

ACCOUNTABILITY DEFICITS AND OVERLOADS: A MISSING FRAMEWORK

Ellen Maree Rock

June 2018

A THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF
PHILOSOPHY OF THE AUSTRALIAN NATIONAL
UNIVERSITY.

© Copyright by Ellen Maree Rock, 2018

All Rights Reserved

DECLARATION

This thesis is wholly based on my own original work carried out during my candidature, and does not contain material that has been submitted for the award of any other qualification.

I have published the following works during the period of my candidature:

1. Ellen Rock, 'Accountability: A Core Public Law Value?' (2017) 24 *Australian Journal of Administrative Law* 189
2. Ellen Rock, 'Fault and Accountability in Public Law' in Mark Elliot, Jason Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law* (Hart Publishing, 2018) 171
3. Ellen Rock and Greg Weeks, 'Monetary Awards for Public Law Wrongs: Australia's Resistant Legal Landscape' (2018) 41 *University of New South Wales Law Journal* (forthcoming)

This thesis reproduces portions of these publications.

The total word count for this thesis is 94,758 excluding footnotes, bibliography and front matter.

Ellen Rock

22 June 2018

ACKNOWLEDGEMENTS

I would first like to thank my primary supervisor, Peter Cane. His support and guidance have been invaluable not only in writing this thesis, but more broadly in developing my fledgling skills as an academic. Early on in my candidature, Peter encouraged me to ‘chart a course out to sea’ in my research and promised that he would let me know if I managed to venture too far from land. At Peter’s encouragement I have embraced the challenges and uncertainties that this research topic has thrown up, and I am grateful for his ever-insightful advice and tireless efforts in leading me to the end of this PhD journey.

I would also like to thank a range of other colleagues who have guided me along the way, including the other members of my supervisory panel, Leighton McDonald and Mark Lunney. In particular, I would like to thank Mark for his ongoing assistance in my academic career, and for introducing me to the exciting world of government liability during my undergraduate degree. Greg Weeks has also been a wonderful source of support, taking me under his academic wing and generously offering his time in reviewing drafts when I am sure he had more important things to occupy his time.

My research has also been generously supported by colleagues at the conferences I have attended during my candidature, including the *Unity of Public Law* conference hosted by the University of Cambridge in September 2016, and the *Postgraduate Workshop in Public Law* hosted by the Gilbert and Tobin Centre of Public Law in June 2016. I would also like to thank the editors and anonymous reviewers who have contributed to the publication of material from my thesis, including the editors of the *University of New South Wales Law Journal*,¹ the *Australian Journal of Administrative Law*,² and the edited collection arising out of the *Unity of Public Law* conference.³

¹ Ellen Rock and Greg Weeks, 'Monetary Awards for Public Law Wrongs: Australia's Resistant Legal Landscape' (2018) 41 *University of New South Wales Law Journal* (forthcoming).

² Ellen Rock, 'Accountability: A Core Public Law Value?' (2017) 24 *Australian Journal of Administrative Law* 189.

³ Ellen Rock, 'Fault and Accountability in Public Law' in Mark Elliot, Jason Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law* (Hart Publishing, 2018) 171.

Thanks go also to thank my wonderful family and friends for their unwavering support. I would like to thank my mother, Robyn, for fostering my love of learning, and my father, Peter, for encouraging me to pursue things I am passionate about. I would like to thank my wonderful parents-in-law and others who have generously offered their encouragement and their help with childcare. Finally, I would like to thank my husband, Tom, for his steadfast support in this project and always. Over the past few years he has learned far more about government accountability than he ever cared to know, and it is no exaggeration to say that I could not have done this without him.

This research has been generously funded by an Australian Government Research Training Program (RTP) Scholarship. I received editing assistance from Matthew Sidebotham in accordance with the Australian standards for editing practice (Standard E).

For Charlie.

ABSTRACT

Accountability is touted as an essential feature of modern democratic society, said to underpin the legitimacy of our system of government. Given its lofty status, it is unsurprising that the concept has given rise to the search for accountability ‘deficits’, claims that a particular mechanism or area is lacking in accountability. At the other extreme sit accountability ‘overloads’, claims that a particular mechanism or area over-delivers on accountability. Though claims of deficit and overload are prevalent in academic and social discourse, little work has been done to explore the content of these concepts. This thesis posits that claims of accountability deficit and overload conceal two steps in logic.

The first hidden assumption is that it is possible to define a ‘benchmark’ of accountability. The ideas of deficit and overload are essentially claims of ‘not enough’ accountability, on the one hand, and ‘too much’ accountability on the other. In order to make good on that claim, we must first accept that it is possible to describe what ‘enough’ accountability looks like. In other words, we must be able to articulate an ideal benchmark of accountability against which we can compare a given mechanism or area, and find that it either falls short of or exceeds that expectation. One possible way of giving shape to such a benchmark would be to transform the mechanistic framework frequently used to analyse accountability mechanisms (ie who is accountable to whom, for what and how?) into a normative framework (ie who *should be* accountable to whom, for what and how?). The difficulty, as explored in this thesis, is that in order to give shape to that normative benchmark, we are called on to resolve complex debates regarding our views and expectations of government, issues that have troubled legal philosophers for centuries. These complexities are concealed when we make claims by reference to the anomalous notion of accountability.

The second hidden assumption in claims of accountability deficit and overload is that the claimant has located the particular mechanism under scrutiny within the wider system of accountability mechanisms. After all, there is little merit in a claim that a particular shortfall in one mechanism represents an accountability gap unless one can also establish that this shortfall is not ameliorated by other mechanisms within the

system. Likewise, in making a claim that the accumulation of mechanisms represents an accountability overload, it is necessary to accept that those mechanisms in fact operate simultaneously to produce that effect. Missing from the literature, however, is a detailed explanation of the various types of relationship dynamics that might exist between accountability mechanisms, which in many cases will have the effect of ameliorating those concerns.

This thesis unpacks these hidden assumptions, ultimately demonstrating that much more work needs to be done to give concrete shape to the concepts of accountability deficits and overloads. If accountability is indeed a foundational concept underpinning our system of government, there is merit in meeting this challenge head-on.

TABLE OF CONTENTS

INTRODUCTION	1
PART I: DEFINING ACCOUNTABILITY	13
Chapter 1: What is Accountability?	15
Chapter 2: Mechanism or Ideal?	23
PART II: ACCOUNTABILITY DEFICITS AND OVERLOADS	29
Chapter 3: Accountability: Too Little or Too Much of a Good Thing?	31
A Accountability as a measurable commodity	31
B Efforts to measure accountability	36
Chapter 4: A Benchmark of Accountability	43
A Five rationales for accountability	44
B Who should be held accountable?	52
1 'Who' is the government?	52
2 A rationale-based approach	55
3 Summary	66
C To whom should they be accountable?	68
1 Capacity and interest to prosecute	70
2 A rationale-based approach	72
3 Summary	83
D For what should they be accountable?	83
1 Fault: defining standards by reference to a wrongdoer's state of mind	86
2 Outcomes: defining standards by reference to whether outcomes 'matter'	94
3 Defining standards: a rationale-based approach	96
4 Summary	113
E How should they be held accountable?	114
1 Via what procedures?	114
2 With what consequences?	119
3 Summary	125
F The difficulty of defining a benchmark of accountability	126

Chapter 5: The Complexity of Accountability Systems	131
A The Australian accountability system	133
1 Legislative mechanisms	133
2 Executive mechanisms	139
3 Judicial mechanisms	144
4 Summary	153
B Features in balance	153
C Relationship dynamics in the system	161
D Summary	169
PART III: THE DIFFICULTY EXPLORED	171
Chapter 6: Aligning the Hypothetical System with the Benchmark	175
A Transparency via the judicial process	177
1 Transparency through open courts	179
2 Procedural contributions to transparency	180
3 Access to reasons	182
4 Application of the benchmark: transparency	184
B Judicial review: control of public power	186
1 Judicial review: remedies of control	187
2 Who is accountable through judicial review?	192
3 To whom is the government accountable through judicial review?	198
4 For what is the government held accountable through judicial review?	203
5 Procedures in judicial review proceedings	208
6 Judicial review: a control-oriented regime?	211
C Misfeasance in public office: restoring harm occasioned by abuse of power	212
1 Misfeasance in public office: remedies of restoration and desert	213
2 Who is subject to liability in tort?	217
3 Who can sue for misfeasance in public office?	227
4 For what does the misfeasance tort hold an agent accountable?	229
5 Misfeasance proceedings: a prosecutor or agent-friendly regime?	236
6 The misfeasance tort: caught between accountability rationales	238
D Misconduct in public office: punishing abuse of power	239
1 Misconduct in public office: desert-oriented sanctions	239
2 Who can be charged with the offence?	243

3	Who can prosecute government misconduct?	246
4	For what does the misconduct offence hold an agent accountable?	250
5	Misconduct: by what procedures are sanctions imposed?	252
6	Misconduct: a desert-oriented offence	254
E	Summary: what does the benchmark reveal?	255
Chapter 7: Analysing the Hypothetical System		258
A	Access to independent mechanisms	260
B	Mutually exclusive causes of action	264
1	Avoiding duplication of causes of action	264
2	Avoiding duplication of remedies	272
3	Preference for alternative mechanisms	276
C	Staged mechanisms	276
1	The 'felonious tort rule'	277
2	The court's inherent power to stay proceedings	278
D	Interdependent causes of action	279
1	Collateral challenge	280
2	Interdependent remedies	282
E	Co-operative causes of action	284
F	Summary: how does the system operate?	286
CONCLUSION		290
BIBLIOGRAPHY		296

INTRODUCTION

Accountability is a concept that is often raised in the context of public governance, a catch-cry to denote values of equity, democracy and justice.¹ It has been described as a 'hurrah-word'² that '[n]obody argues' with,³ and is viewed as a desirable, if not essential, feature of modern democratic regimes. Rising from near anonymity, the concept of accountability has come to be regarded as the 'über-concept of the twenty-first century'.⁴ Notwithstanding our apparent willingness to jump on the accountability bandwagon, the precise metes and bounds of the concept remain contested. The literature abounds with definitions of accountability and descriptions of the essential features of accountability mechanisms. Far from assisting in clarification, the never-ending efforts at defining accountability leave us with many more questions than answers. Is accountability a normative concept, or should it be defined mechanically? Is accountability focused only on facilitating transparency in government operations, or does it also entail some form of response to what is discovered? Rather than seeking to answer these questions through the contribution of yet a further definition of accountability, this thesis builds on the existing literature positioning accountability as central to securing the legitimacy of government.⁵ Where a government is accountable to its citizens, they are more likely to accept its legitimacy; conversely, where a government is viewed as unaccountable, legitimacy is eroded.

Given the lofty status that has been afforded to the concept of accountability, it is perhaps unsurprising that many have turned their attention to concerns about lack of accountability. Where there are accountability deficits, maladministration and

¹ Portions of this introduction are reproduced in Ellen Rock, 'Accountability: A Core Public Law Value?' (2017) 24 *Australian Journal of Administrative Law* 189.

² Mark Bovens, 'Public Accountability' in Ewan Ferlie, Laurence Lynn Jr and Christopher Pollitt (eds), *The Oxford Handbook of Public Management* (Oxford University Press, 2005) 182, 182.

³ Amanda Sinclair, 'The Chameleon of Accountability: Forms and Discourses' (1995) 20 *Accounting, Organizations and Society* 219, 219.

⁴ Matthew Flinders, 'The Future and Relevance of Accountability Studies' in Mark Bovens, Robert Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014) 661, 661.

⁵ Frederick Barnard, *Democratic Legitimacy: Plural Values and Political Power* (McGill-Queen's University Press, 2001) xi; Mark Bovens, Deirdre Curtin and Paul 't Hart, *The Real World of EU Accountability: What Deficit?* (Oxford University Press, 2010) 53.

Accountability Deficits and Overloads: A Missing Framework

malfeasance are rife. Politicians and public servants alike are engaged in graft and corruption, and secret deals are done with corporate fat-cats behind closed doors. Government decision-makers are inefficient, uninterested, or abusing their powers, and citizens who lose out are left to fend for themselves. Under this lens of accountability deficits, ‘every man ought to be supposed to be a knave’,⁶ and the call for increased accountability is concerned with putting in place checks and controls to prevent our officials from yielding to their avarice. While it is difficult to pinpoint or articulate the nature of an ‘accountability deficit’ as reflected in the literature, it appears to contain a temporal element. Deficit claims frequently accompany a perceived change or shift in the status quo, and calls for increased accountability represent a reaction to that shift. So, for instance, the changing size and structure of the executive branch is associated with a contraction in the reach and effectiveness of responsible government as an accountability mechanism. Suggestions to combat this deficit have focused on the expansion of existing mechanisms (eg the growth of judicial review)⁷ and the introduction of new mechanisms (eg merits review tribunals and ombudsmen regimes).

Alongside our continued efforts to identify and correct areas of potential accountability deficit, the past two decades have seen the emergence of a new breed of accountability concern; the accountability ‘overload’. It is said that the accountability pendulum has swung so far in the direction of answering cries of deficit that we have inadvertently caused a new style of accountability problem. Government officials have become so overwhelmed by—or enraptured with—complying with accountability mechanisms that government accountability is being undermined by the very processes designed to support it. Officials are said to be conflicted or paralysed in selecting which accountability demands to respond to, or engaging in practices of ‘gaming the system’ to improve results as measured by a particular mechanism. They might also be hindered in the development of new and innovative practices by rigid accountability standards,

⁶ David Hume, ‘Of the Independency of Parliament’ in Eugene F Miller (ed), *Essays, Moral, Political, and Literary* (Liberty Fund, 1987) 40, 42.

⁷ *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 467 [93] (Kirby J): ‘It is not coincidental that this growth in administrative law remedies has occurred at a time when the theory of ministerial responsibility, as an effective means of ensuring public service accountability, has been widely perceived as having serious weaknesses and immunities’.

Introduction

or simply be so overburdened by compliance regimes that their primary functions are neglected.

We thus see the development of two distinct camps: those calling for increased accountability by expanding the number, reach, or 'bite' of accountability mechanisms, and those calling for a reduction in the number, reach or bite of accountability mechanisms. Both camps view their task as one of 'fixing' accountability as it applies in the context of public governance. In deciding which direction we ought to go, it is critical that we are careful in deciding whether there is, in fact, an accountability deficit or overload that needs to be addressed. These claims of deficit, on the one hand, and overload, on the other, suggest that there is a middle ground for which we ought to aim; too far either side will not only fail to correct an existing problem, but may produce an unintended new problem. Accordingly, the proper diagnosis of accountability deficits and overloads is critical to the identification of an appropriate cure.

But correctly identifying potential accountability deficits and overloads is not only relevant to the goal of curing these problems. It is also critical as a perception issue; *misconceptions* about deficits and overloads may pose just as great a problem as *genuine* accountability deficits and overloads. If (as accepted in this thesis) accountability makes an important contribution to the legitimacy of government, public perception about lack of accountability may pose as significant a threat to legitimacy as academic thoughts on the topic. In other words, a perceived accountability deficit may be as problematic as an accountability deficit in (theoretical) fact. Similarly, misconceptions about the existence of accountability overloads may be as damaging to an official's performance as an actual overload; an official who believes that they are subject to a range of competing accountability priorities may be paralysed by that perceived overload in just the same manner as an official who is actually subject to competing accountability priorities. If perceived deficits and overloads pose a threat to legitimacy and performance, the issue may be one not of 'fixing' the applicable accountability mechanisms, but rather of correcting the misconception through education and reinforcement of the effectiveness of the existing regime. Again, proper diagnosis is critical to the application of the correct treatment.

Accountability Deficits and Overloads: A Missing Framework

With this in mind, this thesis takes as its focus the articulation and measurement of accountability deficits and overloads. Despite the popularity of these concepts, the existing literature tends to gloss over the detail of their content. Claims of deficit and overload are often made in a generalised manner that focuses more on a perceived shift in the status quo than on articulating what has been lost. So, for example, those who identify an accountability deficit in the gradual diminution of responsible government often focus on the nature of that change (eg the changing shape and size of the executive branch). In focusing on that shift, we are left to infer that accountability was in the past effectively supported through that now diminished mechanism. Similarly, those who identify a deficit in the outsourcing of public functions to private contractors often focus on the missing source of accountability (eg the inability to seek judicial review of the decisions of private bodies). In turn, we are left to infer that accountability was in the past effectively supported through the now circumvented mechanism of judicial review. Claims of accountability overload are similarly framed, in focusing on the overlapping quantity of mechanisms and remedies that are said to produce undesired effects.

This thesis argues that, in the hunt for accountability deficits and overloads, there are two key steps in logic that are inadequately addressed in the existing literature. The first is the definition of a 'benchmark' of accountability, which would enable us to articulate what 'enough' (and, in turn, 'not enough' and 'too much') accountability might look like. The second is in locating the particular mechanism under scrutiny within a wider system of accountability mechanisms. Without the former, we cannot explain how it is that a mechanism either falls short of, or exceeds, our accountability expectations. Without the latter, we cannot say that this shortfall or excess is not ameliorated by other mechanisms within the wider system. If the concepts of accountability deficit and overload are indeed as important as we are led to believe, then there is merit in seeking to address these two gaps in the literature. What this thesis in fact demonstrates, however, is that these gaps in the literature are not so much a matter of inadvertence as a reflection of some of the core difficulties in defining government accountability more generally.

Introduction

Taking the first of these two points, the task of defining an accountability benchmark is one that leads us into some particularly difficult areas of legal philosophy. To craft a benchmark that represents an ‘ideal amount’ of government accountability, we would need to be able to move beyond the mechanistic understanding of accountability widely adhered to in the literature, an understanding that analyses accountability mechanisms within the rubric of *who* is accountable *to whom*, *for what* and *how*?⁸ Instead of asking simply ‘who is held accountable?’, we instead need to be able to offer an answer to the question ‘who *should* be held accountable?’. Instead of ‘to whom are they accountable?’, we must decide ‘to whom *should* they be accountable?’. Instead of ‘for what are they held accountable?’, we must ask ‘for what *should* they be held accountable?’. Instead of ‘how are they held accountable?’, we must ask ‘how *should* they be held accountable?’. If we were able to answer these questions, we could move beyond a mechanical definition of accountability, and into the more nuanced territory of articulating what we *expect* of that mechanism. The answers we identify in response to those questions would then provide us with a tool to measure a given mechanism and to determine whether it falls short of expectations (accountability deficit) or overperforms in respect of those expectations (accountability overload).

The difficulty, this thesis suggests, is that answering these questions is no small task. Taking one of the more simple questions, *who should be held accountable*, we are confronted by some complex decisions that we must make about our conceptualisation of ‘the government’. Would our accountability benchmark be shaped by reference to an understanding of the government as a corporate entity, or as a collection of individuals? Our answer to this question will shape our accountability benchmark and tell us whether accountability would demand that the government be made to answer as a whole, or whether responsibility should instead sheet home to individual officials. Only

⁸ See eg Mark Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’ (2007) 13 *European Law Journal* 447, 454–55; Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave Macmillan, 2003) 22–23; Jerry Mashaw, ‘Accountability and Institutional Design: Some Thoughts on the Grammar of Governance’ in M Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press, 2006) 115, 118; Mark Philp, ‘Delimiting Democratic Accountability’ (2009) 57 *Political Studies* 28, 42; Colin Scott, ‘Accountability in the Regulatory State’ (2000) 27 *Journal of Law and Society* 38, 41; Ruth Grant and Robert Keohane, ‘Accountability and Abuses of Power in World Politics’ (2005) 99(1) *American Political Science Review* 29.

Accountability Deficits and Overloads: A Missing Framework

after we have confronted, and answered, this question can we move on to assess whether a particular mechanism satisfies or departs from that benchmark. Of course, deciding on the proper conceptualisation of government is not a simple choice, harking back to the centuries-old debate reflected in the theories of Blackstone, on the one hand, and Dicey on the other.⁹ If we are to offer an answer to the question of *who should be held accountable*, we first need to engage with and resolve this debate. Similar difficulties are confronted in answering the questions of *to whom* should the government be accountable, *for what*, and *how*? We see, therefore, that defining a benchmark of accountability is not simply a matter of plugging a small hole in the literature, but one that draws us into difficult territory that has exercised academic minds throughout history, and continues to do so.

This thesis suggests that one way of tackling the task of articulating a benchmark of accountability is to move beyond the generalised goal of holding the government 'accountable', and to articulate our underlying purpose. The literature often tends to gloss over the broader question of *why* it is that we seek to hold the government accountable.¹⁰ This omission is not so critical in a mechanistic analysis, which focuses on exploring the way in which a given mechanism operates. Once we move into the territory of seeking to define a benchmark of accountability, however, this difficulty can no longer be avoided. In order to say *who should be held accountable*, we need to consider what our purpose in targeting that agent might be. Similarly, in order to say *to whom* they should be accountable, *for what*, and *how*, we must turn our attention to what it is we are hoping to achieve. Though not always at the forefront of analysis, the accountability literature points to a range of potential rationales or goals for accountability. These include the facilitation of transparency, control, restoration, desert and deterrence.

