staff to appear would set a dangerous precedent and was not the correct method by which the Senate should obtain the information it was seeking. He outlined what has subsequently been referred to as the McMullan Principle when he stated:

> [t]he information can be provided without calling a member of ministerial staff before the committee. In my view, ministerial staff are accountable to the minister and the minister is accountable to the parliament and, ultimately, the electors.[8]

Ironically, given that this is the case from which the McMullan Principle takes its name, on this particular occasion the Senate decided to take matters further and compel the appearance of the ministerial staffer before a parliamentary committee. The Senate passed a resolution instructing the Finance and Public Administration Legislation Committee to hold a supplementary estimates hearing and to direct the Director of the National

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[8] Commonwealth, *Parliamentary Debates*, Senate, 7 February 1995, 610 (Bob McMullan).

Media Liaison Service (then Mr David Epstein) to appear before the committee. This resolution was opposed by the Government, however it passed with the support of the Australian Democrats who noted that whilst they had 'grave reservations about what we are doing',[9] they supported the motion on the basis of repeated assurances by the Opposition that no precedent was being set.

The idea that ministerial staff members should not be compelled to appear before parliamentary committees – which is known as the McMullan Principle – has its basis therefore in the basic structures of Westminster parliamentary democracy and the doctrines of responsible government and ministerial responsibility. The foundation of these fundamental principles is the idea that the executive government is subject to parliamentary scrutiny and is accountable to Parliament (and, by extension, to the people). Accountability is maintained through the Ministers, who are presumed to be responsible for all actions and decisions taken by their staff and department, and who may be required by the Parliament to account directly for these actions and decisions. In short, under the doctrine of ministerial responsibility, it is Ministers themselves who are required to be accountable to Parliament, and not their ministerial staff.[10]

The idea of ministerial responsibility is one of the key arguments that is generally relied upon in support of the McMullan Principle as a principle that should be consistently applied. The second key argument that is regularly invoked is that it is important to guarantee a level of confidentiality in discussions between Ministers and their ministerial advisors, which would be undermined if those advisors could be compelled to appear before parliamentary committees.[11]

On the other hand, it would be an obvious concern in terms of accountability if the McMullan Principle operated in such a way as to prevent parliamentary committees from being able to obtain relevant information and allow governments to avoid legitimate parliamentary scrutiny. This would not be a problem if the doctrine of ministerial responsibility was rigorously applied such that Ministers were answerable for not only their own actions, but also those of their staff. The difficulty arises when Ministers are able to claim ignorance of the actions of their advisors. In such a case, the McMullan Principle undermines accountability by allowing Ministers to assert plausible deniability while

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9 See Commonwealth, *Parliamentary Debates*, Senate, 7 February 1995, 612 (Cheryl Kernot).

10 See, eg, Australia, *Parliamentary Debates*, Senate, 7 February 1995, 610 (Bob McMullan).

11 See, eg, Andrew Alexandra & Clare McArdle, 'Accountability and Ministerial Advisors' (2003) 5(2) *Australian Journal of Professional and Applied Ethics* 71, 76.

the advisors themselves are not subject to questioning by parliamentary committees.[12]

The potential tension here was identified by Lucy Hare when considering the position of ministerial advisors in New Zealand (being a role identified within that jurisdiction as personally appointed advisors to Cabinet Ministers or ministerial assistants). Hare acknowledged that the effectiveness of a ministerial advisor depends largely on the strength of their relationship with their individual Minister, and that confidentiality is a significant aspect of this. On the other hand, it is obviously important that executive power – whether exercised by the Minister or their staff – is subject to accountability checks and parliamentary scrutiny. As Hare observed:

> full accountability where personal appointees are concerned may be impeded by the secrecy of their role – particularly where a personal appointee undertakes functions without explicit instruction from the Minister. There is thus a tension between political reality and the constitutional imperative of accountability.[13]

There are significant parallels that can be drawn between the position of ministerial staffers and public servants in terms of accountability. The arguments made in favour of the McMullan Principle are also applicable in the case of public servants. For example, ministerial responsibility extends to actions and decisions taken by their departments. It is obviously also important for there to be a relationship of trust between ministers and public servants in order for public servants to be able to meet the mandated Australian Public Service values of providing the government with frank and honest advice.[14] While public servants are compellable witnesses, there are protocols that govern the evidence they can give (which are discussed in further detail below), with some key limitations being established in an effort to accommodate the concerns related above regarding ministerial responsibility and retaining relationships of trust and confidence.[15] The fact that public servants routinely give evidence before parliamentary committees, and that this is no longer seen as particularly controversial, provides an interesting comparison when considering the debate surrounding the McMullan Principle.

It may be, however, that these parallels between ministerial advisors and public servants only extend so far. In this context, it is interesting to note

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[12] This potential problem was raised and discussed in Anne Twomey, 'Executive Accountability to the Australian Senate and the New South Wales Legislative Council' (Legal Studies Research Paper No 07/70, Sydney Law School, November 2007) 30.

[13] Lucy Hare, 'Ministers' Personal Appointees: Part Politician, Part Bureaucrat' (2004) 2 *New Zealand Journal of Public and International Law* 315, 316.

[14] *Public Service Act 1999* (Cth) s 10.

[15] See, eg, Department of the Prime Minister and Cabinet, *Government Guidelines for Official Witnesses Before Parliamentary Committees and Related Matters* (2015).

the differences between ministerial staff and public servants that was highlighted in the Prime Minister's *Guide on Key Elements of Ministerial Responsibility*:

> 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.[16]

In relation to ministerial advisors, Ian Killey, in *Constitutional Conventions in Australia: An Introduction to the Unwritten Rules of Australia's Constitutions,* has concluded that the McMullan Principle has gained the status of a constitutional convention. He argues that a constitutional convention does exist that ministerial advisors do not appear before parliamentary committees.[17] This is not, however, a conclusion without controversy.

The existence of a constitutional convention precluding ministerial advisors from appearing before parliamentary committees has increasingly been called into question in recent times.[18] For example, Dr Yee-Fui Ng conducted interviews with a number of current and former Ministers and Members of Parliament about their beliefs as to whether such a constitutional convention exists. Dr Ng notes that the existence of such a belief amongst parliamentarians is an essential factor to consider when assessing whether such a constitutional convention has formed.[19] This accords with the long-standing observation that 'the terms of conventions are what the actors believe them to be'.[20] The interviews conducted by Dr Ng showed that there was no positive consensus that such a constitutional convention existed.[21]

Interestingly, interviewees appeared willing to change their position on the issue depending on whether they were in government or opposition![22] This

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16 Department of the Prime Minister and Cabinet, *A Guide on Key Elements of Ministerial Responsibility* (1998) ch 6.

17 Killey, above n 4, 127.

18 See, eg, Yee-Fui Ng, 'The Nexus Between Law and Politics' (Paper presented at Legalwise CPD Seminar, 17 June 2015); Greg Tayor, 'Book Review – Constitutional Conventions in Australia: An Introduction to the Unwritten Rules of Australia's Constitution' (2010) 31 *Adelaide Law Review* 271.

19 Ng, above n 18.

20 Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Oxford University Press, 1st ed, 1991) 12, quoted in Killey, above n 4, 8.

21 Ng, above n 18.

22 Ibid.

in itself does tend to suggest that the McMullan Principle may be more of a political principle invoked when convenient rather than an entrenched constitutional convention applied consistently. Indeed, it may reflect a broader trend that can unfortunately be discerned when it comes to the power (and willingness) of the Parliament, and particularly the Upper House, to hold the Executive Government to account. That is, powers and processes designed to ensure accountability 'tend rigorously to be asserted by the opposition of the day, and resisted by whomever is in government'.[23]

Dr Ng concluded that 'the conventional requirement that the rule be considered binding by political participants is not satisfied at the Commonwealth and Victorian level'.[24] A similar conclusion was also reached in Odgers' *Australian Senate Practice*, which provides that ministerial staff 'have no immunity against being summoned to attend and give evidence, either under the rules of the Senate or as a matter of law'.[25] To illustrate this point, it was noted that there were past examples of ministerial staff giving evidence before Senate committees, with one of the earliest examples being back in 1975 when the Private Secretaries to the Prime Minister and the Minister for Labour and Immigration appeared before a Senate Standing Committee on Foreign Affairs and Defence.[26]

Therefore, there appears to be some disagreement about whether the McMullan Principle should be considered a constitutional convention amongst academics and commentators. As noted above, however, the key questions are whether the political participants as a group acknowledge the existence of the principle, and whether it is accepted as being binding in practice. To this end, an examination of recent examples where the McMullan Principle was invoked will provide an important insight into whether or not the principle can be considered to be an established constitutional convention or not.

IV INVOKING THE MCMULLAN PRINCIPLE IN PRACTICE

The question of whether ministerial advisors can be compelled to appear before parliamentary committees has arisen periodically in recent decades, and consideration of these past examples of practice is central to determining whether the McMullan Principle has become entrenched as a constitutional convention. An examination of these past examples, however, demonstrates that there is not the consistent and uniform practice that would be expected if the McMullan Principle had been accepted as a binding constitutional convention. Further, the routinely diametrically

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23 Ian Holland, 'Accountability of Ministerial Staff?' (Research Paper No. 19, Department of the Parliamentary Library, 2001–02) 14.

24 Ibid.

25 Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice* (Parliament of Australia, 13th ed, 2012) ch 17.

26 Ibid.

opposed views taken by those in government and those in opposition (and the readiness of individuals to alter their stated view depending on whether they are in government or opposition at the particular time in question) strongly suggests that the McMullan Principle could be better described as a principle of political expediency, rather than an entrenched constitutional convention.

To begin with, there are examples of ministerial advisors voluntarily appearing before parliamentary committees. One early example was in 1989 when the head of the National Media Liaison Service (then Mr Colin Parks)[27] agreed to appear before Senate Estimates Committee D and answered questions when his presence was requested by members of the Committee.[28] There have also been examples where Ministers have initially refused to allow ministerial advisors to appear, but have then declined to test the resolve of Parliament when it has insisted upon such an appearance. One example of this is the situation that gave the McMullan Principle its name, which was briefly outlined above.[29] While in 1995 the Minister for Finance initially refused to allow the head of the National Media Liaison Service (then Mr David Epstein) to appear before the Finance and Public Administration Legislation Committee, the Senate decided to take the matter further and passed a resolution directing him to appear, which he subsequently did.[30]

There have also been a number of high profile examples in which Ministers have refused to allow ministerial staff to appear before parliamentary committees, citing the existence of a constitutional convention that precludes them from being called as witnesses. One interesting aspect of each of these examples is the interplay between the Executive and the Parliament, with the former tending to rely on the McMullan Principle and claim that it is a well-established constitutional convention, while the latter tend to dispute this claim. Recent examples include: the Children Overboard inquiry in 2002, the Hotel Windsor inquiry in 2010, and the Orange Grove inquiry in 2004. Each of these will be discussed below in turn.

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27 The head of the National Media Liaison Service being a position that was employed under the *Members of Parliament (Staff) Act 1984* (Cth) and was effectively therefore a ministerial advisor position.

28 Holland, above n 23, 14.

29 See above at Part III.

30 Although it is worth noting in relation to this specific example that the Senate itself expressly attempted to distinguish this case from that of other ministerial advisors by noting that the stated role of the National Media Liaison Service was to provide 'accurate and timely information on government policies'. As such, it was not meant to be party political and, given its unique role, could be distinguished from the usual circumstances in which the McMullan Principle might otherwise be invoked. See Holland, above n 23, 16.