Adopting these five potential rationales, we can then seek to give shape to our accountability benchmark by considering what answer to each question best supports

⁹ Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (Cambridge University Press, 2012) Ch 1.

¹⁰ Mark Bovens, Thomas Schillemans and Paul 't Hart, 'Does Public Accountability Work? An Assessment Tool' (2008) 86 *Public Administration* 225, 230.

Introduction

each rationale. So, for instance, in asking *how* accountability should be achieved, the transparency rationale might lead us to look to procedures capable of compelling the production of information, the control rationale might lead us to look for regulatory orders, the restoration rationale for reparative remedies, the desert rationale for punitive sanctions, and the deterrence rationale for the sanctions most likely to facilitate change going forward.¹¹ In asking *who* should be held accountable, the rationales of transparency and control might suggest that we adopt a broad approach in order to limit the possibility that the exercise of public power will be shielded from scrutiny or that its misdirected exercise be immune from review and redirection. The desert rationale, in contrast, might suggest that we adopt a much narrower approach, one that focuses on identification of the party most responsible for the wrongdoing in question. The restoration rationale might direct us to look for the party with the greatest capacity to restore, whereas the deterrence rationale might suggest we look for the party with the greatest capacity to facilitate improvements going forward. We would reach similarly disparate answers to our remaining questions of *to whom*, *for what*, and *how* the government should be held accountable.

Assuming that it was possible to settle on the rationale(s) to assign to accountability, and to resolve complex debates in order to answer the various questions of *who* should be accountable *to whom*, and so on, we would then have created a standard by which we could measure a given mechanism. So, for example, we might define our benchmark such that accountability would be said to demand that an *individual official* would be accountable to a *defined prosecutor* for their *deliberate wrongdoing* through the imposition of *punitive sanctions* (the desert rationale). Using this benchmark to assess a given mechanism, we would identify a potential deficit if, for example, the sanctions provided were not punitive in nature, or if they were limited to cases where deliberate wrongdoing had caused loss,¹² for example. Similarly, we might identify a potential overload where a mechanism goes further than anticipated by the

¹¹ According to Braithwaite, one possibility in this respect is to apply ‘weak sanctions’ to soft ‘targets’: John Braithwaite, ‘On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers’ (1997) 47 *University of Toronto Law Journal* 305, 329–30.

¹² For example, we might view the availability of punitive damages for the tort of misfeasance in public office as falling into this category, as there is no liability without proof of harm.

Accountability Deficits and Overloads: A Missing Framework

benchmark—for example, by making punitive damages available outside cases of deliberate wrongdoing, or by imposing liability on one party for the actions of another.

The difficulty is that if we accept the possibility that accountability may be underpinned by more than one rationale, we must, in turn, accept that our accountability benchmark may at times pull in different directions. So, for instance, the restoration rationale might demand that liability be imposed on the government as an entity, whereas the desert rationale might demand that liability be sheeted home to the individual wrongdoer. Because these two demands are in opposition, we cannot expect that our accountability benchmark would demand that a single mechanism perform both simultaneously. Accordingly, it would be necessary either to define our accountability benchmark very narrowly so as to avoid this potential conflict (in which case we could not complain about accountability deficits arising outside the confines of that narrowly defined benchmark), or we must allow that accountability will be supported via multiple mechanisms. In other words, even if individual mechanisms might fall short of the benchmark when taken alone, they may produce accountability when taken together. Of course, the more mechanisms made available to support accountability, the greater the chances that they will overlap with one another.

This leads to the second key point made in this thesis, which is that accountability mechanisms must not be measured against a benchmark in isolation, but located within the wider accountability system. The identification of a potential gap or overlap can only ever be taken as a preliminary observation, pending consideration of whether that gap or overlap is ameliorated by the operation of the accountability system as a whole. So, for instance, some might say that the unavailability of judicial review in cases of outsourced public powers represents an accountability deficit. However, until we have considered the alternative sources of control over that outsourced power, we cannot say that the failure of judicial review to attach to those agents is really an accountability deficit. Similarly, we might reach the view that the simultaneous availability of punitive damages for the tort of misfeasance in public office and criminal punishment pursuant to the offence of misconduct in public office represents a potential accountability overload. However, until we have considered the interaction between these two causes

Introduction

of action and whether both in fact impose accountability in the same case, our observation will only ever be a preliminary one.

This thesis argues that accountability systems encompass a range of accountability dynamics that must be understood in order to assess the potential presence of accountability deficits and overloads. First, it is necessary to consider the varying features between accountability mechanisms. So, while some are very accessible, others are more difficult to access; while some are expensive and time-consuming, others are more affordable and efficient; while some are flexible, others are more rigid; while some are coercive, others are more discretionary; while some operate autonomously, others are dependent on the intervention of others; while some are independent, others are subject to supervision and control; and while some enjoy a degree of permanence, others exist at the whim of another party. When viewing these mechanisms in isolation, there is a temptation to treat these various features as a collection of strengths and weaknesses (eg the ideal would be a mechanism that is accessible, cheap, flexible, coercive, autonomous, independent and permanent). However, when approaching accountability as a system, it is possible that a balance of features between mechanisms may better serve accountability overall. So, for instance, the courts can afford to adopt a more rigid approach in light of the flexibility offered by the ombudsman, and the office of the ombudsman can afford to be of a less permanent character in light of the permanence of the courts.

A second feature evident in viewing accountability mechanisms as a system is that they reflect a range of different types of relationship dynamics. Viewing mechanisms in isolation can give the mistaken impression that they operate independently and without regard to one another, giving rise to the over-diagnosis of accountability overloads. For example, if we focus on the tort of misfeasance in public office and the criminal offence of misconduct in public office in isolation, we might view the availability of punitive sanctions under both causes of action as producing a potential accountability overload. However, on closer inspection it becomes apparent that there are much more nuanced relationship dynamics in place between mechanisms in the system. In addition to *independent* relationships, where mechanisms may operate in parallel, mechanisms may

Accountability Deficits and Overloads: A Missing Framework

operate in a *staged* manner (where one is a precondition of another), *mutually exclusively* (where one precludes another), *interdependently* (where mechanisms are interlocked with one another) or *co-operatively* (where mechanisms complement and assist one another). We cannot possibly reach a conclusion that an accountability shortfall or excess identified through use of our benchmark is in fact an accountability deficit or overload without locating the mechanism within this wider system, and appreciating the role played by these various dynamics.

The following outline serves as a map to the course charted in this thesis.

Chapters 1 and 2. The concept of accountability is a contested and contestable one. At core, accountability is a relational concept which refers to a mechanism that can be mapped out by looking at *who* is accountable *to whom*, *for what* and *how*? While some deny that accountability has any normative dimension, it is necessary to enter into this normative territory in order to engage with the concepts of accountability deficit and overload, which presuppose that it is possible to define an 'ideal amount' of government accountability.

Chapter 3. The literature is replete with claims of accountability deficit and overload. Despite the ubiquity of these concepts, closer analysis reveals two missing steps in the logic that underpins them. First, these concepts assume that it is possible to define a 'benchmark of accountability' that can be used to measure a mechanism and point out areas of over- or under- performance; second, they assume that an identified deficit or overload is not ameliorated by the wider system in which the mechanism is located.

Chapter 4. To define an accountability benchmark, it is necessary to settle on the core purpose of accountability, which may include a range of rationales (eg transparency, control, restoration, desert and deterrence). Assuming it is possible to do so, it is then necessary to grapple with a range of other very difficult questions, including complexities around our structure of government, in order to transform the mechanical *who* is accountable *to whom* etc into a normative *who should be* accountable *to whom* etc. The complexity required of this analysis is one of the

Introduction

possible reasons why the literature in the area of accountability deficits and overloads has not been plumbed deeply as yet.

Chapter 5. Assuming it is possible to define a benchmark of accountability and use it to identify potential accountability deficits and overloads, it is then necessary to locate those claims within the wider accountability system. Accountability systems involve a delicate balance in terms of both their features (eg coerciveness, efficiency etc), and their relationship dynamics (eg mutual exclusivity, independence etc). It is not possible to form a final view as to whether a gap or overlap identified using a benchmark is an accountability deficit or overload without appreciating whether these dynamics ameliorate these concerns.

Chapters 6 and 7. To demonstrate the degree of complexity inherent in the task of identifying accountability deficits and overloads, a hypothetical analysis is conducted. This adopts a hypothetical benchmark of accountability (ie offering assumed answers to the range of questions *who should be accountable, to whom,* etc), as well as a simplified hypothetical accountability system (ie common law judicial review, the tort of misfeasance in public office, and the criminal offence of misconduct in public office). Even on adopting a simplified benchmark and using that to assess a narrowly confined set of closely related mechanisms, the enormity of the work required to map out accountability deficits and overloads on a wider scale is clear.

In summary, this thesis serves both to highlight the limitations of the treatment of accountability deficits and overloads in the existing literature, and to offer a framework for future exploration of these ideas. If the concept of accountability is as important to supporting the legitimacy of government as we are given to believe, the task of identifying an appropriate balance between 'enough' and 'not enough' accountability is equally deserving of our attention.

Accountability Deficits and Overloads: A Missing Framework

PART I: DEFINING ACCOUNTABILITY

The concept of accountability has been put to many uses in academic literature and public discourse. Not unlike the rule of law, it is touted as an essential feature of modern democratic regimes, evoking notions of justice, equity and good governance. What such descriptions lack in detail, they more than make up for in rhetorical appeal. But on winding back the rhetoric, what do we discover about the meaning of accountability, and how do we determine whether or not we have ‘achieved’ it? In particular, how do we know whether or not we are falling short of achieving accountability (accountability deficit) or going too far in pursuit of accountability (accountability overload)? This thesis unpacks some of the difficulties that must be confronted in tackling this last question. Part I sets the stage for that analysis by providing an overview of the generally accepted definition of accountability. As detailed in Chapter 1, accountability is best understood as a mechanism that can be analysed within the framework of the questions: *who* is accountable, *to whom*, *for what*, and *how*? One of the largest unresolved questions about accountability, as explored in Chapter 2, is whether it is simply a mechanical concept (ie a description of a mechanism with certain attributes) or more broadly reflects a value or ideal (ie the notion of being an accountable person). The conclusion reached in this chapter is that it is particularly difficult to divorce the concept of accountability from a normative background in discussing concepts of accountability deficits and overloads. Each of these concepts rests on the normative assumption that we can identify an ‘ideal amount’ of accountability. This sets the stage for a detailed analysis of the concepts of accountability deficits and overloads and the assumptions that underpin these claims.

CHAPTER 1: WHAT IS ACCOUNTABILITY?

It is commonplace to start an accountability analysis by stating that it is a concept that everyone agrees is a desirable attribute of democratic regimes. It is a 'golden concept that no one can be against',¹⁶ a 'hurrah-word'¹⁷ with which '[n]obody argues'.¹⁸ Up until the end of the twentieth century, it did not feature prominently in discussions of public governance.¹⁹ Despite its subsequent meteoric rise in popularity and its apparently inherent value,²⁰ the term is not often given a precise definition. A review of the literature indicates that 'accountability' is a term that means different things to different people in different contexts. There are nearly as many descriptions of accountability as there are legal, political and philosophical authors who have written on the topic. Sinclair describes the study of accountability as the exploration of 'a "bottomless swamp", where the more definitive we attempt to render the concept, the more murky it becomes'.²¹ The two decades that have passed since she made this observation have done little to settle the waters, and much more to muddy them. Accountability is ascribed a number of different roles and functions, many of which differ according to context; however, there are a number of elements that are agreed upon.

One of the more widely accepted definitions of accountability is that put forward by Bovens, who defines it as

a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass

¹⁶ Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', above n 8, 448.

¹⁷ Bovens, 'Public Accountability', above n 2, 182.

¹⁸ Sinclair, above n 3, 219.

¹⁹ Richard Mulgan, "'Accountability": An Ever-Expanding Concept?' (2000) 78 *Public Administration* 555, 555.

²⁰ Dubnick traces the frequency with which the term is used through a sampling analysis of one million scanned volumes published in English between 1800 and 2005, and notes a 'sharp and significant upturn' in the usage of the term since the 1970s: Melvin Dubnick, 'Accountability as a Cultural Keyword' in Mark Bovens, Robert Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014) 23, 24.

²¹ Sinclair, above n 3, 221. Sinclair borrows this phrasing from Dahl: Robert Dahl, 'The Concept of Power' (1957) 2 *Behavioral Science* 201, 201.

Accountability Deficits and Overloads: A Missing Framework

judgement, and the actor may face consequences.²²

This definition has resonated with a number of other authors who have adopted it either in whole or with minor qualifications.²³ Oliver offers a similar definition, of 'being liable to be required to give an account or explanation' and 'where appropriate, to suffer the consequences, take the blame or undertake to put matters right if it should appear that errors have been made'.²⁴ In Oliver's view, accountability 'is explanatory and amendatory'.²⁵ Sinclair's definition implies similar reasoning, as she defines accountability as 'a relationship in which people are required to explain and take responsibility for their actions',²⁶ while Strom sees it as 'a mechanism ... by which agency loss may be contained'.²⁷ In his view, there is an accountability relationship where (1) the agent 'is obliged to act on ... behalf' of the principal and (2) the principal can 'reward or punish' the agent in respect of that performance.²⁸ In essence, accountability is 'a map from the outcomes of actions ... of public officials to sanctions by citizens'.²⁹ Mulgan's definition is more complex, as he looks at the 'core sense' of accountability, which he says has the features of being external, involving 'social interaction and exchange', and implying 'rights of authority', wherein the superior body has the 'rights to demand answers and impose sanctions'.³⁰ The definition employed by Grant and Keohane also speaks of rights of authority, as they define accountability as a 'right to

²² Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', above n 8, 450. See also Mark Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism' (2010) 33 *West European Politics* 946, 951 and Bovens, Schillemans and 't Hart, above n 10, 225.

²³ See eg Carol Harlow, 'Accountability and Constitutional Law' in Mark Bovens, Robert Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014) 195, 196, although she would query the inclusion of sanctions in the definition; Jeff King, 'The Instrumental Value of Legal Accountability' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press, 2013) 124, 127; Arnost Vesely, 'Accountability in Central and Eastern Europe: Concept and Reality' (2013) 79 *International Review of Administrative Sciences* 310, 313.

²⁴ Dawn Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness, and Citizenship* (Open University Press, 1991) 22. This definition is adapted from Turpin's definition: Colin Turpin, *British Government and the Constitution: Text, Cases and Materials* (Weidenfeld and Nicolson, 1990) 421–22. Harlow adopts this definition: Carol Harlow, *Accountability in the European Union* (Oxford University Press, 2002) 6.

²⁵ Oliver, above n 24, 22.

²⁶ Sinclair, above n 3, 220–21.

²⁷ Kaare Strom, 'Parliamentary Democracy and Delegation' in Kaare Strom, Wolfgang Muller and Torbjorn Bergman (eds), *Delegation and Accountability in Parliamentary Democracies* (Oxford University Press, 2003) 55, 62.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Mulgan, "'Accountability': An Ever-Expanding Concept?", above n 19, 555–56.

Chapter 1: What is Accountability?

hold [an actor] to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met'.³¹ This definition is predicated on there being

a relationship between power-wielders and those holding them accountable where there is a general recognition of the legitimacy of (1) the operative standards for accountability and (2) the authority of the parties to the relationship (one to exercise particular powers and the other to hold them to account).³²

Some authors have adopted narrower definitions than these. For Scott, '[a]ccountability is the duty to give account for one's actions to some other person or body'.³³ Further, Philp defines an accountability relationship in the sense that 'A is accountable with respect to M when some individual, body or institution, Y, can require A to inform and explain/justify his or her conduct with respect to M'.³⁴

Other authors offer less prescriptive definitions of accountability, seeing it as a sort of umbrella term that incorporates various other concepts. Harlow takes this approach in describing accountability as a 'portmanteau' into which may be packed a 'bundle of notions pertinent to modern systems of government' including 'democratic legitimacy, political responsibility, financial probity and audit'.³⁵ Koppell also conceives of accountability as an umbrella term that consists of five dimensions, being transparency, liability, controllability, responsibility, and responsiveness.³⁶ An actor's accountability is assessed by reference to how it fulfils each of these dimensions, with transparency and liability acting as a basis for enquiries into the remainder.³⁷ Another commentator who takes this line is Dubnick, who defines accountability as a 'genus', for which the

³¹ Grant and Keohane, above n 8, 29.

³² Ibid.

³³ Scott, above n 8, 40.

³⁴ Philp, above n 8, 32.

³⁵ Carol Harlow, 'Accountability as a Value in Global Governance and for Global Administrative Law' in Gordon Anthony et al (eds), *Values in Global Administrative Law* (Hart Publishing, 2011) 173, 178.

³⁶ Jonathan Koppell, 'Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder"' (2005) 65 *Public Administration Review* 94, 96.

³⁷ Ibid.

Accountability Deficits and Overloads: A Missing Framework

relevant 'species' are liability, obligation, answerability, obedience, responsibility, fidelity, responsiveness and amenability.³⁸

These various definitions reveal a number of common streams of thought. One matter on which authors agree is that accountability is an *elusive and illusive concept* that is capable of performing various theoretical tasks; it is a 'chameleon',³⁹ a 'will-o-the-wisp',⁴⁰ an 'ever-expanding concept',⁴¹ a 'portmanteau' containing 'a bundle of notions',⁴² and an 'unspecified umbrella term'.⁴³ A second area of consensus is that accountability is a *relational concept*. It describes the dynamics of a relationship between two parties in which one is entitled to hold the other accountable for their actions. However, there are differences of opinion as to the source of this dynamic. Some appear to see it as an incident of the delegation of power from one party to another,⁴⁴ while others see it as a legal or moral duty stemming from the fact that one party is affected by the exercise of power by another.⁴⁵ Thirdly, there is general agreement that accountability is *coercive*, in the sense that it does not arise in situations of voluntary provision of information.⁴⁶ Fourthly, a minimum defining feature of an accountability relationship is that it requires the *provision of an account or justification* for a chosen course of conduct.⁴⁷ A fifth common thread in the literature is that accountability relationships can arise in a *wide variety of contexts*, not only within the area of public

³⁸ Dubnick, above n 20, 33.

³⁹ Sinclair, above n 3, 219.

⁴⁰ Frederick C Mosher, 'The Changing Responsibilities and Tactics of the Federal Government' (1980) 40 *Public Administration Review* 541, 546, cited in Robert D Behn, *Rethinking Democratic Accountability* (Brookings Institution Press, 2001) 5.

⁴¹ Mulgan, "'Accountability': An Ever-Expanding Concept?", above n 19.

⁴² Harlow, 'Accountability as a Value in Global Governance and for Global Administrative Law', above n 35, 178.

⁴³ Vesely, above n 23, 313.

⁴⁴ This is the delegation model: Strom, above n 27, 55; Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 12; Grant and Keohane, above n 8, 31.

⁴⁵ This is the participatory model: Grant and Keohane, above n 8, 31; Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 13.

⁴⁶ Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 11; Philp, above n 8, 33. Note that Philp is more focused on the account-holder's power to compel than the account-giver's obligation to comply. For this reason, he includes the power of the media to force the hand of politicians through threat of reputational damage as an accountability relationship.

⁴⁷ See eg Mulgan, "'Accountability': An Ever-Expanding Concept?", above n 19, 555; Melvin Dubnick, 'Seeking Salvation for Accountability' (Paper presented at the Annual Meeting of the American Political Science Association, Boston, 29 August to 1 September 2002) 7.

Chapter 1: What is Accountability?

governance, but also in the private sector and social arena.⁴⁸ When examined more closely, the public governance context can be further broken down to refer to public accountability (accountability of the government to the public through political channels),⁴⁹ intra-political accountability (the accountability arrangements that take place within government institutions through hierarchy and supervision),⁵⁰ inter-political accountability (being the relationships that take place between government institutions),⁵¹ and external accountability (being non-coercive accountability arrangements that sit outside the political arena).⁵² A further common theme is that accountability is a *value-laden term*. It is treated as closely related to, though perhaps not synonymous with, a number of other public governance concepts such as control,⁵³

⁴⁸ See eg Mashaw, above n 8.

⁴⁹ Oliver, above n 24, 25–26 (Oliver includes this context within her four-part contextual analysis under the label ‘public accountability’); Mashaw, above n 8, 120 (Mashaw includes this type of accountability as a subset of the broader concept of ‘public governance’).

⁵⁰ Mashaw, above n 8, 120–21. Mashaw describes this type of accountability as ‘a public administrative regime’.

⁵¹ Ibid 121. This is the second aspect of Mashaw’s ‘political accountability’ analysis, encompassing the responsibilities of top-level bureaucrats to elected officials, of parliamentarians to party leaderships, and of administrative officials to relevant committees. See also Oliver, above n 24, 23, who includes this context within her broader description of ‘political accountability’, incorporating the obligations owed between the various branches and levels of government.

⁵² Oliver, above n 24, 27–28. Oliver describes this form of accountability as ‘administrative’, including accountability to non-political bodies such as ombudsmen. She notes that the sanctions arising in these accountability relationships largely consist of non-coercive advisory recommendations.

⁵³ Mulgan, ‘“Accountability”: An Ever-Expanding Concept?’, above n 19, 563–66; Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 18–20; Koppell, above n 36, 97–98; Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’, above n 8, 453–54; Harlow, *Accountability in the European Union*, above n 24, 10.