A *The 'Children Overboard' Inquiry*

The 'Children Overboard' inquiry arose following claims that asylum seekers who had been intercepted in Australian territorial waters by the Australian Navy had thrown children from their boat into the water. These claims were originally made by the then Minister for Immigration, the Hon. Phillip Ruddock MP, during a media briefing on 7 October 2001, and were later repeated by other senior government members, including the Prime Minister. Photographs were also presented that initially appeared to support these claims. The 'Children Overboard' claims became a significant issue during the election campaign, being a campaign in which border protection issues were considered by many to have been a central factor.

It subsequently became clear that no children had been thrown overboard and that the evidence originally thought to support these claims did not actually do so. A central question related to precisely when the Government had become aware that the 'Children Overboard' claims were inaccurate, and whether they knew of this during the election campaign. The Senate Select Committee on a Certain Maritime Incident ('Senate Select Committee') was established to inquire into the 'Children Overboard' incident[31] with a key aspect of this being 'the flow of information about the incident to the Federal Government, both at the time of the incident and subsequently'.[32]

In relation to the 'Children Overboard' incident the Senate Select Committee concluded that ministerial advisors:

> played a significant part in the failure of ministers to correct the public record. Their interactions with public servants and Defence officials, and the way in which they managed information flows in and out of ministers' offices, raise numerous questions about the appropriateness of their performance, let alone matters of courtesy and fair dealing.[33]

The Senate Select Committee was, however, unable to hear evidence from, or to question, any ministerial advisors. Throughout the 'Children Overboard' inquiry, a whole-of-government decision was taken to refuse to allow ministerial staff to appear before the Senate Select Committee.

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[31] The Terms of Reference required the Senate Select Committee to look into the 'Children Overboard' incident and a range of issues directly associated with that incident; operational procedures to ensure the safety of asylum seekers on vessels attempting to enter Australian waters; and issues relating to agreements between Australia, Nauru and Papua New Guinea relating to the Pacific Solution.

[32] Senate Select Committee for an Inquiry into a Certain Maritime Incident, Parliament of Australia, *Main Report* (23 October 2002) [Terms of Reference (b)(ii)].

[33] Ibid [7.124].

For example, Prime Minister John Howard stated that:

> In my view, ministerial staff are accountable to the minister and the minister is accountable to the parliament and, ultimately, the electors … What we are doing in relation to this issue is following the convention, and the convention is that Ministerial staff do not appear.[34]

The Senate Select Committee (unsurprisingly) adopted a different view, concluding in its *Main Report* that this type of blanket refusal was 'anathema to accountability'[35] and that '[t]he time has come for a serious, formal re-evaluation of how ministerial staff might properly render accountability to the parliament and thereby to the public'.[36] This conclusion was supported by advice received from the Clerk of the Senate who concluded that the Senate (and comparable houses of legislatures) had not recognised any immunity attaching to ministerial advisors, and furthermore:

> there is a strong case for subjecting ministerial personal staff to compulsion in legislative inquiries, on the basis that their role is manifestly now not confined to advice and personal assistance … they act as de facto assistant ministers and participate in government activities as such … Moreover, ministers no longer accept full responsibility for the actions of their staff.[37]

The advice received by the Senate Select Committee was not however uniform. The advice provided by the Clerk of the Senate was itself based on legal advice provided by Bret Walker SC who concluded that 'former Ministers and Ministerial staff have no immunity from compulsory attendance to give evidence and produce documents to a Senate committee'.[38] This contrasted with advice given by the Clerk of the House of Representatives who concluded that there was a 'reasonable case'[39] for ministerial immunity also being extended to ministerial advisors.

B *The 'Hotel Windsor' Inquiry*

The 'Hotel Windsor' inquiry was established by the Standing Committee on Finance and Public Administration, which is a committee of the Victorian Legislative Council. The inquiry was designed to investigate the Windsor Hotel redevelopment planning process and was based on the inadvertent release to the media through email of a media plan by the Office of the Minister for Planning that appeared to outline a strategy of using a manufactured public consultation process to provide grounds for

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34 See Ng, above n 18.
35 Senate Select Committee for an Inquiry into a Certain Maritime Incident, above n 32, [7.126].
36 Ibid [7.149].
37 Ibid [7.138].
38 Ibid [7.140].
39 Ibid [7.139].

the rejection of the development despite the formal planning process being expected to recommend its approval.

In March 2010 the Standing Committee resolved to conduct public hearings and to take evidence from a number of witnesses, including four ministerial media advisors.[40] The Victorian Attorney-General formally refused to allow the ministerial advisors to appear before the Standing Committee, claiming that:

> [t]he conventions concerning Ministerial advisors are well established and acknowledged in all Australian Parliaments. The convention, to put it simply, is that advisors are not summonsed by Committees.[41]

The Attorney-General argued that the attempts to compel the ministerial advisors to give evidence were a 'total breach of practice and a total breach of procedure'.[42] The key reason put forward by the Attorney-General in support of this claimed convention was 'the public interest in the security of communications between Ministers and their advisors'.[43]

The Standing Committee issued a number of summonses compelling the ministerial advisors to appear and give evidence, but on each occasion correspondence was received indicating that the Attorney-General had directed the witnesses not to attend the hearing.[44] The Standing Committee reported to the Legislative Council that the intervention of the Attorney-General in directing witnesses not to give evidence 'represents a significant interference in the Committee's functions and ability to fully investigate the issues within its terms of reference'.[45]

It is interesting, but perhaps not at all surprising, to note that in both this and the 'Children Overboard' example, while the relevant Ministers strongly asserted the existence of a long-standing constitutional convention, serious doubt as to the existence of such a convention was expressed by the relevant Parliamentary Committees. In this case the Standing Committee, in its *Second Interim Report (August 2010)*, cited earlier advice that had been given to the Legislative Council by both the Clerk of the Legislative Council and Bret Walker SC in 2007. Both confirmed that ministerial staff had no immunity at law against being

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40 See Victorian Legislative Council Standing Committee on Finance and Public Administration, Parliament of Victoria, *Inquiry into Victorian Government Decision Making, Consultation and Approval Processes* (Second Interim Report – August 2010) [10]–[33].

41 Ibid.

42 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 March 2002, 376 (Rodd Hulls). See also Holland, above n 23, 1.