Accountability Deficits and Overloads: A Missing Framework

democracy,⁵⁴ dialogue,⁵⁵ equity,⁵⁶ justice,⁵⁷ liability,⁵⁸ responsibility,⁵⁹ responsiveness,⁶⁰ the rule of law,⁶¹ the separation of powers⁶² and transparency.⁶³

Many authors see accountability as a *mechanism* that can be mapped out by reference to a series of questions which ask who is to be accountable to whom, about what, and how?⁶⁴ In asking *who is to be held to account*, authors are seeking to identify the party that ought to be placed in the role of account-giver in a particular situation. The answer might be relatively straightforward in cases where one person is solely and directly responsible for exercising a particular power and producing a particular result. However, the answer to this question will be more complex in cases where multiple parties have contributed to an impugned outcome, or where the responsibility for performance rests on someone other than the person who has in fact exercised the power. In such cases, it may be appropriate to designate an organisation as the relevant

⁵⁴ Strom, above n 27, 55; Melvin Dubnick, 'Accountability and the Promise of Performance: In Search of the Mechanisms' (2005) 28 *Public Performance and Management Review* 376, 380.

⁵⁵ Mulgan, "'Accountability': An Ever-Expanding Concept?', above n 19, 569–70.

⁵⁶ Bovens, Schillemans and 't Hart, above n 10, 227.

⁵⁷ Dubnick, 'Accountability and the Promise of Performance: In Search of the Mechanisms', above n 54, 380.

⁵⁸ Koppell, above n 36, 96; Bovens, 'Public Accountability', above n 2, 189.

⁵⁹ Koppell, above n 36, 98; Dubnick, 'Accountability and the Promise of Performance: In Search of the Mechanisms', above n 54, 380; Mark Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations* (Cambridge University Press, 1998) 22–23; Bovens, Schillemans and 't Hart, above n 10, 227; Mulgan, "'Accountability': An Ever-Expanding Concept?', above n 19, 557–58; Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 15–18; Harlow, 'Accountability and Constitutional Law', above n 23, 197–98; Harlow, 'Accountability as a Value in Global Governance and for Global Administrative Law', above n 35, 174–75; Harlow, *Accountability in the European Union*, above n 24, 6; John Braithwaite, 'Accountability and Responsibility Through Restorative Justice' in Michael Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press, 2006) 33, 44.

⁶⁰ Mulgan, "'Accountability': An Ever-Expanding Concept?', above n 19, 566–69; Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 20–22; Koppell, above n 36, 98–99; Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', above n 8, 453; Bovens, Schillemans and 't Hart, above n 10, 227; Dubnick, 'Accountability and the Promise of Performance: In Search of the Mechanisms', above n 54, 380.

⁶¹ Harlow, 'Accountability and Constitutional Law', above n 23, 199–200; Carol Harlow and Richard Rawlings, 'Promoting Accountability in Multilevel Governance: A Network Approach' (2007) 13 *European Law Journal* 542, 546–47.

⁶² Harlow, 'Accountability and Constitutional Law', above n 23, 200–01; Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 20.

⁶³ Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', above n 8, 453; Bovens, Schillemans and 't Hart, above n 10, 227; Koppell, above n 36, 96–97; Harlow, *Accountability in the European Union*, above n 24, 12.

⁶⁴ See eg Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', above n 8, 454–55; Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 22–23; Mashaw, above n 8, 118; Philp, above n 8, 42; Scott, above n 8, 41; Grant and Keohane, above n 8.

Chapter 1: What is Accountability?

account-giver (corporate accountability),⁶⁵ or to hold a superior accountable for the conduct of inferiors (hierarchical accountability),⁶⁶ or to hold the various actors jointly accountable for the result (collective accountability).⁶⁷ The analysis will be further complicated in circumstances where there are multiple contributors who have no direct relationship with one another—for example, where two separate entities each made decisions that were partly responsible for the impugned result.⁶⁸ In the context of public law accountability, one important spin-off question is whether private contractors should fall within the government ‘who’ for the purposes of holding them accountable for the exercise of public power.⁶⁹

When asking *to whom an account is rendered*, there is a divergence in the literature. Some authors focus on the identification of the forum in which accountability is to be adjudicated, for example, the courts or the electoral process.⁷⁰ Other authors are more concerned with identifying the party who is entitled to bring the actor before that forum. The entitlement to hold someone accountable may arise on the basis that a person who authorised the exercise of power in the first place is entitled to supervise its performance (delegation model).⁷¹ Alternatively, a person who is affected by the exercise of power may be seen as entitled to hold the person who exercised it accountable.⁷² In the case of this latter premise, there might be a need to distinguish between those who are affected by the exercise of power so as to afford them a formal right to demand an account, and those stakeholders who are merely interested in the outcome.⁷³

The question of *about what an account is rendered* is necessarily a context-specific one, to the extent that it involves analysis of an actor’s compliance with standards of conduct. At a general level, it is possible to think about what the sources of such standards might be (for example, legal instruments, economic imperatives, and social

⁶⁵ Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’, above n 8, 458–59.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 23.

⁶⁹ See eg Scott, above n 8, 41; Mashaw, above n 8, 152.

⁷⁰ See eg Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’, above n 8, 455–57.

⁷¹ Grant and Keohane, above n 8, 31.

⁷² Ibid.

⁷³ Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 24–25.

Accountability Deficits and Overloads: A Missing Framework

or democratic obligations),⁷⁴ and also to think about the nature of the conduct that might be the subject of those standards (for example, contravention of rules relating to procedure, performance, fairness, continuity and security).⁷⁵

The question of *how accountability is enforced* focuses on the procedure by which an actor is held accountable. For some authors, this question is already answered in part by the second question—to whom an account should be rendered—as they focus in that enquiry on the relevant forum in which accountability is adjudicated. For others, this question involves a more in-depth analysis not only of the accountability forum, but of the process, procedure and outcome of the enquiry.⁷⁶ For example, Mulgan sees the accountability process as involving the three stages of ‘information’ (being ‘initial reporting and investigating’), ‘discussion’ (‘justification and critical debate’) and ‘rectification’ (being ‘the imposition of remedies and sanctions’).⁷⁷ Other authors do not adopt a prescriptive approach to the question of how accountability is to be enforced, preferring the view that the relevant procedure should be the one that is best suited to serving the purposes of accountability.⁷⁸

Surprisingly missing from much of the accountability literature is the more fundamental question of why accountability is relevant at all? What is its function or purpose? It is to this question that we now turn.

⁷⁴ Ibid 28.

⁷⁵ See eg Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’, above n 8, 459–60; Scott, above n 8, 42; Behn, above n 40, 6–10.

⁷⁶ See eg Mashaw, above n 8, 118. Mashaw addresses the ‘how’ question by asking ‘through what processes accountability is to be assured; by what standards the putatively accountable behaviour is to be judged; and, what the potential effects are, of finding that those standards have been breached’.

⁷⁷ Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 30.

⁷⁸ Philp, above n 8, 42.

CHAPTER 2: MECHANISM OR IDEAL?

The question of whether accountability is a normative concept remains the subject of ongoing debate in academic literature. The debate is framed in various ways, including whether accountability is a tool or a value, or whether it is targeted at internal or external motivations, or whether it applies retrospectively or prospectively. When boiled down, all of these debates are essentially disputes as to the function and purpose of accountability. A useful starting point in this analysis (and one which a number of authors adopt),⁷⁹ is the so-called 'Friedrich-Finer' debate, which took place in the first half of the twentieth century. These two theorists represented opposing views in relation to the proper way of conceptualising the responsibility of public servants. For Finer, the proper role of a public servant was to act under the dictates of his superiors.⁸⁰ Public servants were required to account to Ministers, who were in turn charged with taking action to ensure compliance.⁸¹ For Friedrich, the proper role of a public servant was to exercise their functions rationally and responsibly.⁸² Friedrich was in part influenced by the fact that Ministers were incapable of actively monitoring the activities of public servants (either because of the technical nature of their activities, or because of the sheer volume of activities they would be required to supervise).⁸³ On this basis, Friedrich's argument was that the better course was to encourage improved administration through training and incentivising responsible behaviour.⁸⁴ The debate has been characterised in various ways by later authors. Finer himself described the distinction as one between 'a sense of duty' (Friedrich) and 'the fact of responsibility'

⁷⁹ See eg Mulgan, "'Accountability': An Ever-Expanding Concept?", above n 19, 557; Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism', above n 22, 949-50; Harlow, 'Accountability as a Value in Global Governance and for Global Administrative Law', above n 35, 179.

⁸⁰ Herman Finer, 'Better Government Personnel' (1936) 51 *Political Science Quarterly* 569, 580, cited in Michael Jackson, 'Responsibility Versus Accountability in the Friedrich-Finer Debate' (2009) 15 *Journal of Management History* 66, 69.

⁸¹ See Jackson, above n 80, 71.

⁸² Carl Friedrich, *Problems of the American Public Service* (McGraw-Hill, 1935) 30, cited in Jackson, above n 80, 70.

⁸³ See eg Jackson, above n 80, 71.

⁸⁴ See eg *ibid.*

Accountability Deficits and Overloads: A Missing Framework

(Finer).⁸⁵ Harlow describes it as a distinction between subjective accountability (Friedrich) and objective accountability (Finer).⁸⁶ Bovens describes it as a distinction between 'virtue' (Friedrich) and 'obedience' (Finer).⁸⁷ Jackson describes it as a distinction between 'eliciting responsible conduct' (Friedrich) and 'enforcing responsible conduct' (Finer).⁸⁸ For Mulgan, the difference can be seen as one between responsibilities that are internal (Friedrich) and external (Finer).⁸⁹ The debate may also be cast as balance between expertise (Friedrich) and democratic authority (Finer).⁹⁰ Relevantly for present purposes, a further characterisation of the distinction is that between responsibility (Friedrich) and accountability (Finer).⁹¹

A number of accountability theorists frame accountability in terms of its normative value. For example, writing in the context of restorative justice, Braithwaite argues that there is no real justice in the absence of an offender taking active responsibility for their conduct, rather than simply being held passively responsible.⁹² Further, Considine defines accountability as 'the proper use of authority ... in search of the most advantageous path to success',⁹³ while O'Connell describes accountability in terms of whether or not an actor has produced 'high quality of service ... at a lower cost ... while serving more citizens in a courteous manner'.⁹⁴ Bovens concludes that such studies are essentially about the pursuit of good governance, evaluating the 'conduct of actors ... [and] the factors that induce accountable behaviour'.⁹⁵ Where such enquiries identify

⁸⁵ Finer, above n 80, 581, cited in Jackson, above n 80, 69.

⁸⁶ Harlow, 'Accountability as a Value in Global Governance and for Global Administrative Law', above n 35, 179.

⁸⁷ Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism', above n 22, 949–50.

⁸⁸ Jackson, above n 80, 72.

⁸⁹ Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 16.

⁹⁰ Jeremy Plant, 'Carl J Friedrich on Responsibility and Authority' (2011) 71 *Public Administration Review* 471, 476.

⁹¹ Mulgan, "'Accountability': An Ever-Expanding Concept?", above n 19, 557; Jackson, above n 80, 72.

⁹² Braithwaite, 'Accountability and Responsibility Through Restorative Justice', above n 59, 35.

⁹³ Mark Considine, 'The End of the Line? Accountable Governance in the Age of Networks, Partnerships, and Joined-up Services' (2002) 15(1) *Governance* 21, 22, cited in Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism', above n 22, 950.

⁹⁴ Lenahan O'Connell, 'Program Accountability as an Emergent Property: The Role of Stakeholders in a Program's Field' (2005) 65 *Public Administration Review* 85, 86, cited in Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism', above n 22, 950.

⁹⁵ Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism', above n 22, 957.

Chapter 2: Mechanism or Ideal?

accountability deficits, they involve a value judgment regarding the propriety of an actor's conduct.⁹⁶ Bovens sees such research as a 'formidable task',⁹⁷ and has expressed a preference for limiting his study of accountability to its mechanical operation.⁹⁸ His preference is in part guided by his conclusion that 'there is no general consensus about the standards for accountable behaviour', and any such standards are in any event context specific.⁹⁹ While he acknowledges the importance of academic research into the normative aspects of accountability, he advocates maintaining a clear distinction in research into the two ideas. Philp is another commentator who argues for the removal of accountability from its normative context.¹⁰⁰ He goes to considerable lengths to exclude normative concepts from his definition of accountability, arguing that questions of whether or not an actor is "really" accountable' are bound up in normative judgments about whether or not an accountability relationship is achieving objectives that have been assigned to it.¹⁰¹ He would prefer not to 'infuse' the relationship with such value judgments, but instead to identify a core description of the accountability relationship devoid of normative trimmings.¹⁰²

The attempts by Bovens and Philp to disentangle accountability from its normative underpinnings are admirable. However, at least in the context of discussions about accountability deficits and overloads, trespass into normative questions is inevitable. When we ask whether or not a particular arrangement or relationship produces an accountability deficit or overload, we are implicitly asking whether or not particular norms are being adequately upheld. If so, an actor is 'sufficiently' accountable. If not, we may identify an 'accountability deficit', and proceed to look at whether it is appropriate to enhance that particular accountability mechanism so as to achieve more robust enforcement of those standards. If the enforcement of norms has been over-catered for, we may identify an 'accountability overload' and query whether the

⁹⁶ Ibid.

⁹⁷ Ibid 950.

⁹⁸ Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', above n 8, 450. See further Bovens, Curtin and 't Hart, above n 5, 35.

⁹⁹ Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', above n 8, 450.

¹⁰⁰ Philp, above n 8.

¹⁰¹ Ibid 36.

¹⁰² Ibid.

Accountability Deficits and Overloads: A Missing Framework

mechanism should be adjusted so as to reduce the impact of that overload. By the time we come to ask whether a particular arrangement is an accountability mechanism, and whether it is functioning appropriately, we have already made the implicit judgment that there are underlying values that warrant reinforcement. Our analysis of the mechanism must necessarily take place within that context.

This approach is consistent with that adopted by Harlow. She concludes that accountability is not simply a mechanism, but has emerged ‘as a constitutional principle approximating in value to the foundational liberal principle of the rule of law’.¹⁰³ She approves of Oliver’s argument that ‘accountability cannot be effectively imposed if the criteria against which conduct is to be measured in the process of calling to account are not made clear’.¹⁰⁴ On the basis of this observation, Harlow concludes that if standards are not in fact encompassed within the concept of accountability, then at a minimum they are ‘an essential aspect of its context’.¹⁰⁵ Fisher agrees;¹⁰⁶ in her view, ‘standard setting’ is the most significant component of accountability,¹⁰⁷ in the sense that arguments in favour of increasing accountability are essentially

about wanting to align governance regimes to a particular normative vision. The process of holding a decision-maker to account is a process of debating what the standards should be.¹⁰⁸

A slightly different perspective on this argument is taken up by Brennan et al in their treatise *Explaining Norms*.¹⁰⁹ Whereas Harlow, Oliver and Fisher focus on the normative foundations of accountability, Brennan et al argue that accountability is the conceptual foundation of norms themselves. For Brennan et al, the ‘core function’ of norms ‘is to make us accountable to one another’.¹¹⁰ In their words:

Norms, then, construed as clusters of normative attitudes, are perfectly suited to the

¹⁰³ Harlow, ‘Accountability as a Value in Global Governance and for Global Administrative Law’, above n 35, 173.

¹⁰⁴ Dawn Oliver, ‘Standards of Conduct in Public Life—What Standards?’ [1995] *Public Law* 497, 497, cited in Harlow, *Accountability in the European Union*, above n 24, 10.

¹⁰⁵ Harlow, *Accountability in the European Union*, above n 24, 10.

¹⁰⁶ Elizabeth Fisher, ‘The European Union in the Age of Accountability’ (2004) 24 *Oxford Journal of Legal Studies* 495.

¹⁰⁷ *Ibid* 510.

¹⁰⁸ *Ibid* 513.

¹⁰⁹ H Geoffrey Brennan et al, *Explaining Norms* (Oxford University Press, 2013).

¹¹⁰ *Ibid* 36.

Chapter 2: Mechanism or Ideal?

business of creating accountability. Other social facts, such as social practices and clusters of desires, are obviously not. Accountability is an out-and-out normative notion.¹¹¹

On this view, norms are ‘perfect tools for creating accountability’.¹¹² Translating this idea into the present context, we would view public law norms as tools for reinforcing the accountability of government. Ultimately, reducing accountability to a description of a mechanism directs attention away from the *raison d’être* of that mechanism. The reason why we impose an accountability relationship on an actor is to achieve an end goal of ‘accountability’; the mechanism exists because it provides for the enforcement of prescribed norms. In so doing, accountability takes on a normative quality in its own right. In Dubnick’s words, it has ‘been transfigured from an instrument of governing to ... a “virtuous practice”’.¹¹³

For those who deny accountability a normative role, it is particularly difficult to engage in systematic analysis of the concepts of accountability deficits and overloads. As will be explored in Part II of this thesis, the notions of accountability deficits and overloads rest on an assumption that there is some middle ground of an ‘ideal amount’ of accountability that has not been satisfied. This notion of an ‘ideal amount’ of accountability is an inherently normative one. We cannot hope to specify the situations where an accountability mechanism or system has not gone ‘far enough’ or has gone ‘too far’ without engaging with the question of how far the mechanism or system *should* have gone. What is that if not a normative question? At least in this respect, then, we must attribute a normative role to accountability.

¹¹¹ Ibid 38.

¹¹² Ibid 37.

¹¹³ Dubnick, ‘Accountability as a Cultural Keyword’, above n 20, 34.

PART II: ACCOUNTABILITY DEFICITS AND OVERLOADS

As noted in Part I of this thesis, the concept of accountability has been put to many uses in academic literature and public discourse. One of the most prevalent themes of the accountability literature is the notion of accountability deficits and overloads. The literature abounds with claims that accountability mechanisms or regimes do too little, or too much, in holding the government accountable. In order to make good such claims, however, we need to accept that accountability is a measurable commodity, and presumably that there are standards against which a given mechanism can be assessed and found wanting. As outlined in Chapter 3, the accountability literature tends to gloss over these underlying issues. This missing dimension of the literature is the core problem tackled in this thesis, which unpacks two of the hidden assumptions that underlie these claims. The first of these assumptions is that it is possible to identify some form of accountability benchmark, being a normative judgment as to the ‘ideal amount’ of accountability. The second is that it is possible to assess the universe of applicable accountability mechanisms against that benchmark, and to form a judgment as to whether the system underperforms (deficit) or overperforms (overload).

The first of these assumptions is explored in Chapter 4, titled ‘A Benchmark of Accountability’. This chapter posits that a claim of either not enough or too much accountability conceals a judgment as to the ideal amount of accountability needed in that situation. In other words, in arguing that there is an accountability deficit or overload, we presuppose the existence of an accountability benchmark against which we can measure a mechanism or system and find it wanting. It will be recalled from Part I of this thesis that accountability is frequently analysed within the framework of *who* is accountable *to whom*, *for what*, and *how*. Chapter 4 picks up this framework and begins to unpack some of the difficult questions with which we must grapple in defining a benchmark of accountability. We need to make difficult choices about who *should* be held accountable, to whom *should* they be accountable, for what *should* they be held accountable, and how *should* they be held accountable. These are all large questions

Accountability Deficits and Overloads: A Missing Framework

that require us to confront fundamental issues in the structure and operation of our system of government. Perhaps the difficulty of making these choices is one of the reasons the literature on accountability leaves them largely unaddressed.

Even assuming that it is possible to agree on an accountability benchmark, there is a second key difficulty that must be grappled with. As outlined in Chapter 5, analysis of accountability deficits and overloads only makes sense when looking at accountability mechanisms as a *system*, rather than in isolation. So, for instance, there is little to be gained from claiming that a reduction in the effectiveness of responsible government represents an accountability gap unless we also take into account the role of other mechanisms that may have grown to take its place. In this sense, we need to appreciate the nature of the entire system of mechanisms before we can sensibly comment on whether accountability is under- or over-achieved through the operation of that system. We need to understand that there is a balance of features between mechanisms within the system (eg some mechanisms are flexible while others are rigid, some are coercive while others are recommendatory). We also need to appreciate the complexities of the relationships between the mechanisms constituting the system (eg some operate independently, while others operate co-operatively, or mutually exclusively). Again, in order to appreciate whether an accountability deficit or overload exists within the system, it is critical that we understand the nature and shape of that system as a whole.

CHAPTER 3: ACCOUNTABILITY: TOO LITTLE OR TOO MUCH OF A GOOD THING?

One of the most prevalent themes in the accountability literature is claims about the ‘amount’ of accountability that applies in a given situation. There are claims of accountability ‘deficits’ (ie too little accountability) on the one hand, and claims of accountability ‘overload’ (ie too much accountability) on the other. This section seeks to draw out a number of these claims and argues that, while these claims presuppose that accountability is a measurable concept, the literature often glosses over the underlying question of what is being measured, or how the measurement is to be conducted.