43 Quoted in Killey, above n 4, 126.

44 Victorian Legislative Council Standing Committee on Finance and Public Administration, above n 40.

45 Ibid [36].

summoned to give evidence before a parliamentary committee.[46] The Standing Committee itself concluded that:

> in the event that a Minister denies knowledge of a state of affairs or has distanced him/herself from a public servant or advisor's actions and that public servant or advisor has a direct involvement in the state of affairs in question, there may be grounds for the public servant or advisor to be answerable to the Committee.[47]

The Standing Committee in this case sought further advice from the Clerk of the Legislative Council. They were advised that, in general, any action that obstructed the Legislative Council in the performance of its functions could be treated as contempt and, more specifically, that directing somebody not to attend a hearing in response to a summons would be contempt. However, the Clerk further advised in relation to the direction issued by the Attorney-General that 'no further action is possible in the Legislative Council as the Attorney-General is a member of the Legislative Assembly and responsible only to that House and not to the Legislative Council'.[48]

The final recommendation of the Standing Committee in its Second Interim Report was that the Legislative Council should resolve to order the four witnesses to appear before the Standing Committee.[49] This set the stage for a potentially serious conflict between the Parliament and Executive, which was only averted by the fact that the 56th Victorian Parliament expired on 2 November 2010, with a State election held shortly thereafter and resulting in a change in government.

The change in government did not entirely end the matter. The Standing Committee had previously (in June 2010) also referred the matter to the Victorian Ombudsman for investigation.[50] During the course of this investigation 38 witnesses were interviewed, including the relevant Minister, several Members of Parliament and ministerial staff. This included a number of ministerial staff who had previously refused to give evidence before the Standing Committee.[51] The Ombudsman noted that all witnesses cooperated with the investigation,[52] although it was also

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46 Ibid.
47 Ibid [62].
48 Ibid [57].
49 Ibid [46].
50 One interesting aside is that shortly after commencing his investigation the Ombudsman received legal advice from the then Solicitor-General arguing that he did not have the authority to investigate the actions of Ministers and that he had only limited jurisdiction to investigate ministerial advisors. The Ombudsman concluded that he did have jurisdiction. See Victorian Ombudsman, *Ombudsman Investigation into the Probity of the Hotel Windsor Redevelopment*, Ombudsman Investigation Report (2011) 8.
51 Ibid 9.
52 Ibid [61].

remarked that under the *Ombudsman Act 1973* (Vic) the Ombudsman had the statutory power to summon witnesses and interview any person who has information relevant to the investigation.[53] The Ombudsman ultimately concluded that there were concerns regarding the probity of the planning and heritage approval processes for the Windsor Hotel redevelopment. Amongst a number of recommendations made by the Ombudsman included recommendations relating to the accountability of ministerial advisors for checking the accuracy of information, and that the Victorian Government conduct a comprehensive review of the *Ministerial Staff Code of Conduct* 'to ensure that ministerial staff are held accountable to appropriate standards of ethical and professional conduct'[54] and to 'recognise the executive decisions are the preserve of Ministers and public officers and not ministerial staff acting in their own right'.[55]

C *The 'Orange Grove' Inquiry*

Another example of the constitutional convention not being accepted in practice stems from the 2004 'Orange Grove' inquiry in NSW. The inquiry was conducted by the General Purpose Standing Committee No. 4, which is a committee of the NSW Legislative Council. It involved an examination of the approval process relating to the Designer Outlets Centre on Orange Grove Road in Liverpool, and in particular involved an examination of the circumstances surrounding the approval and the role of relevant Ministers in dealing with the development. In its Report the Standing Committee noted that it had invited a number of ministerial staff to appear before the Committee, and observed:

> [a]lthough there are no restrictions on the power of a committee of the Legislative Council to invite ministerial staff as witnesses before a committee, there has been a general political convention, which has resulted in ministerial staff not being called as witnesses.[56]

During the inquiry, a number of ministerial staff did appear voluntarily before the Standing Committee after being invited to do so. However, the Chief of Staff to the Assistant Planning Minister (Michael Meagher) indicated that he would decline his invitation to appear on the basis that the Assistant Planning Minister was invoking the constitutional convention and had not authorised his appearance. In fact, Meagher declined an invitation to appear on two occasions,[57] and the Standing Committee then issued a summons for his appearance under the *Parliamentary Evidence*

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53 Ibid 19.
54 Ibid 14, 84.
55 Ibid 14, 84.
56 General Purpose Standing Committee No 4, NSW Legislative Council, *The Designer Outlets Centre, Liverpool Report 11* (2004) [1.19].
57 Although it should be noted that he did offer to assist by answering questions on notice: see ibid [1.21].

Act 1901 (NSW).[58] This was the first time that any Standing Committee of the NSW Parliament had ever taken the step of issuing a summons to compel the appearance of a ministerial advisor.[59] The summons was ultimately answered, and Meagher appeared before the Standing Committee on 30 August 2004.[60]

V A CURRENT CONSTITUTIONAL CONVENTION?

The above examples highlight the diametrically opposed views that the Executive and the Parliament appear to take regarding the existence of the McMullan Principle as an established constitutional convention. While these cases are not a comprehensive examination of every example of the McMullan Principle being invoked in recent years, they are illustrative of the lack of consistent practice and the lack of general acceptance by political participants as a whole. These examples are therefore themselves sufficient to strongly suggest that the McMullan Principle is more of a political principle than an entrenched constitutional convention.

It was identified above that the key factors to consider when determining whether a particular practice has become entrenched as a constitutional convention are whether the principle is consistently acknowledged and accepted by political participants, and whether they consider it to be binding in nature. On both of these grounds the McMullan Principle fails to meet the threshold. In each of the above examples the invocation of the principle by the Executive has been met by an equally forceful rejection of the principle by the relevant Parliamentary Committee. There appears to be habitual disagreement between the Executive and Parliamentary arms of government regarding the existence of the McMullan Principle as an entrenched constitutional convention. The contestable nature of the principle is itself evidence that it has not attained the status of an established constitutional convention.