A ACCOUNTABILITY AS A MEASURABLE COMMODITY

Bovens et al define an accountability deficit as ‘a condition where those who govern us are not sufficiently hemmed in by requirements to explain their conduct publicly—to legal, professional, administrative, social or political forums who have some sort of power to sanction them’.¹¹⁴ Historically speaking, accountability deficits have attracted significant academic interest. Questions have been raised as to whether our system of governance contains accountability ‘gaps’¹¹⁵ in a range of contexts. One of the greatest sources of concern has been the expansion and fragmentation of the administrative state, and its perceived impact on the effectiveness of ‘traditional’ political accountability mechanisms.¹¹⁶ For instance, ministerial responsibility does not ‘bite’ in the traditional manner if Ministers do not (and perhaps cannot) have direct oversight

¹¹⁴ Bovens, Schillemans and 't Hart, above n 10, 229.

¹¹⁵ Richard Mulgan and John Uhr, 'Accountability and Governance' in Glyn Davis and Patrick Weller (eds), *Are You Being Served? State, Citizens and Governance* (Allen and Unwin, 2001) 152, 153.

¹¹⁶ See eg Richard Mulgan, 'Accountability Deficits' in Mark Bovens, Robert Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014) 545, 548; Mulgan and Uhr, above n 115, 157; Margaret Allars, *Introduction to Australian Administrative Law* (Butterworths, 1990) 18.

Accountability Deficits and Overloads: A Missing Framework

over all of the activities that take place within their portfolios.¹¹⁷ Similarly, the chain of accountability from voters to those who ultimately wield and exercise public power has been so attenuated that the ballot box cannot be viewed as an accountability mechanism that has any direct impact on the day-to-day operations of government. Two areas of supposed accountability deficits receiving significant attention in more recent discourse relate to accountability in the context of outsourced public functions¹¹⁸ and in the context of network or multilevel governance, as in the case of the European Union.¹¹⁹

The counterpart to the range of arguments focusing on accountability deficits or gaps is the argument that accountability, far from being lacking in our system of governance, has in fact gone the other direction. It goes without saying that if a number of institutions are simultaneously tasked with accountability functions, there will come a point where they overlap with one another. Scott identifies this as the ‘redundancy’ model, in which

overlapping (and ostensibly superfluous) accountability mechanisms reduce the centrality of any one of them. In common parlance, redundancy is represented by the ‘belt and braces’ approach, within which two independent mechanisms are deployed to ensure the system does not fail, both of which are capable of working on their own.¹²⁰

While there are no doubt failsafe-style benefits that may be ensured by such an approach, commentators have raised concerns as to whether this degree of overlap presents a threat to accountability, claiming instances of accountability ‘overload’,¹²¹ ‘overkill’,¹²² ‘paradox’,¹²³ ‘trap’,¹²⁴ ‘dilemma’¹²⁵ and ‘multiple accountabilities disorder’.¹²⁶

¹¹⁷ Mulgan, 'Accountability Deficits', above n 116, 548–49.

¹¹⁸ See eg Mashaw, above n 8, 134; Richard Mulgan, 'Government Accountability For Outsourced Services' (2006) 65(2) *Australian Journal of Public Administration* 48; Mulgan, 'Accountability Deficits', above n 116, 549.

¹¹⁹ See eg Mulgan, 'Accountability Deficits', above n 116, 546; Mulgan and Uhr, above n 115.

¹²⁰ Scott, above n 8, 52–53.

¹²¹ Bovens, Schillemans and 't Hart, above n 10, 229.

¹²² Maurits Barendrecht, 'Rule of Law, Measuring and Accountability: Problems To Be Solved Bottom Up' (2011) 3 *Hague Journal on the Rule of Law* 281, 294.

¹²³ Dubnick, 'Accountability and the Promise of Performance: In Search of the Mechanisms', above n 54, 395.

¹²⁴ Janet Kelly, 'The Accountability Trap' (2007) 96(3) *National Civic Review* 46; Mulgan and Uhr, above n 115, 152.

¹²⁵ Behn, above n 40, 10.

¹²⁶ Koppell, above n 36, 95.

Chapter 3: Accountability: Too Little or Too Much of a Good Thing?

These labels point to various concerns that authors raise in circumstances where there is 'too much' accountability. For instance, some raise concerns about the potentially negative performance implications arising in situations where an actor is subject to numerous accountability demands pulling in different directions. For example, an actor may 'oscillate ... between behaviours that are consistent with conflicting notions of accountability'.¹²⁷ Is accountability about following directions, or adhering to applicable rules? Is it about being transparent and facing consequences for past conduct, or responding to external demands in a forward-looking sense?¹²⁸ It is easy to see that if expectations are not clearly defined, an actor may potentially find themselves serving many masters, some of whom disagree with one another.¹²⁹ Obfuscation is also cited as a potential danger arising in situations of 'too much' accountability. For example, Mulgan suggests that where there are multiple forums in which an agent might be held accountable, an agent may be tempted to 'forum-shop' by seeking to be dealt with in the regime in which they will be subject to the least scrutiny, or least severe sanction.¹³⁰ Other potential negative effects include the 'blame game', where accountability processes become focused only on fault-finding to the detriment of restoration.¹³¹ Actors may also be drawn into attempts to 'game the system' to maximise the appearance of performance according to accountability criteria,¹³² or become too focused on short-term goals associated with accountability metrics at the expense of paying attention to longer-term organisational success.¹³³ Too much accountability may also be thought to discourage innovation by fixing rigid standards according to current knowledge.¹³⁴ A further aspect of the accountability 'overload' debate is a more pragmatic one; the burden of simply participating in various accountability proceedings reduces the time

¹²⁷ Ibid.

¹²⁸ Ibid 96.

¹²⁹ Arie Halachmi, 'Accountability Overloads' in Mark Bovens, Robert Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014) 560, 561.

¹³⁰ Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 221.

¹³¹ Behn, above n 40, cited in Halachmi, above n 129, 561.

¹³² Christopher Pollitt, *The Essential Public Manager* (Open University Press, 2003), cited in Halachmi, above n 129, 561.

¹³³ Halachmi, above n 129, 561.

¹³⁴ H De Bruijn, 'Performance Measurement in the Public Sector: Strategies to Cope with the Risks of Performance Measurement' (2002) 15 *International Journal of Public Sector Management* 578, cited in Halachmi, above n 129, 561.

available to perform the day-to-day operations with which an institution is charged.¹³⁵ Bovens et al sum this point up with the quip that administrators ‘spend half their time explaining to all sorts of accountability forums what they intend to be doing, and the other explaining to them why they did not get around to doing all these things’.¹³⁶

Accountability overload may not only have implications for the government officials who are subject to the impugned range of accountability mechanisms; it may also produce negative effects for the individual seeking to utilise them. The availability of a multitude of mechanisms may produce ‘appeal fatigue’, with individuals withdrawing from their goal of holding the government accountable in the face of the range of options available, or lacking expertise to know which mechanism is most appropriate.¹³⁷ The complexity of the system may also produce negative overload for individuals who are faced with difficult choices between seemingly competing mechanisms, each offering different structures in time, cost and ease of use, and each promising slightly different potential outcomes.

Whether or not we agree with these various concerns is not critical for present purposes. All we need note is that when we take these arguments together, we can see that the literature abounds with claims as to the sufficiency of accountability in various areas. When we look beneath the labels of ‘gaps’, ‘deficits’, ‘overloads’, ‘traps’ etc, it appears that all of these claims presuppose that accountability is a measurable phenomenon. That is, we can look at a public polity, institution, official or power and determine whether it is being held accountable to an appropriate degree (or too little, or too much). Despite the ubiquity of claims about the sufficiency of accountability, the literature is somewhat scant in its explanation of how sufficiency is to be measured.¹³⁸ Bovens et al note that ‘few if any of the parties to the debate specify which standards they employ. The literature is remarkably light on assessment tools and methods’.¹³⁹

¹³⁵ Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 222.

¹³⁶ Bovens, Schillemans and 't Hart, above n 10, 227–28.

¹³⁷ Gabrielle Appleby, Alexander Reilly and Laura Grenfell, *Australian Public Law* (Oxford University Press, 2nd ed, 2014) 203.

¹³⁸ Examples of analyses purporting to do so include Bovens, Schillemans and 't Hart, above n 10, 230; Bovens, Curtin and 't Hart, above n 5; Stephen Page, 'Measuring Accountability for Results in Interagency Collaboratives' (2004) 64 *Public Administration Review* 591.

¹³⁹ Bovens, Schillemans and 't Hart, above n 10, 230.

Chapter 3: Accountability: Too Little or Too Much of a Good Thing?

This view is echoed by Scott, who notes that, while ‘public lawyers almost universally regard [accountability mechanisms] as inadequate ... [i]t is rarely possible to discern how adequacy is actually being assessed’.¹⁴⁰

This thesis adopts the position that there are two core limitations evident in many claims of accountability deficit and overload. The first is that many of these claims skate over the question of what accountability demands. If authors do not unpack this question, their analysis lacks the rudder needed to make good their claims of deficits and overloads. It is essential that we identify the ‘normative yardstick’¹⁴¹ sitting behind these claims in order to get a clear picture of the criteria against which accountability mechanisms are being assessed. Secondly, much of the accountability literature dealing with deficits or gaps tends to focus in on particular means of securing accountability to the exclusion of other (presumably less important) means. Mulgan notes that this is particularly the case in relation to claims of ‘gaps’ in political accountability mechanisms.¹⁴² Such an approach risks presenting a ‘distorted view’¹⁴³ of the nature and degree of claimed accountability gaps, as it fails to attribute appropriate weight to the contribution that might be offered by other sources.

These limitations can be explained through an example, as follows. It is a well-accepted proposition that damages are not recoverable in judicial review proceedings in Australia: ‘mere invalidation of an administrative decision does not provide a cause of action or a basis for an award of damages’.¹⁴⁴ Some might argue that the unavailability of damages for public law wrongs presents a potential accountability deficit.¹⁴⁵ As argued above, such a claim presupposes that the accountability of government officials who are subject to public law norms can be measured, and found wanting. It is not immediately apparent, however, how that might be assessed. First, if we want to be able

¹⁴⁰ Scott, above n 8, 42–43.

¹⁴¹ Bovens, Curtin and 't Hart, above n 5, 49. See also Mulgan, 'Accountability Deficits', above n 116, 553.

¹⁴² Mulgan, 'Accountability Deficits', above n 116, 552.

¹⁴³ *Ibid.*

¹⁴⁴ *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1991) 31 FCR 29, 41. See also Ellen Rock and Greg Weeks, 'Monetary Awards for Public Law Wrongs: Australia's Resistant Legal Landscape' (2018) 41 *University of New South Wales Law Journal* (forthcoming).

¹⁴⁵ This is a perhaps an extension of Panetta's suggestion that government accountability would be increased through the introduction of a remedy in damages for wrongful administrative decisions: Rossana Panetta, 'Damages for Wrongful Administrative Decisions' (1999) 6 *Australian Journal of Administrative Law* 163, 179.

to describe judicial review as a sufficient (or insufficient) accountability mechanism we would need to know what accountability *demands*. This presupposes that accountability has certain goals or functions. Implicit in this example, perhaps, is a suggestion that accountability demands the restoration of individuals who are harmed by breach of a particular public law norm. Of course, much of the literature fails to unpack this normative dimension of the argument that there is an ‘accountability gap’. Secondly, in order to sensibly speak about this supposed shortfall as a ‘gap’ we surely need to understand the wider accountability *context* in which this mechanism operates. The above argument focuses on a particular type of accountability mechanism (ie the means by which the courts hold the government to account through judicial review) to the exclusion of all other mechanisms. For instance, this deficit claim says nothing about the role to be played by damages in private law proceedings, the availability of ex gratia compensation, the powers of the ombudsman or the many other types of mechanisms that might potentially play a role in restoring the judicial review applicant. There is something quite unsatisfactory about describing the unavailability of damages as a deficit if the supposed gap is filled by an alternative mechanism.

Taking all of these matters together, this thesis adopts the position that in order to make any clear claim about the existence or otherwise of an accountability deficit (or overload), we need to be able to do at least two things. First, explain what it is that accountability *demands*, and second, explain whether that demand is being met *by the system* of mechanisms that apply in that area. Chapters 4 and 5 of this thesis set out some of the difficult choices and complex analysis that would be required in order to move towards that ultimate goal. The balance of this chapter first looks at two of the more coherent attempts in the literature at measuring accountability.

B EFFORTS TO MEASURE ACCOUNTABILITY

Recent literature presents two notable attempts at proposing a method that might be used to measure accountability. The first is that of Bovens et al in their 2010 study of accountability in the European Union. Adopting Bovens’ definition of accountability as

Chapter 3: Accountability: Too Little or Too Much of a Good Thing?

a starting point,¹⁴⁶ the authors describe a framework that they intend for use in the systematic assessment of accountability arrangements.¹⁴⁷ The core of the framework is the identification of what the authors describe as the three ‘theoretical perspective[s] on the rationale behind accountability’.¹⁴⁸ The first perspective they identify is the ‘democratic perspective’, in which the goal of accountability is to secure means for citizens to control their democratically elected representatives.¹⁴⁹ The second is the ‘constitutional perspective’, in which the relevant goal is preventing tyranny and abuse of power.¹⁵⁰ The third is the ‘learning perspective’, which is concerned with facilitating improvements in the delivery of public services.¹⁵¹ The authors then identify evaluation criteria said to be relevant in assessing accountability by reference to these three perspectives. In the context of the democratic perspective, the relevant criterion is concerned with identifying the extent to which a regime ‘enables democratically legitimized bodies to monitor and evaluate executive behaviour and to induce executive actors to modify that behaviour in accordance with their preferences’.¹⁵² Within the constitutional perspective, the relevant criterion considers ‘[t]he extent to which an accountability arrangement curtails the abuse of executive power and privilege’.¹⁵³ Finally, within the learning perspective, the relevant criterion focuses on the extent to which an arrangement ‘stimulates public executives and bodies to focus consistently on achieving desirable societal outcomes in the smartest possible fashion’.¹⁵⁴ The framework of perspectives and evaluation criteria set out by Bovens et al is intended to provide a foundation for ‘the assessment of accountability relations’, with the authors suggesting that the evaluation within each perspective ‘may produce different types of

¹⁴⁶ See definition accompanying footnote 22 above.

¹⁴⁷ Bovens, Curtin and ‘t Hart, above n 5, 32.

¹⁴⁸ Ibid 50. The framework is based on earlier work described in Bovens, Schillemans and ‘t Hart, above n 10.

¹⁴⁹ Bovens, Curtin and ‘t Hart, above n 5, 50.

¹⁵⁰ Ibid 51–52.

¹⁵¹ Ibid 52.

¹⁵² Ibid 54.

¹⁵³ Ibid 55.

¹⁵⁴ Ibid.

Accountability Deficits and Overloads: A Missing Framework

accountability deficits'.¹⁵⁵ This evaluative challenge is then taken up by other contributors to their study.

The approach proposed by Bovens et al is subject to two core limitations (each of which the authors acknowledge) that prevent it from delivering on the ultimate goal of identifying whether or not there are in fact potential accountability deficits in a given system (here, the European Union). The first limitation is in the nature of the criteria that the authors use for assessment: '[t]hese building blocks cannot in themselves provide us with definite answers to the question whether accountability deficits in European governance exist'.¹⁵⁶ In order to answer that broader question, the authors note that it would be necessary to define a yardstick against which the assessment is being made. In other words, in order for the criteria identified by Bovens et al to be capable of identifying accountability deficits within each perspective, it would be necessary for the authors to say how far the arrangements need to go in order to 'sufficiently' support democracy, avoid the abuse of power, and improve the delivery of public services. Without identifying those yardsticks, any conclusion that there is a deficit in an accountability arrangement necessarily conceals some underlying normative judgment about what it means to be accountable. Referring back to the language adopted above, the framework therefore lacks the 'rudder' that might otherwise be employed to allow it to measure the sufficiency of accountability. While Bovens et al have identified a yardstick that we can use to evaluate accountability, they have failed to tell us how long it is! Any claim of 'measurement' made using this yardstick is therefore a reflection of the views of the individual using the yardstick, rather than the content of the tool itself.

The second limitation of this approach is one of scale. As Bovens et al note, each particular agent or body that is selected for the purposes of assessment 'has its own, multifaceted accountability regimes'.¹⁵⁷ The task of seeking to map out the full size and shape of that regime is a large undertaking, which the authors suggest might need to be

¹⁵⁵ Ibid 57.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid 58.

Chapter 3: Accountability: Too Little or Too Much of a Good Thing?

explored in a series of monographs rather than a single volume.¹⁵⁸ For that reason, choices must be made as to which accountability arrangements will be the focus of the assessment. The difficulty with that approach is that without considering the regime as a whole, we can only ever reach preliminary views on possible areas of deficit.¹⁵⁹ For instance, employing the framework in 2008, Bovens et al sought to evaluate the accountability of a single type of mechanism: boards of oversight in The Netherlands.¹⁶⁰ Their analysis revealed that this mechanism aligns most closely with the 'learning perspective' of accountability rather than the constitutional or democratic perspectives.¹⁶¹ While the analysis tells us some interesting things about the accountability contribution made by boards of oversight in The Netherlands, what it does not do is tell us anything about whether their operation produces anything in the way of accountability deficits or overloads. That broader task, of course, can only be performed by holistically assessing the place of boards of oversight within the broader system of accountability mechanisms relevant in that context. As Mulgan reminds us, focusing on one mechanism or category of mechanisms without considering others risks presenting a 'distorted view'¹⁶² of perceived gaps.

The second notable contribution to recent literature on measuring accountability is that of Brandsma and Schillemans, who propose the use of an 'accountability cube' as a 'mapping tool' in analysis of accountability processes.¹⁶³ The cube offers a visual depiction of the 'intensity' of a given accountability process across the three common phases of accountability: information, discussion and consequences.¹⁶⁴ The authors propose that the cube can be used to measure a given accountability mechanism, producing a range of potential results. For instance, 'a situation with much information,

¹⁵⁸ Ibid.

¹⁵⁹ Wille's contribution to the study by Bovens et al is a notable exception in this regard, seeking to canvass a wide range of mechanisms applicable to the European Commission: Anchrut Wille, 'The European Commission's Accountability Paradox' in Mark Bovens, Deirdre Curtin and Paul 't Hart (eds), *The Real World of EU Accountability: What Deficit?* (Oxford University Press, 2010) 63. However, the lack of normative rudder in the framework (discussed above) necessarily limits the conclusions that may be drawn.

¹⁶⁰ Bovens, Schillemans and 't Hart, above n 10.

¹⁶¹ Ibid 236.

¹⁶² Mulgan, 'Accountability Deficits', above n 116, 552.

¹⁶³ Gijs Jan Brandsma and Thomas Schillemans, 'The Accountability Cube: Measuring Accountability' (2013) 23 *Journal of Public Administration Research and Theory* 953, 960.

¹⁶⁴ Ibid. A visual depiction of the cube is presented at page 961.

intensive discussions and many opportunities to impose consequences' would fall within the portion of the cube that represents the 'most accountability'.¹⁶⁵ Conversely, a situation 'with little information, nonintensive discussions and few consequences' would fall within the portion of the cube that represents the least accountability.¹⁶⁶ It is suggested that the tool can be used to 'locate potential accountability deficits in one or more of the three analytically distinct phases of accountability'.¹⁶⁷ The authors go on to employ the accountability cube to assess the accountability arrangements of the European 'comitology' committees.¹⁶⁸

Again, a core limitation of the method proposed by Brandsma and Schillemans (which is acknowledged by the authors) is that it does not resolve the underlying normative difficulties inherent in the identification of accountability deficits and overloads. The authors indicate that whether a deficit identified using the tool is 'normatively problematic' is a question that 'depends on one's normative theory of good governance'.¹⁶⁹ In this sense, while offering a useful tool for evaluation, it is not a 'normative tool'¹⁷⁰ or 'normative yardstick'¹⁷¹ in its own right. The authors suggest that the tool be used to identify potential areas of accountability deficit, following which it would be necessary to employ 'an appropriate normative benchmark' to assess that claim.¹⁷² As with the framework offered by Bovens et al, then, the accountability cube can take us only so far in our attempt to identify accountability deficits and overloads within our system of governance. In order to transform the potential deficit identified using the tool into an actual deficit, it is necessary to develop and articulate the normative yardstick lacking within the cube itself.

The foregoing criticism of the assessment tools proposed by Bovens et al and Brandsma and Schillemans is certainly not intended to diminish the important contribution these authors have made to the literature. As noted in Section A, much of

¹⁶⁵ Ibid 960.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid 961.

¹⁶⁸ Ibid 961 and following.

¹⁶⁹ Ibid 961.

¹⁷⁰ Ibid.

¹⁷¹ Ibid 962.

¹⁷² Ibid 963.

Chapter 3: Accountability: Too Little or Too Much of a Good Thing?

the literature on deficits and overloads tends to gloss over the question of what is being measured and how that measurement is being conducted. In this respect, each is a welcome step towards developing a robust assessment tool. It is also not to suggest that the lack of a normative ‘rudder’ in the proposed tools is a glaring omission on the part of the authors. Each explicitly states their intention to adhere to a mechanistic, rather than normative, understanding of accountability in defining their tools.¹⁷³ Rather, the argument put forward in this thesis is that, when making claims of accountability deficits and overloads, at a minimum we need to be able to specify what accountability *demands* (Chapter 4), and whether those demands are met by the *system* of applicable mechanisms (Chapter 5). Without tackling these two issues, our analysis is limited to measuring the quantity of accountability mechanisms (ie listing the number of mechanisms which satisfy the definition of ‘accountability’) rather than the quality of accountability mechanisms (ie whether there is ‘sufficient’ or ‘too much’ accountability in a given circumstance by reason of the interaction between those mechanisms).

¹⁷³ Bovens, Curtin and 't Hart, above n 5, 35; Brandsma and Schillemans, above n 163, 961.

Accountability Deficits and Overloads: A Missing Framework

CHAPTER 4: A BENCHMARK OF ACCOUNTABILITY

One of the most significant limitations of existing discussions about accountability deficits and overloads is the failure to identify the yardstick against which a given arrangement is being measured. There is an inherent logical flaw in claiming that there is ‘not enough’ or ‘too much’ of something without specifying what ‘enough’ might mean. So, how might we take on the task of identifying what ‘enough’ accountability looks like? One approach would be to add a normative dimension to each aspect of the framework set out in Chapter 1. In other words, instead of asking simply ‘who is held accountable?’, we need to be able to offer an answer to the question ‘who *should* be held accountable?’. Instead of ‘to whom are they accountable?’, we must decide ‘to whom *should* they be accountable?’. Instead of ‘for what are they held accountable?’, we must ask ‘for what *should* they be held accountable?’. Instead of ‘how are they held accountable?’, we must ask ‘how *should* they be held accountable?’. In tackling this task, we would be moving beyond a mechanical analysis of the accountability contribution made by a given mechanism, and into the realm of asking what we *expect* of that mechanism. Were we able to do this, we might then have a basis to argue that the mechanism either falls short of expectations (accountability deficit) or overperforms in respect of those expectations (accountability overload).

The difficulty is that importing a normative dimension to each of these questions asks us to make very complex decisions about the nature and purpose of accountability and the means by which we wish to hold the government to account. For instance, in looking at the first question, ‘who *should* be held accountable?’, we must make decisions about whether we view the government as a collection of individual officials (a Diceyan approach), or as a corporate entity. We must choose whether to sheet home responsibility to a low-level official who may have made an error, or to make their superiors accept responsibility for that failing. In approaching these kinds of questions, we ultimately need to make difficult decisions about who in government ought to be held accountable in order for us to say that we have struck an ideal accountability

balance. This thesis is not the appropriate forum to provide definitive answers to these large philosophical questions. Instead, the task taken on in this chapter is to set out some of the possible options we might choose between, as well as some of the potential implications of those choices. Ultimately, this chapter serves to mark out the scale of the challenge before us in defining a normative benchmark for the ‘ideal amount’ of accountability, against which we might then proceed to measure accountability deficits and overloads. The very size of this challenge is a potential explanation for this gap in the existing literature.

This chapter commences with one of the most important normative questions about accountability that up to now has received insufficient attention. That question is: what is the purpose of accountability? Why is it important, and what do we hope to achieve through imposing it (Section A)? While there are a number of possibilities, this thesis outlines five potential rationales for accountability: transparency, control, restoration, desert and deterrence. These rationales then serve to inform the remaining sections in this chapter, which respectively look at who should be held accountable (Section B), to whom (Section C), for what (Section D), and how (Section E).

A FIVE RATIONALES FOR ACCOUNTABILITY

One of the most important questions that must be tackled in seeking to import a normative dimension to the concept of accountability is to identify its purpose. Why is accountability important in the context of public governance; what is its rationale? Despite the importance of this question, much of the literature on accountability tends to gloss over it.¹⁷⁴ We cannot afford to avoid this question, however, if we are hoping to establish a benchmark of accountability. As set out in the following sections of this chapter, we can only make decisions about *who* should be held accountable if we have first thought about what we are hoping to achieve through targeting those agents. We can only make decisions about *to whom* those agents should be held accountable if we have first thought about what our purpose is in facilitating that arrangement. We can

¹⁷⁴ Bovens, Schillemans and 't Hart, above n 10, 230.

Chapter 4: A Benchmark of Accountability

only make decisions about *for what* those agents are held accountable if we have first thought about why we are targeting particular conduct. And we can only make decisions about *how* we hold agents accountable if we have thought about what the goal of doing so might be. As put by Brandsma and Schillemans, '[t]he issue of expectations is central to the entire accountability process'.¹⁷⁵ Section A briefly outlines a number of the possible rationales that we might draw on in establishing a normative benchmark of accountability.

Perhaps one of the more compelling arguments about the purpose of accountability is that it is linked with the concept of legitimacy. On this view, we hold officials accountable to maintain and increase public confidence in our system of government.¹⁷⁶ There is much to be said for the idea that, by government opening itself up to public scrutiny, the public is able to develop a degree of trust in government, which in turn contributes to its ongoing legitimacy. As Bovens et al argue, the existence of accountability mechanisms that facilitate transparency and dialogue between government and citizens 'can promote acceptance of government authority and the citizens' confidence in the government's administration'.¹⁷⁷ For Barnard, accountability functions as a 'gravitational centre in the legitimation of democratic governance',¹⁷⁸ essentially providing a foundation on which legitimacy might rest. On this view, effective accountability mechanisms are capable of fostering citizens' faith in a system of governance. Conversely, substandard accountability mechanisms may produce the inverse effect of eroding public confidence in the government.¹⁷⁹ For instance, if accountability mechanisms take on the character of empty processes we might have real concerns about whether those mechanisms are capable of going any way to support the legitimacy of government. This may be the case, for example, where an accountability forum simply engages in a box-ticking exercise with no real concern or motivation to test compliance with relevant standards. Perhaps more concerningly, empty accountability mechanisms and processes might even come to decrease confidence in

¹⁷⁵ Brandsma and Schillemans, above n 163, 956.

¹⁷⁶ Barnard, above n 5, xi.

¹⁷⁷ Bovens, Curtin and 't Hart, above n 5, 53.

¹⁷⁸ Barnard, above n 5, xi.

¹⁷⁹ Bovens, Schillemans and 't Hart, above n 10, 239; Bovens, Curtin and 't Hart, above n 5, 53.

Accountability Deficits and Overloads: A Missing Framework

government over time. We might perceive the empty mechanism as a shield being employed by government so as to avoid ‘real’ accountability via other means.

If we accept that legitimacy is our overarching goal in the pursuit of government accountability, the next step in defining a benchmark of accountability is to think in more concrete terms about the manner in which this goal is to be achieved. This thesis explores five possible perspectives that we might adopt in this respect.¹⁸⁰ The first possible rationale is that of transparency. It was noted above that theorists generally agree that a minimum defining feature of accountability is that it demands the provision of an account.¹⁸¹ As noted above, public scrutiny allows the public to develop trust in the government, which in turn contributes to legitimacy; justice is not only done, but seen to be done. On this view, our motivating force in pursuing government accountability would be to achieve transparency in government operations. We would prefer accountability processes that lay bare government operations for public scrutiny and we would bolster means of accessing information from government. This rationale would eschew governing behind closed doors, promote openness in decision-making (including through the provision of reasons) and favour efforts to make government communication meaningful¹⁸² (the ‘transparency rationale’).

A second possible rationale for accountability might be that of control. Many theorists agree that a key function of accountability is to provide the account-holder with the ability to control the exercise of power by the account-giver. Mulgan and Uhr go so far as to describe this as the ‘core purpose’ of accountability.¹⁸³ Employing the principal-agent model, they see accountability as a tool to be employed by principals to ensure that their agents act in the interests of their principals rather than themselves.¹⁸⁴ Bovens describes this rationale for accountability as the ‘democratic perspective’, where ‘public accountability is an essential condition for the democratic process’.¹⁸⁵ On this

¹⁸⁰ Koppell makes a similar argument, identifying transparency and liability as ‘foundations, supporting notions that underpin accountability in all its manifestations’: Koppell, above n 36, 96.

¹⁸¹ Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’, above n 8, 453; Harlow, *Accountability in the European Union*, above n 24, 12.

¹⁸² Richard Mulgan, *Making Open Government Work* (Palgrave Macmillan, 2014) 4.

¹⁸³ Mulgan and Uhr, above n 115, 153.

¹⁸⁴ *Ibid.*

¹⁸⁵ Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’, above n 8, 463.

Chapter 4: A Benchmark of Accountability

view, the motivating rationale for accountability is to facilitate control, allowing citizens to require the government to comply with the interests of those citizens. Our primary concern would be to facilitate accountability processes that enable citizens to exercise control over government, and to compel the government to act in accordance with the preferences of the public (the ‘control rationale’).

A third rationale that we might assign to accountability is that of restoration. There are many authors who see restoration as an essential feature of an accountability regime. Oliver sees accountability as an inherently ‘amendatory’ process, requiring matters to be ‘put ... right if it should appear that errors have been made’.¹⁸⁶ Mulgan and Uhr agree, describing an accountability process as being of ‘little value’ in absence of ‘redress’.¹⁸⁷ Beyond transparency, Mulgan notes that accountability entails ‘appropriate rectification through the provision of compensation for victims’, without which ‘accountability seems frustrated’.¹⁸⁸ In similar terms Harlow and Rawlings describe ‘reparation and effective redress’ as ‘key factors’ in establishing legitimacy through accountability;¹⁸⁹ there is a risk that if wrongs are left unremedied, the value of accountability in reinforcing the legitimacy of government may be undermined. This idea is echoed in research which suggests that third parties who have observed injustice are in part restored when observing restoration of a primary victim.¹⁹⁰ If we accept this view, the restoration of individuals who have been harmed by government wrongs is important not just for the individual, but also for wider society. We would therefore be concerned to ensure that victims are not left without a remedy and have a means of accessing restoration (the ‘restoration rationale’).

¹⁸⁶ Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness, and Citizenship*, above n 24, 22, adopting the views of Turpin: Turpin, above n 24, 421–22.

¹⁸⁷ Note that the authors also see ‘improved performance’ as another factor that can add value to an otherwise bare reporting obligation: Mulgan and Uhr, above n 115, 153.

¹⁸⁸ Richard Mulgan, ‘One Cheer for Hierarchy—Accountability in Disjointed Governance’ (2003) 55(2) *Political Science* 6, 10.

¹⁸⁹ Harlow and Rawlings, above n 61, 546.

¹⁹⁰ For an interesting study of this phenomenon in the context of workplace injustice, see Natàlia Cugueró-Escofet, Marion Fortin and Miguel-Angel Canela, ‘Righting the Wrong for Third Parties: How Monetary Compensation, Procedure Changes and Apologies Can Restore Justice for Observers of Injustice’ (2014) 122 *Journal of Business Ethics* 253.

Accountability Deficits and Overloads: A Missing Framework

Another possible rationale for accountability might be that of punishment. There are many theorists who incorporate notions of punishment into their definitions of accountability.¹⁹¹ One of the more emphatic is Mulgan, who sees an accountability process as ‘seriously incomplete’ without the possibility of the imposition of punishment,¹⁹² this being one of the factors that distinguishes being ‘called’ to account from being ‘held’ to account:

In many cases, particularly when mistakes have been made and things have gone wrong, we want to see something more than just transparency and communication, important though these functions are. We want appropriate rectification ... and penalties for those responsible. Without such responses, accountability seems frustrated. Particularly when an institution has caused a major disaster and loss of life, heads should roll. If heads stay stubbornly in place, as often happens, we think that accountability has been denied.¹⁹³

To similar effect is Schedler’s view that ‘[e]xercises of accountability that expose misdeeds but do not impose material consequences will usually appear as weak, toothless, “diminished” forms of accountability [which] will be regarded as acts of window dressing rather than real restraints on power’.¹⁹⁴

If we turn to the literature on punishment we can identify two potential rationales, each of which might be relevant in discussions about accountability. These two rationales broadly reflect the ‘retributivist’ and ‘consequentialist’ justifications for punishment.¹⁹⁵ Retributivist justifications for punishment (which underpin Mulgan’s argument)¹⁹⁶ are grounded in notions of desert.¹⁹⁷ On this view, we would hold agents

¹⁹¹ See eg Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 9–10; Koppell, above n 36, 96–97; Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness, and Citizenship*, above n 24, 22; Behn, above n 40, 3; Grant and Keohane, above n 8, 29–30; Strom, above n 27, 62; Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations*, above n 59, 39.

¹⁹² Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 10.

¹⁹³ Mulgan, ‘One Cheer for Hierarchy—Accountability in Disjointed Governance’, above n 188, 10.

¹⁹⁴ Andreas Schedler, ‘Conceptualizing Accountability’ in Andreas Schedler, Larry Diamond and Marc F Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Reinner Publishers, 1999) 13, 15–16.

¹⁹⁵ Leo Zaibert, *Punishment and Retribution* (Ashgate Publishing, 2006) 4. Zaibert prefers to describe the ideas making up these camps as ‘justifications’ rather than ‘theories’ of punishment: ‘A theory of punishment seeks to tell us what punishment is ... A justification of punishment, on the other hand, seeks to tell us when it is morally (or politically, or in any other normative way) legitimate to inflict punishment’ (at 7).

¹⁹⁶ ‘[A]ccountability implies an element of retributive justice’: Mulgan, ‘One Cheer for Hierarchy—Accountability in Disjointed Governance’, above n 188, 10.

¹⁹⁷ Zaibert, above n 195, 4 and 7.

Chapter 4: A Benchmark of Accountability

accountable for particular conduct and using particular means because they *deserve* that treatment. This type of punishment is condemnatory in character. Punishment is the vehicle through which society is able to voice its disapproval of wrongdoing, and its judgment that the underlying conduct is in some way reprehensible. In the accountability frame, punishment of this nature is important ‘in order to underline the importance of the norms that were contravened’.¹⁹⁸ If we were to adopt a desert-based rationale of this nature, we might seek to define an accountability benchmark that centres on notions of responsibility and blameworthiness (the ‘desert rationale’).

The second camp of punishment justifications are those which can be classified as ‘consequentialist’, which centre around the idea that punishment is designed to achieve positive results going forward (such as reform or deterrence).¹⁹⁹ Such justifications potentially have an important role to play in the context of accountability: ‘accountability ... can be seen as designed to influence the future as much as to judge the past’.²⁰⁰ On this view, the norms that are reinforced through accountability mechanisms ‘cast their shadows ahead’.²⁰¹ In Mulgan’s view, the use of punishment in the accountability context has ‘important deterrent effects on those held accountable’.²⁰² Bovens also sees deterrence as a function of accountability. He notes that the prospect of being held accountable ‘often forces us to seek new ways of preventing such a situation from arising’.²⁰³ For him, there is a clear link between accountability mechanisms and better governance:

The realisation that one will or might be held to account, the passive side of responsibility, stimulates people to behave responsibly, the active side. Giving account of oneself is therefore one of the most important means by which we can try to maintain the fragile public sphere and to make sure that the way in which society is arranged does not at crucial points slip through our collective fingers.²⁰⁴

¹⁹⁸ Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations*, above n 59, 39.

¹⁹⁹ Zaibert, above n 195, 4.

²⁰⁰ Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 18.

²⁰¹ Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations*, above n 59, 39.

²⁰² Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 18.

²⁰³ Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations*, above n 59, 39.

²⁰⁴ *Ibid.*

Accountability Deficits and Overloads: A Missing Framework

In addition to deterring against undesirable behaviour, Bovens also emphasises the role that accountability plays in improving performance, which he discusses by adopting the language of 'learning'.²⁰⁵ In his view, accountability should 'enhance ... the learning capacity and effectiveness' of public officials.²⁰⁶ He notes that, in this context, it is not only the individual who is the subject of an accountability enquiry who is targeted; others who see the outcome of a public enquiry also adjust their behaviour by reference to that outcome.²⁰⁷ In this way, the imposition of sanctions and incentives does not have the goal of deterring only the particular individual against whom they are imposed. Seeing a colleague subjected to an accountability process and suffering sanctions can also influence the broader group of public officials subject to the same standards of conduct. This point is made clear by Behn. He notes that, through the act of holding a specific account-giver accountable, the account-holder 'seeks to influence the behaviour of all future public officials'.²⁰⁸

Not everyone agrees that accountability has a legitimate deterrent function. For example, Philp expresses concern that by making the threat of accountability a motivation for acting, there is a risk of eroding public officials' discretion and autonomy,²⁰⁹ (essentially another way of framing the concern that the imposition of punishment and sanctions may lead to defensive practises).²¹⁰ Doubts have also been expressed as to whether we can prove a link between accountability and improved performance²¹¹ or 'ethical or morally responsible behaviour'.²¹² If the experience of tort researchers is anything to go by, the task of proving deterrence (or over-deterrence) is likely to be empirically difficult.²¹³ What we can say is that one of our *goals* in connection

²⁰⁵ Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', above n 8, 466.

²⁰⁶ Ibid.

²⁰⁷ Bovens, 'Public Accountability', above n 2, 193.

²⁰⁸ Behn, above n 40, 14.

²⁰⁹ Philp, above n 8, 38.

²¹⁰ See also Mulgan and Uhr, above n 115, 165; Bovens, 'Public Accountability', above n 2, 194.

²¹¹ Dubnick, 'Accountability and the Promise of Performance: In Search of the Mechanisms', above n 54.

²¹² Melvin Dubnick, 'Accountability and Ethics: Reconsidering the Relationships' (2003) 6 *International Journal of Organization Theory and Behavior* 405, 406. Dubnick's observations are made on the basis of his review of the available literature, in which he failed to identify any factor which he believed provided the necessary link (or 'motivating force') between the act of account giving and 'desirable' performance: Dubnick, 'Accountability and the Promise of Performance: In Search of the Mechanisms', above n 54, 395.

²¹³ See eg Donald Dewees, David Duff and M Trebilcock, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (Oxford University Press, 1996).

Chapter 4: A Benchmark of Accountability

with accountability is to achieve both specific (influencing the individual official) and general (influencing others who look on) deterrence with a view to discouraging undesirable conduct and encouraging improved performance (the ‘deterrence rationale’). The question of whether the means we select are capable of achieving those ends is one that must be left for another day.

To summarise, we might look to a number of potential rationales to explain our purpose in holding the government to account, including transparency, control, restoration, desert and deterrence. This is not intended to be a comprehensive statement of all possible rationales, as we might in time identify others. The identification of these five rationales really serves to make two points in this chapter. The first is that our choice of rationale (or rationales) will necessarily influence the decisions that we make in defining a benchmark of accountability against which we purport to measure accountability deficits and overloads. For instance, in determining *who* should be held accountable we might adopt a very different approach if our rationale is restoration as opposed to desert. The former would suggest that we select our account-giver on the basis of their ability to perform restoration (eg how deep their pockets might be), whereas the latter might suggest that we target the individual who has done wrong. In this way, we might reach different answers to the questions *who*, *to whom*, *for what* and *how* in defining an accountability benchmark depending on the rationale that we have identified. The second point is that, unless we can narrow our choice to a single rationale, the task of seeking to accommodate multiple rationales simultaneously may bring our choices into conflict with one another. Accordingly, we need not to only identify relevant rationales for accountability, but also to make decisions about how those rationales should be balanced against one another in circumstances where they produce conflicting results. Bearing these two points in mind, this chapter demonstrates the size of the challenge inherent in defining an accountability benchmark that we might use to measure accountability deficits and overloads.

B WHO SHOULD BE HELD ACCOUNTABLE?

The first question accountability theorists often look to in describing accountability regimes is to ask: ‘Who is being held accountable?’²¹⁴ In seeking to define a benchmark of accountability, we must rephrase this question as ‘who *should* be held accountable?’ In other words, which government agent or entity ought to be made to answer in an accountability forum? If we were able to provide an answer to this question, we might then have a basis to look for potential shortfalls or overlaps in our system of governance. This might be the case, for example, where the person who *should* be held accountable has avoided the relevant accountability mechanism, or where the wrong person has been subjected to the mechanism, or where the same party has unnecessarily been brought to account via multiple mechanisms. There are a number of difficulties that we must confront in seeking to decide who *should* be held accountable for the purposes of defining an accountability benchmark.

1 ‘Who’ is the government?

The first difficulty to confront in deciding *who* ought to be held accountable for the purposes of our benchmark is the sheer complexity of modern government. In the Australian context, the government is divided vertically and horizontally into a host of interlocking institutions and functions. The first major division of power, derived from Australia’s federation, is the vertical division of power between the Australian states and the Commonwealth government as prescribed in the *Constitution*, and to local government through the delegation of power by the Australian states.²¹⁵ The second major division of power in Australian government is a horizontal one. At both state and federal level, powers are split between the legislative, executive and judicial branches of government. Power within each of these branches is then further devolved into complex hierarchical structures. So, for instance, the legislative branch is broken into the Houses of Parliament, parliamentary committees and staff. The courts operate as part of a

²¹⁴ See eg Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’, above n 8, 454–55; Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 22–23; Mashaw, above n 8, 118; Philp, above n 8, 42; Scott, above n 8, 41; Grant and Keohane, above n 8.

²¹⁵ Nicola McGarrity and George Williams, ‘Recognition of Local Government in the Commonwealth Constitution’ (2010) 21 *Public Law Review* 164.