There is no doubt that, to the extent it is asserted by the Executive, the McMullan Principle has the practical impact of placing ministerial advisors in an invidious position when an individual ministerial advisor is invited to appear before a parliamentary committee but is then instructed by their

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58 Section 4 of the *Parliamentary Evidence Act 1901* (NSW) provides that any person, other than a Member of Parliament, may be summoned to attend and give evidence by the Parliament or a Parliamentary Committee. Sections 7 and 8 go on to provide that if they fail to attend without just cause or reasonable excuse an arrest warrant may be issued.

59 General Purpose Standing Committee No 4, above n 56, [1.22]. See also Beverly Duffy and David Blunt, 'Information is power: recent challenges for committees in the NSW Legislative Council' (Paper presented at the 45th Presiding Officers' & Clerks' Conference; Apia, Samoa, 30 June – 4 July 2014).

60 See General Purpose Standing Committee No 4, above n 56.

relevant Minister to either not appear or not to answer particular questions. The untenable position that ministerial advisors find themselves in when confronted with this situation was recognised by the Senate Select Committee for an Inquiry into a Certain Maritime Incident. The Senate Select Committee ultimately found that whilst it did have the power to compel attendance by ministerial staff, it had 'decided not to exercise its power to compel their attendance, and thereby expose the advisors to the risk of being in contempt of the Senate should they not respond to the summons'.[61]

Part of the decision by the Senate Select Committee not to issue summons for ministerial advisors was based on the previously expressed view that it would be 'unjust for the Senate to impose a penalty on a public servant who declines to provide evidence on the direction of a Minister'.[62] Indeed in 1994 the Senate Committee on Privileges had called the exercise of parliamentary powers to impose penalties on public servants in such circumstances 'untenable'.[63] Instead, as Peter Hanks QC observed:

> any confrontation between the witness's duty to her or his Minister and the witness's obligation to the House or the Committee is likely to be diverted into a confrontation between the House or the Committee and the Minister. That is what happened in 2007, when the Attorney-General openly instructed witnesses summoned before the Select Committee on Gaming Licensing not to answer questions or produce documents; and the Legislative Council then took formal (albeit symbolic) action, not against the witnesses, but against the Government in the Council.[64]

This discretionary decision to look for alternative solutions is itself important to consider when examining whether a constitutional convention exists. Ian Killey has pointed to a number of examples where parliamentary committees have asserted the power to call ministerial staffers to appear before the committee, but have then failed to take any action to enforce that appearance. It is suggested that this reflects 'the silent recognition of a convention by non-government parties'.[65] It may be, however, that it instead reflects a realistic assessment of the practical difficulties of enforcement in these circumstances and the surrounding political sensitivities that inform such decisions. As was noted by the Finance and

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61 Senate Select Committee for an Inquiry into a Certain Maritime Incident, above n 32 [7.146].

62 Ibid [7.149].

63 Senate Committee of Privileges, Parliament of Australia, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994 (49th Report)* (1994) 5.

64 Peter Hanks, 'Parliamentary Privileges in Victoria: The power of a House of Parliament to demand production of documents and the giving of evidence' (Paper presented at Legalwise CPD Seminar, 17 June 2015).

65 Tayor, above n 18. See also Killey, above n 4, 126.

Public Administration References Committee when considering the question of enforcement in relation to a related topic:

> [t]here are no effective deterrents for non-compliance with the order. The Senate has no remedies to enforce its powers against Ministers who are members of the House of Representatives; its penalties in the Senate, such as suspending Ministers from the chamber, are ineffective; and it would be unfair for the Senate to punish public servants for following Ministers' directions.[66]

Indeed, in Western Australia the *Policy for Public Sector Witnesses Appearing Before Parliamentary Committees* produced by the Public Sector Commissioner recognises that where public servants appearing before a Parliamentary Committee are given a lawful directive by a Minister not to release information or documents or answer a question they must comply with that directive. In such circumstances 'it will be for the Committee to take the matter up with Minister or the Minister representing the Minister in the relevant House'.[67]

The failure of Parliament to take enforcement action does, however, suggest an implicit acceptance by the Parliament that an Executive direction should take priority over an express order from Parliament. The unwillingness of the Parliament to assert its authority and to test the resolve of the Executive in these cases is perhaps further evidence of the growing dominance of the Executive within the Australian political landscape. This point has previously been made by Dr Ian Holland, who observed:

> [i]t is worth considering exactly why it is sometimes claimed that public servants should not be confronted by the powers of the chambers of parliament. Implicit in the statement that one should not penalize a public servant who is acting on the directions of a Minister is a concession that the Minister has the legal authority to issue directions to someone to defy the Senate or House of Representatives. In making this concession, those who claim to be seeking to assert the power of the Senate are in fact deferring to the power of the executive and are encouraging the public servants (and probably ministerial staff) to do the same. This seems to rest uneasily with the Parliament's declarations on powers and immunities, and the limited case law that exists in this area.[68]

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66 Finance and Public Administration References Committee, Parliament of Australia, *Independent Arbitration of Public Interest Immunity Claims* (2010).

67 Office of the Public Sector Commissioner (Western Australia), 'Policy for Public Sector Witnesses Appearing Before Parliamentary Committees' (Public Sector Commissioner's Circular 2010-03, 29 March 2010) <https://publicsector.wa.gov.au/sites/default/files/documents/2010-03_policy_for_public_sector_witnesses_appearing_before_parliamentary_committees_3.pdf>.

68 Holland, above n 23, 23.

Phil Larkin sees this inability of Parliament 'to put into force its power to compel individuals without immunity from appearing before committees'[69] as a practical limitation that renders the question about whether there is a constitutional convention 'somewhat academic'.[70]

VI THE FUTURE OF THE MCMULLAN PRINCIPLE

It has been concluded above that the McMullan Principle has not – despite the claims periodically made by members of Executive Governments – attained the status of an entrenched constitutional convention. It may not currently be an accepted constitutional convention, but should it be? In this concluding section the paper will go on to consider whether there are any underpinning policy reasons that support the future entrenchment of the principle.

The arguments in favour of the McMullan Principle, which have been outlined above, emphasise the unique nature of the role of the ministerial advisor. The importance of preserving ministerial accountability and the confidentiality and trust between an advisor and their individual Minister have both been put forward as key arguments in favour of the McMullan Principle. To consider the continued persuasiveness of these claims it is necessary to briefly examine the role of the ministerial advisor and, in particular, the way that this role has evolved in recent times.

A *The Evolving Role of the Ministerial Advisor*

Ministerial advisors were first introduced by the Whitlam Government in the early 1970s. They are distinct from both electoral and departmental staff, and are employed to provide direct support to Ministers in their ministerial roles. Ian Killey describes ministerial advisors as being different from other public servants in that 'they are neither apolitical, impartial, and certainly not independent'.[71] The role of a ministerial advisor has expanded over time, with the job of the modern ministerial advisor being described as follows:

> [t]hey play an important part in the management of the flow of information into and within the Ministerial office – ensuring that relevant information is obtained in a timely manner, that accurate records are kept, and that where necessary that information reaches the Minister in a suitable form. They may also interface with the bureaucracy, other ministers' offices and other stakeholders, including giving directions to departments and agencies. If they have been employed because of their particular expertise they may help shape the policy agenda, give the Minister policy advice, and write speeches on that area. Increasingly, they manage media perceptions

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69 Larkin, above n 2, 109.
70 Ibid.
71 Killey, above n 4, 124.

> and reporting. And they are often instrumental in 'delivering' policy initiatives – keeping major players focused and cooperating until the initiative has been implemented.[72]

An increasingly important aspect of this role is liaising between Ministers and the public service.[73] Whereas traditionally the ministerial advisor had no delegated authority to direct public servants, this has gradually changed over time. Examples such as the 'Children Overboard' incident[74] illustrate the potentially independent role that may be played by modern ministerial advisors, particularly in terms of their possible 'gatekeeper' role in determining exactly what specific information is passed from the public service through to the Minister. The modern ministerial advisor will now frequently be seen to 'act as a conduit between the [Departmental] Secretary and the Minister, often injecting policy advice along the way'.[75]

Andrew Alexandra and Clare McArdle describe the role of the advisor in Australia as being inherently dualistic.[76] That is, while ministerial advisors are partisan appointments who are employed by the Minister, they work within the broader parliamentary sphere and have a role within both the executive and legislative arms of government.

These potentially competing interests have been expressly noted in the United Kingdom in the *Code of Conduct for Special Advisors* which describes special advisors (as they are known in that jurisdiction) in the following way:

> They add a political dimension to the advice and assistance available to Ministers while reinforcing the political impartiality of the permanent Civil Service by distinguishing the source of political advice and support.
>
> Special advisors should be fully integrated into the functioning of government. They are part of the team working closely alongside civil servants to deliver Ministers' priorities. They can also help Ministers on matters where the work of government and the work of the government party overlap and where it would be inappropriate for permanent civil servants to become involved. They are appointed to serve the Prime

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72 Alexandra and McArdle, above n 11, 74–5. For further discussion regarding the nature of this role see Malcolm Abbott and Bruce Cohen, 'The Accountability of Ministerial Staff in Australia' (2014) 49 *Australian Journal of Political Science* 316.

73 Noting, of course, the role that Departmental Liaison Officers also play in this regard, being public servants who are seconded to a ministerial office from their Department.

74 For a discussion of the 'Children Overboard' incident see part IV(A).

75 John Halligan et al, *The Australian Public Service: The view from the top* (Coopers & Lybrand, University of Canberra, 1996) 71.

76 See Alexandra and McArdle, above n 11.

> Minister and the Government as a whole, not just their appointing Minister.[77]

Alexandra and McArdle note that there are a 'general lack of clear conventions or guidelines regarding the nature of the role of ministerial advisor and the responsibilities consequent on that role'[78] and that this is reflective in a lack of consistency at a practical level across Ministers' offices. This was also noted by the Senate Select Committee examining the 'Children Overboard' incident, which remarked that while the Prime Minister's *Guide on Key Elements of Ministerial Responsibility* provided some guidance at the Commonwealth level, it dealt almost entirely with 'possible conflicts between their individual self interest and the interests of their minister' and did not consider 'problems that might arise through the ministerial advisor's pursuit of what they perceive as the interests of their minister or their party'.[79] Alexandra and McArdle have concluded that:

> [s]uch lack of clarity as to the role of the ministerial advisor within the parliamentary system of government must make it very difficult for advisors to know how to act when faced with conflicts between their immediate political loyalties and the broader commitment to open and accountable government.[80]

There has been some forward movement in this area in recent years with, for example, the introduction of the *Code of Conduct for Ministerial Staff* at the Commonwealth level in 2008. This relevantly provides that ministerial staff employed under the *Members of Parliament (Staff) Act 1984* (Cth) must:[81]

- Acknowledge that ministerial staff do not have the power to direct [public servants] in their own right and that [public servants] are not subject to their direction;
- Recognise that executive decisions are the preserve of Ministers and public servants, and not ministerial staff acting in their own right; and
- Facilitate direct and effective communication between their Minister's department and their Minister.

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77 United Kingdom Cabinet Office, *Code of Conduct for Special Advisors* (October 2015) Gov.uk [1]–[2] <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468340/CODE_OF_CONDUCT_FOR_SPECIAL_ADVISORS_-_15_OCTOBER_2015_FINAL.pdf >.

78 Alexandra and McArdle, above n 11,77.

79 Senate Select Committee for an Inquiry into a Certain Maritime Incident, above n 36, [7.117]. See also Larkin, above n 2, 109.