Chapter 4: A Benchmark of Accountability

complex appellate hierarchy reaching across jurisdictional boundaries. The executive is more complex again, encompassing at its core the cabinet and the office of the Governor-General, but more broadly including the various government departments and their employees, public and statutory authorities and agencies, and various institutions that we can conceive of as forming the ‘integrity’ branch.²¹⁶ To further complicate this description, each of the institutions within the various branches of government is then populated by individuals who may exercise power alone, or as members of groups, or via internal hierarchies. To speak generally of the accountability of ‘government’ conceals the size and complexity of these structures; in defining a benchmark of accountability against which we might seek to identify accountability deficits and overloads, we need to be able to unpack these nuances and be precise in identifying *who* will be held accountable.

Further complexity arises because public powers are rarely conferred on a discrete individual or institution who will then exercise that power from start to finish. Frequently, there will be degrees of co-operation between individuals and institutions in connection with the exercise of powers. So, for instance, the detention of an asylum seeker may follow a complex series of interactions between officials sitting within various institutions of government. The initial detention may be effected by a border patrol officer; officials within the Department of Immigration and Border Protection may collect information in relation to a claim for asylum; the Minister or a senior official may make a decision to refuse a visa; a tribunal may refuse to overturn that decision on merits review; a judge may refuse to overturn the decision on judicial review; and immigration officials may then give effect to the detention. A flaw within one of these areas of activity (eg crucial information missed during the initial investigation) may have flow-on effects in relation to the course taken by later officials. This ‘problem of many hands’²¹⁷ may make it very difficult to pinpoint an individual or institution that might be held accountable for the end result. This problem will be exacerbated in circumstances where the relevant fault is not one that can comfortably be attributed to

²¹⁶ So, for instance, on the traditional tripartite separation of powers model, merits review tribunals, ombudsmen and commissions of inquiry all fall within the executive branch of government.

²¹⁷ Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’, above n 8, 457.

Accountability Deficits and Overloads: A Missing Framework

a particular individual or entity, but is more accurately described as a systemic fault. This may be the case, for instance, where a breakdown in the communication protocol between two entities means that the relevant procedure is not followed. *Who*, in that circumstance, ought to be held accountable for the result? Because government activity is frequently the result of a complex chain of interactions and co-operation between individuals and entities, it may be difficult to make choices about *who* ought to be held accountable in the design of our accountability benchmark.

This complexity is further compounded by the recent trend towards outsourcing of public functions to private contractors. The past three decades in Australia have seen the outsourcing of a host of public functions to non-government entities and individuals, including the management of immigration detention facilities, prisons, health and disability services and so on. Concern that this outsourcing trend represents a potential area of accountability deficit²¹⁸ directs our attention to the question of *who* ought to be held accountable for the exercise of outsourced powers for the purposes of our accountability benchmark. Should these contractors be held directly accountable pursuant to the same regimes that apply to government entities? Should they be held accountable pursuant to alternative regimes? Ought the government be held accountable for the actions of private contractors? These questions require us to make normative judgments about whether we wish to require the government to answer for the conduct of those that perform functions on its behalf, or whether we are more concerned with requiring the party who has done wrong to answer for their misdeeds, or perhaps both? It is only once we have decided *who* ought to be held accountable for the purposes of our benchmark that we can then use that benchmark to assess whether outsourcing represents a potential area of accountability deficit.

Putting to one side the difficulties of mapping out the range of individuals and institutions that make up 'the government', there is in fact a much more important philosophical question we must confront in deciding *who* ought to be held accountable, which requires us to think about how we conceptualise 'the government'. The question of whether we should treat the government as a corporate entity or as a collection of

²¹⁸ See discussion in Mashaw, above n 8, 134.

individuals is one that has exercised political and legal theorists for centuries. As explored by McLean in her treatise on the elusive notion of the Crown, there are broadly two schools of thought.²¹⁹ The first, reflected in Blackstone's theory of the state, regards it as an abstract entity; a juridical person with its own moral personality that comes into being on the establishment of civil society.²²⁰ On this view, the government might be understood as a corporate entity that exercises power through the acting mind and will of the sub-entities and individuals that constitute it. If we see the government in these terms, our accountability benchmark might answer the question of *who* ought to be held accountable by targeting mechanisms towards the overarching entities of government, rather than towards the individuals who make up those entities. It would be necessary, then, to attribute the acts and will of government officials to the entities that they represent. The second school of thought, most prominently reflected in Dicey's theories, adopts a view of the state, not as an abstract entity, but as a collective of individuals.²²¹ If we were to adopt this model for the purposes of our accountability benchmark, the question of *who* ought to be held accountable would be more concerned with sheeting home responsibility to individuals who have contributed to an impugned outcome. All of this tells us that, in order to decide *who* ought to be held accountable in defining our benchmark, it would be necessary to come to a landing on a centuries-long debate regarding our conceptualisation of 'the government'.

2 A rationale-based approach

Against this background, the sizeable task that we must confront in defining a benchmark of accountability is to decide who should be held accountable if we were to achieve some 'ideal amount' of government accountability. There are essentially three different models we might choose between in defining that benchmark.²²² The first is

²¹⁹ McLean, above n 9, Ch 1.

²²⁰ William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765-9) 48, cited in McLean, above n 9, 3.

²²¹ McLean, above n 9, 3.

²²² Bovens, 'Public Accountability', above n 2, 190-92. Bovens also identifies 'collective accountability' as a model pursuant to which any member (or members) of an organisation can be singled out to be held accountable for the actions of one or more members of the organisation. For present purposes, this can be subsumed within the notion of hierarchical accountability, which is concerned with holding one person accountable for the actions of another.

Accountability Deficits and Overloads: A Missing Framework

the *individual accountability* model, pursuant to which the task is to hold an individual accountable for their own acts and choices. Mulgan views this as the most ‘central and straightforward’ style of accountability, in which ‘the person held accountable is the person who is responsible, in the sense of being the person who can choose to act or not to act in the performance of certain duties and who is therefore liable for praise or blame’.²²³ Where multiple agents have been involved, the aim would be to share accountability according to the contribution of each. In the context of public governance, this model would (for example) demand that a public servant who was grossly negligent in the exercise of their duties, resulting in the deportation of the wrong person, be held personally accountable for that result. The second possible model is the *hierarchical accountability* model, pursuant to which one actor is held accountable for the actions of another. In many instances, it may be a superior being held accountable for the acts of an inferior, though there may be variations depending on context. In the above example, a government department might be held vicariously accountable for the negligence of the public servant. (As Bovens notes, it is possible that responsibility may nonetheless be shifted back to the individual wrongdoer after the fact.)²²⁴ The third possible model is the *corporate accountability* model, pursuant to which an abstract entity is held accountable for the acts and choices made by those who represent it as a unitary actor.²²⁵ In the above example, the government department would be held directly (as opposed to vicariously) accountable for the negligence of the public servant. So, which of these different models would represent the ‘ideal amount’ of government accountability for the purposes of defining the benchmark? Returning to the discussion set out in Section A of this chapter, our choice of *who* ought to be held accountable will be heavily influenced by the accountability rationale that we select (transparency, control, restoration, desert or deterrence).

²²³ Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 23.

²²⁴ Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’, above n 8, 457.

²²⁵ *Ibid.*

(a) Who should provide the answers?

The transparency rationale is concerned with exposing the machinations of government for public scrutiny. Adopting this rationale, the question of *who* should be held accountable might direct our attention to identifying the best source of information. This might suggest a number of possible approaches. For instance, if we think that the best source of information is the person most directly involved in the relevant decision-making process or outcome, it might make sense to adopt the individual accountability model. Adopting this approach, information would be sourced ‘straight from the horse’s mouth’, thereby increasing the quality of the information provided and reducing the likelihood that explanations might be lost in translation. Within this model, the person who ought to provide the answers would be the judge who has decided a case, or the immigration official who has cancelled a visa, or the local government official who has granted a development application. We might, therefore, be wary of accountability arrangements in which only the head of the organisation operates as a source of information, with subordinates being ‘muzzled’.²²⁶ Such arrangements allow for the flow of information to be controlled and might result in ‘public scrutiny [being] blunted’.²²⁷

While the individual accountability model might be considered useful in terms of sourcing the most accurate and rich information, there are a number of potential drawbacks to that approach. One such drawback is that (as outlined above) the nature of government operations and decision-making means that a matter is rarely dealt with from start to end by a single individual. Frequently, an outcome will be the result of a chain of interactions between various individuals and entities, making it difficult to isolate who might be best placed to act as the information-provider in a given instance. And, even if it were possible to receive explanations from all relevant parties, the complexity of the resulting picture will frequently fail to explain the situation as a whole. In such a situation, we might think that the corporate accountability model might offer a better contribution to the transparency of government, allowing information to be

²²⁶ See eg Mulgan, ‘One Cheer for Hierarchy—Accountability in Disjointed Governance’, above n 188, 11–12.

²²⁷ *Ibid* 12.

Accountability Deficits and Overloads: A Missing Framework

gathered from multiple sources and delivered through a single communication channel. The resulting information is then more likely to be compiled into a comprehensive and straightforward explanation than would be the case if the recipient were to receive multiple and potentially conflicting accounts from a range of parties.

A further reason we might wish to move away from the individual accountability model in certain circumstances is related to the notion of legitimacy. While relying on an individual accountability model has the potential to target the individual who has engaged in the relevant conduct or made the relevant decision, we might wonder whether legitimacy is better supported by hearing from that individual's superiors or employers. We might have serious questions about the legitimacy of our system of government if the official government explanation for mistakes and maladministration is left to low-level public servants simply on the basis that they happen to be most closely connected to the outcome. If the transparency rationale is concerned with reinforcing the legitimacy of government, a hierarchical model of disseminating information might operate to reassure citizens that serious matters are being taken seriously and being dealt with at the highest levels. There is also something to be said for the notion that citizens may be more trusting of information being provided by a senior official rather than a low-level public servant.

This discussion serves to demonstrate that, when adopting the transparency rationale, there are different choices we might make in deciding who ought to provide the information, with benefits and drawbacks to each. The individual accountability model potentially provides the most rich and accurate source of information; the corporate model is well-suited to providing information about complex government processes; the hierarchical model has the potential to reinforce legitimacy by demonstrating that the government is taking a matter seriously. Because of the benefits and drawbacks to each model, it is difficult to select just one model to employ for the purposes of our benchmark of accountability; deciding who should provide the answers is quite simply a matter on which reasonable minds will differ and which might vary from situation to situation.

(b) Whom should we control?

The second rationale explored in Section A of this chapter is the control rationale. Under this rationale, the primary concern of accountability is to provide principals with the ability to control their agents, dictating the manner in which they exercise their power and bringing them back within legal boundaries when exceeded. The question of ‘who’ we should control for the purposes of establishing a benchmark of accountability is therefore concerned with identifying the party best placed to bring an exercise of power back within the boundaries that have been transgressed. In deciding which accountability model (individual, hierarchical or corporate) is best suited to this purpose, the most logical approach is to focus our attention on the *conferral* of power in each case, with the result that we would seek to control the *repository* of the power (ie the person or body responsible for its exercise). In some cases, this will reflect an individual accountability model. So, for instance, where a power to grant development consent has been conferred on the Planning Officer of a local council, an invalid exercise of power by that Planning Officer ought to attract a control order directed at that Officer. Similarly, a misdirected exercise of a power conferred on the Minister for Immigration and Border Protection ought to attract a control remedy addressed directly to the Minister. In circumstances where that Planning Officer or Minister is the repository of the power, it makes little sense to direct a control order to other parties, such as their superiors or employers. This leads us to the conclusion that we ought to adopt an individual accountability model in such cases.

However, in other cases our focus on the conferral of power will lead us to adopt the hierarchical accountability model. So, for instance, in a case where one individual has exercised power on behalf of another (eg a low-level public servant has made a decision on behalf of their superior officers), we would adopt a hierarchical accountability model in issuing our order to the repository of power (the superior officer) in preference to the individual who exercised the power (the low-level public servant). Finally, in cases where the repository of power is an entity rather than an individual, we would adopt a corporate accountability model. So, for instance, where a power is conferred on a local council, or statutory body, or tribunal, we would be

concerned with directing our control order to that relevant entity, rather than to the individual officer who happened to exercise power on behalf of the entity in the instant case. Therefore, if we adopt the control rationale for accountability, the question of *who* we should control will lead us to focus on identifying the repository of power. This would result in the employment of different accountability models in different situations. In some cases this will direct attention to the individual who exercised the power, in other cases to their superior, and in other cases to an entity.

(c) *Who should provide restoration?*

The third accountability rationale explored in Section A was the restoration rationale. This rationale is concerned with correcting the outcomes that arise by reason of a misdirected exercise of public power; it is about putting wrongs right.²²⁸ If we adopt restoration as our accountability rationale, how would we answer the question ‘*who* should provide restoration’? On one view, we might say that the best means of achieving restoration is to identify the party best placed to satisfy such a claim—that is, the party with the most plentiful resources. This would likely lead us away from the individual accountability model, which would see the burden of satisfying restoration claims rest on the individual official who can be said to have caused harm. Instead, we might reach the conclusion that the hierarchical or corporate accountability models are better suited to ensuring that the party being held accountable has the necessary resources to facilitate restoration. The essential difference between these two models is that, in the case of hierarchical accountability, the government would stand in for the primary wrongdoer, providing restoration on their behalf. In comparison, the corporate accountability model would hold the government accountable directly, with the government providing restoration for its own wrongdoing. For present purposes, however, what is important is that the victim is restored by the government in either case.

There is a potential benefit in adopting the hierarchical or corporate accountability models for the purposes of the restoration objective, as the government is better placed

²²⁸ Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness, and Citizenship*, above n 24, 22, adopting the views of Turpin: Turpin, above n 24, 421–22.

Chapter 4: A Benchmark of Accountability

than the vast majority of individuals to facilitate restoration. If (as is likely to be the case in most circumstances) losses are to be remedied through the provision of a monetary award, the government coffers will in almost all cases be better resourced than those of individual government officials.²²⁹ While many have been critical of the 'deep pockets' mentality as a driver of expanded government liability, the fact remains that the pool of funds available to resource restoration is more substantial when adopting a corporate accountability model than one premised on individual liability.

On the other hand, one of the core concerns regarding the adoption of a corporate accountability model for the purposes of restoration centres not on the *ability* of governments to resource damages claims, but on the source and nature of those funds. Government coffers are, of course, filled through public taxation, exacted for the purposes of supporting public works and providing public services. As the argument goes, the redirection of these funds into restoration of individuals who have been placed worse off as a result of government activity reduces the overall pool of funds available to perform these public functions. It follows that public services would be diminished or that higher taxes would need to be levied to support the expanded range of demands on those funds. And, as put by Stapleton in discussing government liability in tort, 'why should the accidents of tort litigation determine the allocation of public money to various activities?'²³⁰ In essence, if we adopt a corporate accountability model, it is not the government that is accountable to provide restoration, but the public itself, either through the provision of taxes or compromising on the provision of public works and services.²³¹ However, these arguments take on less significance in light of the restoration rationale for accountability. If our primary concern is to ensure that individuals harmed through government activity are restored, the fact that the government is in a better

²²⁹ Peter H Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (Yale University Press, 1983) 101.

²³⁰ Jane Stapleton, 'Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence' (1995) 111 *Law Quarterly Review* 301, 313.

²³¹ Harlow notes that this view does not reflect the reality that individual agencies operate within individual budgets rather than drawing on a general pool of funds, and that many government agencies are insured against liability: Carol Harlow, *State Liability: Tort Law and Beyond* (Oxford University Press, 2004) 25.

position to achieve this would likely outweigh our misgivings that the real underwriter of such liability is the tax-paying public.

In deciding between the hierarchical and corporate accountability models, one factor that might lead us to prefer the corporate accountability model is that it simplifies the process of identifying an appropriate defendant. This is particularly so in cases where losses are caused by systemic, rather than individual, fault. As was noted above, the nature of government is such that the result about which a victim complains may have been produced through a complex series of interactions between officials and entities and as a result of various policies and procedures. It might be very difficult in such a case to pinpoint the particular individual who can be said to have caused the loss complained of. One benefit of the corporate accountability model is that this difficulty might be avoided through holding the government directly liable for systemic failings. If we are primarily concerned with restoring loss, we might welcome an approach to liability that reduces the burden on harmed individuals to pinpoint the particular government official or entity that can be said to have caused that loss.

(d) Who deserves to be punished?

The fourth accountability rationale explored in Section A was that of desert, being the goal of condemning past conduct. If we were to adopt this rationale, how would we answer the question of *who* should be punished? According to the desert rationale, an agent is punished on the basis that they deserve it; punishment stands as a public and symbolic expression of disapproval of blameworthy conduct. We might say that this rationale is most conformable with the individual accountability model, as this places the focus of accountability on identifying the individual who ought to be punished for their own wrongdoing. As explored in more detail in Part III of this thesis, punishment via the criminal law is the archetype of the individual accountability model in this respect, with the elements of criminal offences being primarily concerned with identifying the individual with the relevant mens rea and actus reus to establish the offence. For instance, a public official who has exercised their powers for personal gain may be found to have committed the offence of misconduct in public office, and be personally subject to penalties including imprisonment and fines. We would likely be

Chapter 4: A Benchmark of Accountability

satisfied that the individual accountability model has served the desert rationale of accountability well in such a scenario; the individual official who has engaged in egregious conduct has been publicly condemned for their behaviour on the basis that they deserve such recrimination.

While the individual accountability model might be thought to serve the desert rationale of accountability well in many cases, we might wonder whether there are circumstances that justify expanding beyond these boundaries. Are there circumstances in which we might wish to be able to condemn not only an individual official, but the government entity as a whole? This might be the case where, for example, the government has designed and implemented an egregious policy; to adapt Sir Leslie Stephen's famous example, the execution of all blue-eyed babies. If such a policy were to be implemented, we might wonder whether the condemnatory function of accountability captured by this rationale might be best achieved through targeting the government entity as a whole, rather than simply the individual officials who had the bad luck to be charged with its implementation. As put by Cane:

The powerful functional case for government criminal liability is that it makes it harder for governments to offload on to individual public agents responsibility for what is done in the name of the government or the public.²³²

This might lead us to look to corporate accountability as a useful model for the purposes of the desert rationale. While the individual accountability model might represent the orthodox means of achieving the desert goal of accountability, there might be some circumstances in which we may wish to look beyond this model.

(e) Whom should we deter?

The final rationale for accountability explored in this thesis is the deterrent rationale. On this view, the primary function of accountability mechanisms would be to influence the future activity of government by disincentivising undesirable behaviour and/or incentivising desirable behaviour. The goal would be not only to target the individual

²³² Peter Cane, *Responsibility in Law and Morality* (Hart Publishing, 2002) 267. For a similar point made in the context of tortious liability, see page 263 of that work and Peter Cane, 'Damages in Public Law' (1999) 9 *Otago Law Review* 489, 512.

Accountability Deficits and Overloads: A Missing Framework

official who has contravened a norm (specific deterrence), but also to influence others (general deterrence). If we adopt the deterrence rationale for accountability, the question of who ought to be held accountable would be concerned with targeting the parties or entities that have the greatest capacity to influence future change, either for themselves or by setting an example for others.²³³

The individual accountability model would lead us to take the position that by subjecting an individual who has contravened a norm to an accountability process, we are likely to deter that individual from committing future infractions (specific deterrence) and deter others from engaging in similar conduct (general deterrence). To follow Dicey's line of thinking, for example, we might require an individual official to pay damages to their victim with a view to deterring that official from committing future infractions.²³⁴ The question of whether the imposition of sanctions on individual officials in fact produces a deterrent effect is a fraught one, which, in the context of tort law, has exercised academic minds for decades.²³⁵ If this experience is anything to go by, it may be very difficult to empirically prove that sanctions imposed via accountability mechanisms in fact deter individuals against future infractions.²³⁶ Further, there are those who would suggest that, far from achieving the goal of improved performance, the imposition of sanctions on individuals in fact risks diminished performance. On this view, individuals who are at risk of exposure to sanctions as a consequence of their performance may be encouraged to adopt defensive practices.²³⁷ So, for instance, an official may be disinclined to reject a development application in circumstances where they are at risk of liability to the vexed applicant; an official who is wary of exposure to potential sanctions may avoid making the 'tough decisions'.

²³³ Braithwaite, 'On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers', above n 11, 333.

²³⁴ As Harlow notes, while Dicey does not explicitly embrace the deterrence model, he appears to assume that this will be a corollary of the imposition of tortious liability on individual officials: Harlow, *State Liability: Tort Law and Beyond*, above n 231, 23–24.

²³⁵ See eg Dewees, Duff and Trebilcock, above n 213.

²³⁶ In the context of accountability mechanisms more generally, see Dubnick, 'Accountability and the Promise of Performance: In Search of the Mechanisms', above n 54.

²³⁷ See eg Mulgan and Uhr, above n 115, 165; Bovens, 'Public Accountability', above n 2, 194.