80 Alexandra and McArdle, above n 11, 77.

81 Australian Government, *Code of Conduct for Ministerial Staff* (2008).

While the *Code of Conduct for Ministerial Staff* clearly recognises the evolution of the role played by ministerial staff, it may not be a particularly effective mechanism in terms of providing for enhanced accountability. The first issue is that:

> it makes no provisions for accountability to Parliament, instead limiting advisors' executive role on the basis that if they have no executive role, they need have no direct accountability to Parliament.[82]

The second issue is that there are no clear sanctions provided for any breaches of the *Code*, with breaches being dealt with by the Prime Minister's Chief of Staff and the relevant Minister. Perhaps more fundamentally, the *Code* does not mention any obligations that ministerial staff may have towards the Parliament other than a general obligation that they make themselves aware of both the APS *Values* and *Code of Conduct* which bind Parliamentary Service employees, and that they do not knowingly or intentionally encourage or induce a public official to breach the law or parliamentary obligations. This is despite ministerial staffers being formally employed under the *Members of Parliament (Staff) Act 1984* (Cth), and highlights the possible tension that exists given the duality of the role played by ministerial staffers as highlighted by Alexandra and McArdle above.

Those advocating the McMullan Principle as an entrenched constitutional convention and preferred practice appear, however, to base this assertion on a traditional understanding of the advisor's role, namely that ministerial advisors are working solely under the direct instruction of their responsible Minister. When this is the case 'the chain of accountability running through the Minister to Parliament may hold'[83] as the Minister will be able to answer questions relating to the activities of the advisor and can be held accountable for those actions.

Increasingly, however, it appears that the role of ministerial advisors has evolved

> to a point where they enjoy a level of autonomous executive authority separable from that to which they have customarily been entitled as the immediate agents of the Minister.[84]

The Senate Select Committee in the Children Overboard example found this evolution of the role of ministerial advisors to be a key factor that has led to what they identified as 'a serious accountability vacuum at the level

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82 Larkin, above n 2, 109–10.
83 Ibid 109.
84 Senate Select Committee for an Inquiry into a Certain Maritime Incident, above n 32, [7.107].

of ministers' offices'.[85] Similarly, the Victorian Ombudsman recommended following his investigation into the Hotel Windsor redevelopment that the *Ministerial Staff Code of Conduct* in Victoria should be reviewed to recognise that ministerial advisors acting in their own right do not have the power to direct public servants or to make executive decisions.[86]

Modern ministerial advisors 'actually have a good deal of independence and discretion in much of their work, and this seems to be integral to the role'.[87] This creates a potential accountability vacuum, as Ministers are able to claim ignorance of the actions of their advisors while the advisors themselves are not subject to parliamentary scrutiny by being required to answer questions before parliamentary committees. Phil Larkin has argued that examples such as the 'Children Overboard' inquiry suggest that this 'accountability gap is not simply potential or hypothetical but very real, and that it has indeed been used by ministers to dodge accountability'.[88]

Indeed, during the original Senate debate from which the McMullan Principle takes its name, the Opposition noted that the Government had been careful to distinguish between the role of the National Media Liaison Service[89] and 'the more political role that ministerial staff often perform'.[90] Over time, the role of the ministerial advisor has evolved into one that is highly political and increasingly autonomous. As was noted by Dr Stanley Bach:

> [i]n principle, these advisors are not supposed to have managerial authority. So when an advisor tells public servants that their Minister wants something done, the advisor is assumed to be speaking for the Minister and acting at the Minister's direction. In practice, however, some ministerial advisors have been given managerial responsibilities, and it can be very tempting for other advisors to give directions to public servants on the basis of what the advisor thinks the minister would want if he had been consulted or on the basis of what the advisor believes is in the minister's best interests.[91]

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85 Ibid.

86 Victorian Ombudsman, above n 50, 84.

87 Alexandra and McArdle, above n 11, 76–7.

88 Larkin, above n 2, 109.

89 With the roles and function of the National Media Liaison Service stating that 'representatives will not work with local or state party branches … and will not be involved in party programs, nor electoral campaigning'. See Commonwealth, *Parliamentary Debates*, Senate, 7 February 1995, 607 (Rod Kemp).

90 Ibid.

91 Dr Stanley Bach 'Strengthening Australia's Senate: Some Modest Proposals for Change' (Papers on Parliament No 50, Parliamentary Library, 2010).

When this is combined with the significantly increased number of ministerial staffers,[92] it becomes clear that if the McMullan Principle is recognised as an established practice that should be routinely applied, this will, in light of the way that ministerial advisor roles have evolved, have significant implications for executive accountability and the effectiveness of the parliamentary committee system.

Indeed, Bob McMullan himself later recognised the potential accountability gap when he reconsidered these issues from the perspective of Opposition and argued that whilst the McMullan Principle was 'in the normal course'[93] correct:

> that means you have to accept responsibility for what your staff do. You cannot say: 'They're responsible to me but I do not care what they do; I am not going to tell you what they do. If they make a mistake, it is nobody's business.' Then there is a black hole of accountability because they deal with the departments. They give instructions; they receive directions … There is a big black hole in Australian accountability, and either ministers have to accept responsibility for what their staff do or staff have to be accountable. It cannot be that nobody is accountable.[94]

The importance of ensuring that ministerial advisors are now subject to some formal level of accountability was expressly recognised in 2010 by the Victorian Public Sector Standards Commissioner in the *Review of Victoria's integrity and anti-corruption system.* The Commissioner noted that while accountability for ministerial advisors had traditionally been addressed through the convention of individual ministerial responsibility, the evolution of the role played by ministerial advisors has meant that this may no longer be the best approach:

> This makes the traditional approach of ministerial accountability for the actions of their staff increasingly challenging and increases the likelihood that ministers could distance themselves from the actions (or inactions) of their staff. It has resulted in suggestions that ministerial officers should be more directly subject to scrutiny.

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92 As noted, for example, by the Senate Select Committee for an Inquiry into a Certain Maritime Incident, above n 32, [7.113]. The Select Committee noted that '[t]he number of staff working in ministers' offices has at least doubled in thirty years', although it was noted that this growth appeared 'primarily to be the consequence of decisions about the machinery of government, and attempts to make government more 'professional', rather than the desire of governments to secure partisan advantage or gain further dominance over parliament'.

93 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 2006, 178 (Bob McMullan).

94 Ibid.

> As ministerial officers, parliamentary advisors and electorate officers are publicly funded, the Review considers that they should be subject to external scrutiny to ensure they act with integrity.[95]

The evolving role of the ministerial advisor, and in particular the evidence suggesting that advisors are increasingly able to act with a significant degree of independence and discretion, provides strong support for the view that the McMullan Principle should be revisited and that its primary rationale (in terms of the doctrine of ministerial responsibility) is no longer always applicable.

B *Improving the Accountability of Ministerial Advisors*

The changing nature of the ministerial advisor role is one factor that weighs strongly against the continued application of the McMullan Principle into the future, with the increased independence being exercised by some ministerial advisors undermining arguments that the principle is a necessary application of the doctrine of ministerial responsibility. The above statement by Bob McMullan identifies two potential options when it comes to improving accountability in relation to ministerial advisors – 'either ministers have to accept responsibility for what their staff do or staff have to be accountable'.[96]

That is, if the McMullan Principle is going to be invoked, it should only be in circumstances where the Minister themselves is prepared to appear before the Committee and accept responsibility for an issue. There is, however, no guarantee that this will occur in every situation. For example, while the Senate may order a Senator to attend and give evidence before a Senate Committee,[97] there is an accepted limitation (whether based on comity or law) on the power of either House of Parliament to summons witnesses from either the other House or from a State or Territory Parliament, although their attendance may be requested in a voluntary capacity.[98] Indeed, in the Children Overboard incident, the Senate Select Committee noted that the relevant Minister had failed to submit information or appear before the Inquiry (indeed, he declined three successive invitations to appear), and argued that this 'further eroded public confidence in the government'.[99]

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95 Victorian Public Sector Standards Commissioner, *Review of Victoria's integrity and anti-corruption system*, Review (2010).

96 Ibid.

97 Commonwealth of Australia, *Standing Orders and other orders of the Senate* (August 2015) Standing Order 177.

98 Evans and Laing (eds), above n 25, chs 2, 17. See also Abbott and Cohen, above n 84, 328; Anne Twomey, above n 21, 26; Ian Holland, 'Reforming the conventions regarding parliamentary scrutiny of ministerial actions' (2004) 63 *Australian Journal of Public Administration* 3.

99 Senate Select Committee for an Inquiry into a Certain Maritime Incident, above n 36, [7.175].

Absent this direct ministerial accountability, an insistence upon the McMullan Principle does appear to expose a concerning accountability gap when it comes to ministerial advisors. However, it is also important to recognise that even if parliamentary committees are able to compel ministerial advisors to appear and answer questions, this does not mean that there are no limits surrounding that questioning. To this end, as initially noted above, parallels may be drawn between ministerial advisors and public servants. Indeed, the accepted limitations that are applied to questioning of public servants by parliamentary committees would seem to be equally appropriate in the case of ministerial advisors.

For example, Bret Walker SC has drawn a distinction between the ability of a parliamentary committee to summons a public servant to appear before the committee and their ability to compel that public servant to answer particular questions when they do appear. It was suggested that there is a convention that public servants cannot be compelled to answer questions about policy 'in such a way as to endanger the necessary confidence between Ministers and public servants'.[100] Similarly, the Clerk of the Legislative Council observed that, in this respect, ministerial advisors 'should generally not be held accountable for matters of opinion on policy, which is the domain of Ministers'.[101] This reflects the Parliamentary Privilege Resolutions agreed to by the Australian Senate which provides that:

> [a]n officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister.[102]

Similarly, Alexandra and McArdle have recommended that whilst the McMullan Principle should be weakened in order to ensure appropriate accountability and parliamentary scrutiny, protocols should be established similar to those applying to public servants. For example:

> Public servants cannot give information on matters of policy; certain material is protected by public interest immunity, and in camera evidence may be given where desirable … Advisors should also be shielded from questioning about the personal life of the minister, opinions expressed in the office, policy or media advice offered or discussed, and party matters.

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[100] Legal opinion obtained by Mr Bret Walker SC, Select Committee on Gaming Licensing, Legislative Council, *First Interim Report* (2007) 47 quoted in Victorian Legislative Council Standing Committee on Finance and Public Administration, above n 40, [46].

[101] Quoted in Victorian Legislative Council Standing Committee on Finance and Public Administration, above n 40, [44].

[102] Australian Senate, *Parliamentary Privilege Resolutions* (1988) 1(16) <http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/standingorders>.

> They should however be required to respond honestly to questions as to whether advice from the bureaucracy was passed onto the minister, whether information was received in the minister's office, and whether instructions from the Minister were passed to the bureaucracy.[103]

While it appears strongly arguable that ministerial advisors are able to be summonsed before a parliamentary committee – with this paper establishing above both that the McMullan Principle is not an entrenched constitutional convention and that it has diminishing applicability given the evolution of the ministerial advisor role – this does not mean that a parliamentary committee should consider itself to have *carte blanche* when questioning such a witness. Given the significant parallels that can be drawn between the position of ministerial advisors and public servants there would appear to be sound policy reasons for applying similar protocols to those which currently apply to public servants when giving evidence before parliamentary committees.

VIII CONCLUSION

The examples discussed above suggest that the McMullan Principle has not attained the status of an entrenched constitutional convention. The result of this conclusion is that a parliamentary committee may well have the legal authority in a particular case to compel ministerial advisors to appear and give evidence, although whether a committee has the political will to enforce such an appearance is another question. However, where a ministerial advisor does appear before a parliamentary committee, there are sound policy reasons for applying similar protocols to those which currently apply to public servants when they give evidence before parliamentary committees. This reflects the importance of striking a balance between parliamentary accountability and the need to also preserve a level of confidence in the relationship between individual Ministers and their advisors.

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[103] Alexandra and McArdle, above n 11, 80.