Chapter 4: A Benchmark of Accountability

A related risk, highlighted by Braithwaite, is that punitive sanctions targeted at individual wrongdoers may ultimately produce reactance, prompting the individual to adopt a defiant stance and resist the demand for improved behaviour;²³⁸ an ‘I’ll show you!’ response. To avoid this possibility, Braithwaite suggests that applying ‘weak sanctions’ to ‘soft targets’ is potentially more likely to produce the desired result of forward-looking change.²³⁹ The aim is to deter, not through holding a few criminally responsible, but through more broadly targeting the range of ‘actors with causative or preventative capability with respect to that abuse’.²⁴⁰ A related aspect of the theory is that the best approach is not to target individual wrongdoers who stand to benefit from wrongdoing, but instead to seek out ‘gatekeepers’, being those who have the capacity to facilitate or prevent the agent’s actions.²⁴¹ As the argument goes, there is more to gain by imposing the burden of compliance on a disinterested third party than on the agent who would otherwise benefit from their own wrongful conduct.²⁴² If we were to take these ideas on board, we would be concerned with holding accountable, not those who have done wrong, but those who have the capacity to influence prospective change. This might suggest a more hierarchical, rather than individual, model of accountability.

The individual accountability model is also open to criticism on the basis of its capacity to address systemic wrongdoing. As noted by Schuck, we would likely have doubts as to whether there is any utility in punishing a prison official for implementing a prison policy of solitary confinement.²⁴³ This individual, having acted in accordance with the policy of their employer, is unlikely to regard punishment as a fair means of deterrence, and others looking on are placed in the unenviable position of choosing between obeying their employer and the risk of personal liability. An alternative option to facilitate the deterrence rationale would be to adopt the corporate accountability model. This would see government entities held accountable for the actions of their agents and employees, with a view to encouraging those entities to improve overall

²³⁸ Braithwaite, ‘On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers’, above n 11, 322–24.

²³⁹ *Ibid* 318.

²⁴⁰ *Ibid* 333.

²⁴¹ *Ibid* 334.

²⁴² *Ibid* 337.

²⁴³ Schuck, above n 229, 101.

performance by better managing those agents and employees going forward. This model aligns with Schuck's view that agencies are generally well equipped to facilitate deterrence.²⁴⁴ In his view, there is more to be gained by targeting the agency than the 'street-level official' in light of the agency's knowledge, resources and powers, which position them to influence the future behaviour of their employees.²⁴⁵ If we were to adopt sanctions that require significant resources to support (eg monetary payments), it might be argued that the 'deep pockets' of the government potentially cushion the impact of sanctions imposed on government agencies and departments. However, the reality is that these entities operate within the constraints of their budgets and must answer up the chain for overspends that might arise following the payment of substantial damages awards.²⁴⁶ As for the individual accountability model, the question of whether particular sanctions applied to government entities in fact achieve deterrence as an empirically provable fact is likely to be a matter of debate. At best, we can say that particular sanctions might be applied with the goal of deterring undesirable conduct. We must say the same for the counter-argument to the effect that sanctioning entities might promote over-deterrence (ie where the threat of punishment fosters defensive practices). The lack of evidence of the effectiveness (or counter-productiveness) of sanctions against government entities is nonetheless a matter that we must bear in mind in defining our benchmark of accountability.

3 Summary

The foregoing discussion has demonstrated that there are many choices that we must make in deciding *who* should be held accountable, depending on which rationale for accountability we might adopt. So, for instance, while the desert rationale tends towards the individual accountability model, the restoration rationale tends towards the corporate accountability model. Even on adopting a particular rationale, there are then difficult choices to be made about which approach might best suit that rationale. So, for instance, if we adopt the transparency rationale, we might reach differing views on the

²⁴⁴ Ibid 104.

²⁴⁵ Ibid 104–05.

²⁴⁶ On this point, see Harlow, *State Liability: Tort Law and Beyond*, above n 231, 25.

Chapter 4: A Benchmark of Accountability

best accountability model depending on whether we are concerned with identifying the richest source of information (the individual accountability model), or the most authoritative (the hierarchical or corporate accountability models). We might also find that different models are appropriate in different contexts. So, for instance, in some situations we may think that sourcing detailed and accurate information from the person most closely connected is critical (eg when used as evidence in a court case), whereas in other situations we may be more motivated to ensure that information is made available efficiently. Therefore, the question of who should be held accountable is not always apparent, even with the assistance of the accountability rationales. What we can say, based on the discussion in this section, is that there is no one model that applies equally well to all accountability rationales and across all contexts; there are horses for courses.

This leads us to one of the most significant issues we must confront in seeking to identify a benchmark of accountability; how to balance the competing rationales against one another. If we accept that accountability requires us to potentially support each of the five accountability rationales (transparency, control, restoration, desert and deterrence), we must seek to adopt a benchmark of *who* should be held accountable that is capable of serving these various objectives. The difficulty is that there will be cases where these objectives are in tension with one another. So, for instance, one means of serving the restoration rationale would be to adopt the corporate accountability model, requiring the government to make a monetary payment to a harmed individual. As outlined above, this approach might be preferred to the individual accountability model on the basis that the government is better resourced to finance such claims. In comparison, the desert rationale is far more conformable with the individual accountability model. In a case where an individual official has engaged in egregious conduct warranting condemnation, we might doubt whether that official is likely to suffer the requisite degree of condemnation if public funds are used to restore the individual they have harmed, leaving the official no worse off. Instead, we might wonder whether the goals of restoration and desert may dually be served by requiring the individual official to directly foot the bill for the victim's loss in such a case (which in

the tort context may be achieved through the provision of compensatory and punitive damages). Of course, this might leave the victim at risk of losing out if the official happens to be impecunious. If we are to try and choose a single mechanism to provide accountability, the best choice for one rationale might produce an inversely negative effect for another. We must choose, in such a case, to prefer either punishment of the official or restoration of the victim, or, perhaps, to hive off both rationales to be served through separate accountability processes. This complex balancing act would be further complicated if we were then to draw in the remaining accountability rationales of restoration, control and deterrence, each of which might lead us to look for different answers as to who should be held accountable.

To summarise, the foregoing discussion has demonstrated that, in seeking to establish a benchmark of accountability, the question of who ought to be held accountable is not a straightforward one, and will depend to a large degree on which rationale for accountability we adopt. If we need to accommodate more than one rationale, the decision is further complicated by attempting to balance these rationales against one another so as to achieve a result that best serves either the majority, or those we determine to be most important. Until we can reach a landing on these complicated questions, we will struggle to set a benchmark against which we can seek to identify accountability deficits or overloads. After all, we cannot hope to establish that an agent has escaped accountability if we cannot establish that they ought to have been held accountable in the first place. If we wish to be able to take a firmer grasp on our claims of accountability deficits and overloads, the first step is to focus our attention on who should be held accountable by making clear what we are seeking to achieve (transparency, control etc), and arguing for the best means to achieve it (individual, hierarchical or corporate accountability models).

C TO WHOM SHOULD THEY BE ACCOUNTABLE?

As noted in Chapter 1, the question of *to whom* an agent is required to provide an account has been conceptualised in two ways in the literature. The first

Chapter 4: A Benchmark of Accountability

conceptualisation focuses on the forum in which accountability is to be adjudicated.²⁴⁷ So, for instance, the party *to whom* an agent is accountable would encompass bodies such as the courts, ombudsmen, administrative tribunals, Parliament and so on. For the purposes of defining a benchmark of accountability, the nature of the accountability forum is better dealt with as an aspect of the *how* dimension of the accountability framework. Different accountability forums will vary, for example, in the manner in which they make accountability judgments. These matters are dealt with as a component of the question *how should an agent be held accountable*, rather than *to whom should an agent be accountable?*

The focus of this section instead looks at the second conceptualisation of the *to whom* question, which focuses not on the accountability forum but on the party who is entitled to instigate the accountability process (referred to here as the ‘*prosecutor*’).²⁴⁸ So, for instance, only those who have a valid legal claim are entitled to bring an action in court to secure government accountability in that forum, and only those who are eligible to vote are entitled to exercise their powers within the electoral accountability forum. In some cases, a forum itself may also play the role of prosecutor. This will be the case, for example, where a forum is entitled to commence an own-motion enquiry.²⁴⁹ To redefine this conception of the *to whom* question as an accountability benchmark, it is necessary to decide who *should* be selected as a prosecutor for the purposes of deploying an accountability mechanism. In this respect, we can imagine a spectrum. At its broadest, we might have an entirely open regime that would allow any person to hold the government accountable. At the narrower end of the spectrum, we might limit access to only a particular group or individual to be charged with the accountability-enforcement role. In between, we might allow limited classes of individuals or groups with particular qualities or interests to access accountability mechanisms. As explored in the following discussion, there are two key difficulties that

²⁴⁷ See eg Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’, above n 8, 455–57.

²⁴⁸ Mulgan notes that, in this respect, accountability has a ‘dual direction, requiring the government agency or official to answer first, and most directly, to the court or tribunal itself and, secondly, through the court or tribunal to the individual members of the public who have initiated the hearing and appeared in court’: Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 76.

²⁴⁹ See eg *Ombudsman Act 1976* (Cth) s 5(1)(b).

we will encounter in selecting the prosecutor(s) that best reflect an ideal benchmark of accountability. First, there are a multiplicity of factors that might influence a prosecutor's capacity and interest to undertake that role, and second, we will likely reach differing views on the best choice of prosecutor depending on which accountability rationale we are interested in promoting.

1 Capacity and interest to prosecute

If our overarching concern is to maximise the likelihood that the government will be held accountable, there are a number of different factors that might influence our selection of a prosecutor. One such factor is the *size* of the class. It goes without saying that if we increase the number of potential prosecutors, we also increase the likelihood one or more of them will be willing and able to exercise their entitlement to hold the government to account. Conversely, limiting prosecutorial functions to a single point decreases that likelihood. In essence, increasing the size of the prosecutorial class allows us to 'hedge our bets' in the manner of the redundancy model of accountability (discussed in more detail in Chapter 5).

However, maximising the number of people who have the interest and resources to hold the government accountable (and thereby reducing the chances that no-one will do so) might not be our only concern. We might also wish to take into account, for example, the *skills* and *resources* of the prosecutor. For instance, there might be valid reasons why we might wish to limit prosecution of criminal offences to the Director of Public Prosecutions in preference to private prosecutors. If our concern is to maximise the likelihood of successfully holding the government accountable where it ought to be so, we might think that an experienced prosecutor with the backing of relevant resources has greater prospects of satisfying that aim. We might similarly say that a further factor with the potential to increase chances of a successful prosecution is *knowledge*. As distinct from skills (which may be of a general nature), a prosecutor may be better placed to perform their role if they have intimate knowledge of the facts and circumstances giving rise to the prosecution. So, for instance, a person who was on the receiving end of particular conduct will naturally be better placed to complain of it than a third party who has only received a related version of those facts.

Chapter 4: A Benchmark of Accountability

A further factor that might influence our choice of prosecutor is that of *motivation*. We might say, for example, that a person is particularly well-motivated to undertake a prosecution if that role is part of their job description (eg the Director of Public Prosecutions). We might also say that a person is more likely to engage in a prosecution if they stand to gain something as a result (eg the reversal of a decision that personally affects them). Others might wish to engage in a prosecution out of more altruistic motives, such as to help another or to protect an interest that is not personal to them (eg environmental concerns). Yet others might have a political agenda. If our sole concern was to maximise the likelihood of prosecution, we might wish to harness these various motivations so as to create a class of prosecutors that captures them. However, people may also have other, less altruistic, motives for bringing a prosecution (eg spite, vengeance or greed), and we would need to decide whether we are willing to allow these in order to maximise the likelihood of prosecution. A person might be more inclined to bring a prosecution when motivated by financial gain (eg receiving a windfall in the nature of a punitive damages award).²⁵⁰ We could, therefore, increase the likelihood that accountability will be enforced by providing financial incentives for prosecution. However, in defining our benchmark of accountability we would need to consider whether allowing our accountability regime to foster profiteering might flood the system with unmeritorious prosecutions. If every 'real' accountability prosecution was matched with five purely speculative prosecutions, we might wonder whether the legitimacy of the system would be put at risk. A further issue of motives that must be taken into account in defining the benchmark is those motives that might encourage a prosecutor *not* to exercise their entitlement. For example, we might be concerned that bias, corruption or self-interest might disincline a government employee from prosecuting 'their own'.²⁵¹ If we are concerned to avoid this possibility, or even the appearance of such a possibility, we might wish to ensure that the category of individuals entitled to prosecute a claim is wider than a defined government prosecutor.

²⁵⁰ Concerns about creating a 'windfall' underlie arguments against allowing punitive damages awards: Peter Cane, *An Anatomy of Tort Law* (Hart Publishing, 1997) 188.

²⁵¹ See eg *Gouriet v Union of Post Office Workers* [1978] AC 435, 97.

A final factor (and related to the previous) that might be relevant to our choice of prosecutor is *independence*. There might be reasons to prefer a prosecutor who is capable of making an independent assessment of the case, rather than being primarily influenced by questions of self-interestedness or retribution. This might decrease the likelihood of prosecutions being brought for ulterior purposes, and potentially increase public confidence in the accountability regime overall.

In summary, it is possible to see that one of the difficulties involved in defining the normative benchmark of *to whom* the government should be accountable is that there are a number of factors that might influence the likelihood of prosecution. On the one hand, we might think that allowing a very open regime will maximise the chance of a prosecution taking place, but on the other we might think that chances of successful prosecution are increased by limiting access to those with particular types of skills, resources, knowledge, motives and/or independence. Striking an appropriate balance between these various factors will present a challenge in defining a benchmark of accountability.

2 A rationale-based approach

The task of balancing the various factors that might define the class of prosecutors becomes further complicated once we begin to think about the various rationales for accountability explored in this thesis. The question of ‘to whom’ the government ought to be accountable may admit different answers depending on which rationale for accountability we choose to adopt.

(a) *To whom should the government provide an account?*

The transparency rationale of accountability is closely aligned with notions of open government. In many respects, the question of to whom the government ought to provide an account might be answered ‘everyone’. Ultimate transparency would be achieved if the government were to publicise all aspects of its internal operations and decisions and make all information publicly accessible. To a more limited extent, this accountability approach is evident in the duties of positive disclosure established under the *Freedom of Information Act 1982* (Cth), which require agencies to publish certain

Chapter 4: A Benchmark of Accountability

information proactively. Such information includes, for example, details regarding the agency's structure, functions, appointments, annual reports, operational information and information routinely provided to Parliament or to the public via freedom of information requests.²⁵² Provided that a person has the means of accessing the portal through which this information is made available (generally the agency website), any person is able to access this information at any time. This proactive accountability approach of widespread public access to government information is also evident in other aspects of government administration. For instance, proceedings in Parliament are publicised via free-to-air television and via publicly available Hansard records, and court decisions are publicly available through open-access sources such as Austlii and public libraries. Assuming that a person has the ability and means to access and interpret the information provided in this form, we can understand this information to be essentially available to all. Of course, not all government information is made available in such a proactive sense. For other information, it is necessary to consider who should be entitled to *call* for the provision of an account; to whom should the government be obliged to provide information on demand?

If we are to adopt the transparency rationale for accountability, we would likely prefer a very widespread right to obtain access to government information. We would not wish, for example, for access to be limited to those sufficiently well-connected or well-resourced to exercise the privilege. In this respect, of the factors discussed above, our primary concern might be to maximise the size of the class of potential prosecutors, rather than limiting it to those with particular skills, knowledge and resources. In a practical sense, this would require that the mechanism we rely on to facilitate transparency does not contain barriers that might inhibit widespread access (eg high access fees). A perhaps more difficult question to consider is whether a person's motives for accessing information ought to play a role in our decision as to whether they ought to be excluded from the regime. For instance, should we be concerned that a person is seeking to access information for the purposes of personal financial gain, as opposed to some more altruistic, public interest-based motive? Again, if our primary concern is to

²⁵² *Freedom of Information Act 1982* (Cth) s 8.

Accountability Deficits and Overloads: A Missing Framework

facilitate transparency in government operations, we would likely be interested in adopting an accountability benchmark that prioritises transparency over any countervailing concerns about whether the person accessing information is ‘deserving’ of that access. In this respect, we might say that, for the purposes of the transparency rationale, the size of the class of prosecutors would potentially be the most important factor influencing our choice of benchmark.

When we look at the Australian freedom of information laws, we can see quite a good reflection of this approach in defining the class of persons entitled to seek access under the regime. For instance, pursuant to the Commonwealth legislation, ‘every person has a legally enforceable right to obtain access’ to documents (broadly defined) held by Ministers and ‘agencies’,²⁵³ defined to include government departments, bodies established for a public purpose and other prescribed authorities.²⁵⁴ Under that regime, the responding agency is entitled to levy a charge for access to the information²⁵⁵ but, in deciding whether a charge ought to be waived, the agency will take into account the extent to which the charge might cause financial hardship to the applicant as well as whether the provision of access to the information is in the public interest.²⁵⁶ Therefore, while the regime does not facilitate free access to information to all, there is a mechanism built in for the purposes of allowing free access in those cases where the applicant might not otherwise be able to afford it. The regime also provides that an applicant’s motives for accessing information are not a disqualifying factor, as a person’s right of access is not to be affected by either their reasons for seeking access, or the agency’s belief as to what those reasons might be.²⁵⁷ In this respect, the Commonwealth freedom of information regime is relatively consistent with a benchmark that is concerned with enabling widespread access to government information.

²⁵³ Ibid s 11.

²⁵⁴ Ibid s 4(1), definitions of ‘agency’ and ‘prescribed authority’.

²⁵⁵ Ibid s 29.

²⁵⁶ Ibid s 29(5).

²⁵⁷ Ibid s 11(2).

(b) Who should be entitled to control the government?

The control rationale for accountability is concerned with ensuring that, when viewed through the lens of the principal–agent model, citizens have the means to control their government and to ensure that it acts in accordance with their interests. In thinking about *to whom* the government should be accountable for this purpose, one answer might be to say that the relevant reference point ought to be the public as a whole. But this overly simplistic response does not tell us very much about how the ‘public as a whole’ might hold the government accountable. In one sense, elections represent a marking point for accountability of this nature; the public goes to the ballot booth and casts a vote to either retain or replace the incumbent government. The announcement of the outcome of the vote can be seen to reflect a wholesale exercise of the public’s control over government. Compulsory voting can be viewed as reinforcing this wholesale control by requiring all eligible voters to participate.

However, there are important limitations on the extent to which the electoral vote reflects the judgment of ‘the public’ as a whole. First, there are categories of persons who are excluded from voting eligibility, including those under 18 years of age, non-citizens and certain classes of prisoners, for example. Can we say that the vote reflects the will of ‘the public’ in circumstances where there are categories of individuals who are excluded from participation? In deciding whether the electoral process truly represents an exercise of control by the public, we must also take into account the manner in which the vote contributes to the electoral outcome. For instance, while the *Constitution* mandates that representatives are chosen ‘directly by the people’,²⁵⁸ the lack of any constitutional requirement of ‘one vote one value’²⁵⁹ means that the weight of an individual’s vote might differ by reference to the electorate in which it is cast. While the legislatively permitted margin for discrepancy is presently relatively low (currently an allowance of 10 per cent either more or less than the average),²⁶⁰ we cannot

²⁵⁸ *Australian Constitution* s 44.

²⁵⁹ The High Court rejected the argument that a permitted variation of 10 per cent between electorate sizes contravened any constitutional requirement of ‘one vote one value’ in *Attorney-General (Ex rel McKinlay) v Commonwealth* (1975) 135 CLR 1.

²⁶⁰ *Commonwealth Electoral Act 1918* (Cth) s 66.

say that each vote carries the same weight in exercising control through the electoral accountability mechanism.

We must also consider whether the method through which votes are calculated impacts the extent to which an electoral outcome reflects the will of 'the public'. For instance, a first-past-the-post system (used in early federal elections in Australia) might be criticised on the basis that a successful party might be elected even in circumstances where the majority of the public voted for other candidates.²⁶¹ By comparison, the proportional representation method might be said to be a better reflection of control by the public, as it allows for representation in proportion to the amount of votes cast.²⁶² The preferential voting method presently used in elections for the House of Representatives might be viewed as presenting something of a midway point; votes cast for an unsuccessful candidate are not 'wasted' after being passed on to another, but a voter for a smaller party or independent is less likely to see their preferred candidate in power. One of the larger concerns about the employment of a vote as a reflection of the will of the public is that it potentially leads to a risk of the 'tyranny of the majority'.²⁶³ On this view, the election mechanism may not protect a minority that votes against a government elected by the majority. This concern also arises in the context of arguments regarding the weighting of electoral districts (eg greater weighting for votes in a rural versus metropolitan areas).²⁶⁴ While this thesis is not the place to explore this more wide-ranging debate, the key take-away point for present purposes is that there are limits on the extent to which an election result reflects the will of 'the public'; rather it may best be said to reflect the will of a *majority* of the public.

Perhaps a more balanced response to the question of *to whom* the government ought to be accountable would be to say that the government should be held accountable, not just to the public as a whole, but at the same time to individual members of the public. If we were to adopt such a joint and several approach to the

²⁶¹ Bryan Mercurio and George Williams, 'Australian Electoral Law: "Free and Fair"?' (2004) 32 *Federal Law Review* 365, 376.

²⁶² *Ibid* 377.

²⁶³ See eg John Stuart Mill, *On Liberty* (Cambridge University Press, 1989).

²⁶⁴ The constitutionality of this practice was unsuccessfully challenged in *McGinty v Western Australia* (1996) 186 CLR 140.

question of who ought to be entitled to control the government, we would potentially be able to balance our concern to ensure that the government adheres to an approach that best reflects the democratic interests of the majority, while also requiring them to be responsive to the needs of the minority. If we cannot shape a single mechanism so as to adhere to this benchmark, we might, for example, favour a balance of control via majority-based mechanisms (eg elections) with individual-based mechanisms (eg judicial review).

(c) *Who should be entitled to restoration?*

The restoration rationale is concerned with ensuring that individuals who suffer harm as a consequence of government wrongdoing are not left to bear their own loss. The question of *to whom* the agent defined in Section B of this chapter ought to be accountable would naturally centre on the harmed individual. For example, where a person is imprisoned as a result of an administrative error, there is little doubt that this individual is the person to whom the relevant government agent would owe an obligation to restore. However, as tort cases demonstrate for us, the matter will not always be so simple. One complicating factor is that there might be cases in which the ultimate victim (ie the person who in fact suffers loss or damage) is a number of steps removed from the initial government activity. So, for instance, in *Sutherland Shire Council v Heyman*²⁶⁵ it was not the initial owners who had constructed a home but the subsequent purchasers of that home who were said to have suffered loss as a result of the local council's negligent inspections during construction. In such a case, latent loss may be transferred from one party to another to appear at some later point in time. In other cases, the immediate class of victims may be of such a size as to make restoration impractical or impossible. For example, the case of *Three Rivers District Council v Bank of England [No 3]* was a claim in which hundreds of depositors were said to have suffered loss as a result of the misfeasance of the Bank of England in its supervision of a failed banking institution.²⁶⁶ Indeterminacy of loss is one of the chief concerns raised in the context of discussions about expanding the liability of government for regulatory-type

²⁶⁵ (1985) 157 CLR 424.

²⁶⁶ [2003] 2 AC 1.

Accountability Deficits and Overloads: A Missing Framework

functions, particularly in relation to pure economic loss.²⁶⁷ In order to define our accountability benchmark, it would be necessary for us to revisit a number of these well-rehearsed policy concerns and to reach a landing on whether government wrongdoing should render it liable to restore all those who have suffered loss, or only a subset who are in some way more closely connected to that government activity (eg through time or physical proximity), or only those who have suffered certain types of loss (which is considered in more detail in Section D below).

Assuming that it is possible to define the victim(s) to whom the government would owe an obligation of restoration, it is then necessary to consider who ought to be charged with seeking that restoration. Should it be a right personal to the victim that only they can exercise? Or ought we establish an independent body whose role it would be to seek restoration on a victim's behalf? At its broadest, we might even make the regime entirely open, allowing any interested person to take up the mantle and seek restoration on behalf of a victim. In deciding *to whom* the government ought to have to answer in connection with restoring harm, we might conclude that the most coherent approach would be to focus on the interests of the victim. On one view, we might say that achieving restoration is sufficiently important to the victim that we should allow broad rights of access to increase the chances that this outcome might be achieved. However, perhaps a more important factor to bear in mind is the victim's autonomy. We might, for example, be justifiably concerned if our benchmark of accountability provided a third party with the right to seek restoration of an assault victim without their consent. There might be a multitude of reasons why that victim might wish to avoid subjection to an accountability process (eg not wishing to be brought into contact with their assailant) with the result that restoration may not be their primary concern. The restoration rationale is primarily victim-oriented and, as such, it might be fitting that the choice of whether to engage an accountability mechanism would in this context lie with the victim. This is not to say that the victim's choice not to seek restoration should allow the wrongdoer to escape accountability; rather, that it may be a situation in which another rationale for accountability (eg the punitive rationale) might be

²⁶⁷ Peter Hogg, Patrick Monahan and Wade Wright, *Liability of the Crown* (Carswell, 4th ed, 2011) 249–50.

Chapter 4: A Benchmark of Accountability

engaged. There may, of course, be cases where a victim is unable to exercise their choice to seek restoration (eg due to age or disability), in which case we might think that the benchmark ought to allow a third party to bring proceedings on their behalf. However, we would likely consider these cases to be the exception rather than the rule if we take victim autonomy as our starting point.

To summarise, then, it seems that the approach most consistent with the restoration rationale for accountability would be to say that the person *to whom* the agent defined in Section B of this chapter should owe an obligation of restoration is the victim who has suffered loss or damage as a consequence of government wrongdoing. We might also say that the most coherent approach would be to leave the choice of whether or not to seek restoration with that victim, wherever possible. Of course, this conclusion leaves unresolved the much larger question of how we can define a ‘victim’ for the purposes of our accountability benchmark. This much more difficult problem is addressed in Section D below.

(d) *Who should be entitled to call for punishment?*

The final two rationales for accountability are tied to the notion of punishment: desert and deterrence. If we take these punishment rationales as our focus, how would we define our benchmark question of *to whom* the government must answer? There are a number of different options that we might explore in this respect. At its narrowest, we might limit the entitlement to seek punishment to a single defined point (eg a Director of Public Prosecution). A slightly broader approach would be to allow anyone immediately affected by the conduct complained of (eg a victim) to seek punishment. At its broadest, we would say that any interested party ought to be entitled to take steps to impose punishment on the government. In seeking to define a normative benchmark of accountability, we would need to decide which of these various options best supports the desert and deterrence rationales for accountability. Before thinking about the implications of each option, however, it is useful to return briefly to the underlying purpose of each of these rationales. The desert rationale is condemnatory in nature. It is concerned with ensuring that those who have committed wrongs of a particular nature (see Section D below) are punished on the basis that they deserve to be so. The

Accountability Deficits and Overloads: A Missing Framework

deterrent rationale is more forward-looking in nature. It is concerned with improving public governance by discouraging both the wrongdoer and others from committing similar infractions going forward. In thinking about these two rationales, there are a number of factors that might influence our choice of prosecutor.

As a starting point, if our concern is to maximise the likelihood that prosecution will take place, we might think that the best approach is to open up the right of prosecution to allow anyone to seek punishment. By casting the net widely in the first instance, we might think to increase the likelihood that someone will take on the prosecution task. In so doing, we would likely also be interested in thinking about the potential *motivations* for commencing prosecution, as there is little utility in defining a large group of potential prosecutors, none of whom is interested in the role. There are a number of observations that we might make on this point. First, unless a person is charged with the duty of prosecution (discussed below), we would likely need to consider why individuals might be inclined to perform this task in defining our benchmark of accountability. There are a number of reasons why a person might potentially be motivated to prosecute. For instance, a person who is aggrieved might be interested in participating in a prosecution out of a desire for vengeance or retribution (well-aligned with the desert rationale for accountability). Others might be motivated by the prospect of personal gain, which might be the case, for example, if punitive damages are available following a successful prosecution. Still others might have altruistic motives, seeking to prosecute in order to make a difference by discouraging that conduct going forward (aligned with the deterrent rationale for accountability). If we are concerned with maximising the likelihood of prosecution, we might be concerned to try and harness these types of motivations by setting up procedures that encourage these individuals to take on the prosecution task.

However, we might be concerned less with the *likelihood* of prosecution, and more with the likelihood of *successful* prosecution. If that is the case, we might be better to think not simply about the quantity of potential prosecutors, but whether their qualities are likely to make them an effective prosecutor. So, for instance, we might think that a person who has previous experience in prosecution and a good understanding of the

Chapter 4: A Benchmark of Accountability

relevant procedures may be better placed to achieve a successful result than someone for whom the task is new territory. We might also wish to ensure that our prosecutor is sufficiently well resourced to enable them to effectively see the prosecution through. For example, if a successful prosecution requires production of certain categories of evidence, it is unlikely that we would want to define our benchmark of accountability so as to empower a prosecutor who lacked the resources to gather that evidence. In this respect, there is much to be said for carefully considering the use of a professional prosecutor, employed and funded for the dedicated role of engaging in public prosecution. A professional prosecutor would, of course, be well-motivated to perform that function, quite simply because it would be their job to do so. Their professional role would also facilitate a degree of independence in the prosecution function. Rather than being swayed by notions of vengeance or greed, the professional prosecutor may be better placed to independently assess a situation and determine whether prosecution is warranted, thereby reinforcing the legitimacy of the function. A further factor in favour of using a professional, government prosecutor is one of optics; '[i]f punishment is the means by which society communicates its moral condemnation of bad acts, then the state is society's most appropriate proxy for communicating such condemnation'.²⁶⁸ By assigning the task of condemnation to the government, we may reinforce the seriousness of the breach.

However, there is one potential limitation on the motivations of a professional prosecutor we would need to consider. Being a part of the machinery of government, we may have concerns that a professional prosecutor might not be inclined to prosecute government officials, either from self-interest (eg fear of retribution) or from the desire to 'protect their own'. This concern underpins the rationale for the continued availability of private prosecutions in the context of the criminal law. Writing in 1883, Sir James Fitzjames Stephen suggested that the rule was likely a result of English historical influences as opposed to a product of design.²⁶⁹ However, in a passage cited

²⁶⁸ Miriam H Baer, 'Choosing Punishment' (2012) 92 *Boston University Law Review* 577, 603.

²⁶⁹ James Fitzjames Stephen, *A History of the Criminal Law of England* (Macmillan, 1883) 496.

Accountability Deficits and Overloads: A Missing Framework

with approval by Priestly JA in *Spautz v Gibbs*,²⁷⁰ Stephen pointed to a potential justification for the availability of private prosecutions as follows:

[N]o stronger or more effectual guarantee can be provided for the due observance of the law of the land, by all persons under all circumstances, than is given by the power, conceded to every one by the English system, of testing the legality of any conduct of which he disapproves, either on private or on public grounds, by a criminal prosecution. Many such prosecutions, both in our days and in earlier times, have given a legal vent to feelings in every way entitled to respect, and have decided peaceably, and in an authentic manner, many questions of great constitutional importance.²⁷¹

This sentiment is engaged in cases where matters of public interest or public policy are at issue. For instance, in *MacLaurin v Hall*, Pring J referred to Stone's Justices' Manual as authority for the proposition that

when the offence is not an individual grievance, but is a matter of public policy and utility, and concerns the public morals, any person has a general power to inform and sue for the penalties, unless the Statute creating the offence contains some restriction or regulation limiting the right to some particular person or party.²⁷²

The notion of a constitutional mandate in favour of the availability of private prosecution can also be seen in concerns about relying solely on state officials to enforce the criminal law. What of circumstances where state prosecutors refuse to enforce the law? In such circumstances, the availability of private prosecutions can be seen to perform a critical role in reinforcing the rule of law. This notion is reflected in Lord Diplock's reference to the right of private prosecution in *Gouriet v Union of Post Office Workers* as a 'useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law'.²⁷³

Drawing these various arguments together, it is possible to see that, for the purposes of the desert and deterrence rationales, we need to make choices about which approach is best adapted to achieving our aims. While we might think that the best chance of maximising the likelihood of a prosecution is to define a wide class of potential prosecutors, we may ultimately conclude that the chances of a successful prosecution are increased by limiting the task to a central professional prosecutor.

²⁷⁰ (1990) 21 NSWLR 230, 247.

²⁷¹ Stephen, above n 269, 496.

²⁷² (1913) 13 SR (NSW) 114, 119 citing *Stone's Justices Manual* (40th ed, 1908) 866.

²⁷³ [1978] AC 435, 97.

However, to bolster the legitimacy of that role, we might also need to consider retaining a residual right for others to commence prosecutions in circumstances where the professional prosecutor declines to do so.

3 Summary

In summary, the question of *to whom* the parties discussed in Section B of this chapter ought to be accountable is complicated by a number of matters. First, there are a number of different factors that might contribute to our views about what makes a good prosecutor, including the size of the class, their resources, skills, knowledge and motivations. Secondly, the question of what makes a good prosecutor will differ depending on the accountability rationale that we adopt. So, while we might think that the task is best suited to a professional prosecutor in the case of the punitive rationales of desert and deterrence, we might favour a far more wide-ranging right of access in respect of the control and transparency rationales. Again, if we are seeking to define a benchmark of accountability, we need to be able to do so in a manner that accommodates these differing considerations.

D FOR WHAT SHOULD THEY BE ACCOUNTABLE?

The third question that is frequently asked in the context of describing accountability mechanisms is *for what* the agent is held accountable. Using this descriptive framework we might say that an agent is accountable to explain their conduct with respect to ‘finances’, ‘politics’, ‘law’ and the like.²⁷⁴ However, in order to transform this descriptive framework into a normative benchmark, we need instead to be able to answer the question ‘for what *should* an agent be held accountable?’ In other words, what conduct or outcomes do we think should attract the operation of an accountability mechanism if we are to achieve some ‘ideal amount’ of government accountability? The enormity of this undertaking is one of the most significant barriers that stands in the way of defining a benchmark that we might use to measure accountability deficits and overloads. There

²⁷⁴ See eg Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 28; Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness, and Citizenship*, above n 24, 23–28.

are quite simply as many answers to this question as there are people you might choose to ask. To catalogue the full range of options would likely fill the remaining space in this thesis, for which reason the following discussion is limited in scope. Thankfully, this lack of depth does not pose any serious limitation on this project, as the ultimate goal served by this thesis is to highlight the scale of the task of defining a benchmark of accountability. The point being made here is that, in order to adopt a normative benchmark of accountability, we would need to be able to come to a landing on what types of outcomes or conduct would be targeted by the benchmark. The fact that there are so many options to choose between (including a number not canvassed here) makes good that point.

One way of approaching the task would be to start by articulating the larger picture of 'for what' the government should be held accountable in terms of the different values we would expect the system to reflect. Even at this level of abstraction, however, the task is a difficult one. How would we choose which values are sufficiently important to be incorporated into the benchmark? Those who have attempted to catalogue values underpinning public law point to values such as legality, fairness, consistency, rationality, integrity, honesty, good faith, openness, accessibility, participation, efficiency and effectiveness, amongst others.²⁷⁵ While it is difficult to disagree with the merits of these various values, it is a large leap from identifying such a catalogue to crafting a benchmark pursuant to which government conduct might be measured. Values are slippery in nature and subject to evolution over time. If we allow the same to be the case in respect of our accountability benchmark, we would need to accept that the benchmark will be subject to ongoing development and may change and evolve in accordance with public expectations.

²⁷⁵ See eg Chief Justice Robert French, 'Administrative Law in Australia: Themes and Values Revisited' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 24; Mark Aronson, 'Public Law Values in the Common Law' in Mark Elliot and David Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge University Press, 2015) 134, 144-45; Michael Taggart, 'The Province of Administrative Law Determined' in Michael Taggart (ed), *The Province of Administrative Law* (Hart Publishing, 1997) 1, 3; Judith Bannister et al, *Government Accountability: Australian Administrative Law* (Cambridge University Press, 2015) 20.

Chapter 4: A Benchmark of Accountability

Even assuming that it is possible to come to a landing on a set of values we believe should underpin our accountability standards, a second difficult task is that of defining standards to give effect to these values. Adopting the above catalogue of values as a foundation, we would need to attempt to construct a benchmark pursuant to which the government would be held accountable for failing to exercise powers within legal boundaries (legality), for acting unfairly in the exercise of its powers (fairness), for exercising powers in an inconsistent or arbitrary manner (consistency) and so on. However statements such as these are rather question-begging. For example, a benchmark which provided simply that the government must not act 'unfairly' tells us very little about the types of conduct that would demand an accountability response. Instead, we would need to build up detailed sets of standards that reflect each of these values. For instance, we might adopt as part of our accountability benchmark the fair hearing rule, requiring that an affected individual have the opportunity to be heard before an adverse decision is made. This standard would contribute to the accountability value of fairness, and a breach of that standard would be one for which the agent ought to be held accountable. But this would only be one small subset of the range of standards that would need to be constructed in order to give effect to the value of fairness. Until we are able to articulate the full set of standards that we say would represent government accountability, we cannot use our benchmark to point out potential accountability deficits (ie circumstances where a breach of a standard fails to enliven an accountability mechanism) or overloads (ie circumstances where a breach of a standard enlivens multiple accountability mechanisms, or the wrong ones).

A third difficulty in utilising a catalogue of values to define standards for the purposes of our accountability benchmark is that such values may at points come into conflict. So, to take an example from the above administrative law values, the most efficient means of dealing with a matter (eg accepting or rejecting all applications on the papers) may not be the most fair (eg where an individual is denied a full opportunity to put their case). Unless we could be satisfied with an accountability benchmark that pulled in two opposite directions (ie simultaneously demanding both maximum efficiency and maximum fairness), we would need to be able to define our standards so

as to strike an appropriate balance between these sets of values in circumstances where there is a tension between them. The task would be even further complicated if we permitted the standards to vary depending on context (eg if we were to say that fairness is more important than efficiency where individual rights are at stake). Again, then, defining our benchmark of accountability requires us to make difficult choices about what it means for the government to be 'accountable' in a given instance.

A final (and arguably the most difficult) aspect of the task before us is in articulating the manner in which our accountability benchmark would link the standards that we select to the various rationales of accountability. So, for instance, if we were to adopt the fair hearing rule as a relevant component of the benchmark, would we say that a breach of this standard (ie denying a fair hearing) is one that would enliven the desert rationale? We might have serious reservations about adopting a benchmark that imposed a condemnatory punitive sanction on an official who unknowingly excluded a party from being heard based on a mistake in the file paperwork. The real difficulty, then, is that we need to find a way to draw a link between each rationale, and the standard(s) that ought to enliven it. One way we might choose to explore this idea is to focus on two of the components that are relevant in defining standards of conduct, and to explore how they might interact to define standards for the purposes of each rationale: *fault* and *outcomes*.

1 Fault: defining standards by reference to a wrongdoer's state of mind

The notion of fault is one that might play a significant role in defining the standards of conduct that make up our accountability benchmark. 'Fault' captures a range of factors relating to an agent's state of mind. Most frequently, it is conceived of as the degree of intention attaching to an act. However, also bound up in the notion of fault are questions of motive, knowledge and belief. Looking first at intention, it is a concept that refers to the degree of deliberateness attaching to an agent's state of mind. The three degrees of deliberateness that are relevant for present purposes are intention, recklessness, and negligence. Intention is essentially a deliberate choice of conduct,

Chapter 4: A Benchmark of Accountability

which may or may not be designed to achieve certain ends.²⁷⁶ Recklessness is one step behind intention, though it is also deliberate in nature.²⁷⁷ Recklessness is ‘awareness of a risk that certain consequences will result from conduct, and indifference to that risk’.²⁷⁸ In a context where a risk taken is unreasonable, indifference or disregard to that risk will therefore amount to recklessness. In this context, it is important to distinguish between the idea of ‘not caring’ whether a risk may eventuate, and the legal notion of recklessness, which is more properly characterised as ‘deliberately taking a known risk’.²⁷⁹ Negligence is sometimes thought about in terms of ‘inadvertence’ or ‘inattention’,²⁸⁰ however it is more appropriately described as a failure to adhere to a prescribed standard.²⁸¹ In other words, a defendant can be equally accountable for an oversight as for an intended consequence.

Motives are also often relevant in the context of an assessment of fault. In simple terms, motivation refers to a person’s reason for doing something. While related to the concept of intention, the two terms are not synonymous. For example, a person may drive over the speed limit in a motor vehicle with a murderous desire to harm others, or out of a desire to experience the thrill of driving fast, or out of a desire to race an ill child to the hospital. In each case the conduct of driving over the speed limit is deliberate, but the motive for that intentional conduct differs. The consequences of that conduct (such as injury to a pedestrian) may therefore correlate with the motive (as in the case of a murderous motive), or be an unintended side effect. This example also says something about the various character of motives that may drive a person’s behaviour. Good motives (such as racing an ill child to seek medical care) may in certain circumstances justify otherwise blameworthy conduct.²⁸² ‘Bad’ motives may be divided into the categories of intrinsically malicious or collaterally malicious.²⁸³ Intrinsically malicious motives are those which are inherently reprehensible, such as in the above

²⁷⁶ Peter Cane, ‘Mens Rea in Tort Law’ (2000) 20 *Oxford Journal of Legal Studies* 533, 535–36.

²⁷⁷ Ibid 536.

²⁷⁸ Ibid 535.

²⁷⁹ Cane, *Responsibility in Law and Morality*, above n 232, 80.

²⁸⁰ Ibid 79.

²⁸¹ Cane, ‘Mens Rea in Tort Law’, above n 276, 536.

²⁸² See eg ibid 541.

²⁸³ This is the terminology proposed by Cane: ibid 539.

example wanting to use a motor vehicle to injure or kill others. Other such motives would include spite, or wanting to gain at the expense of another. Collaterally malicious motives are those which, while not intrinsically bad, are not authorised in the circumstances. The thrill-seeking desires of our dangerous driver would fall into this category, as would acting for personal gain or some other goal which the circumstances render inappropriate.

A person's knowledge is a further state of mind that contributes to their degree of fault. There are a number of observations that we can make about the relevance of a person's knowledge. First, the fact that a person turns out to have been wrong about what they thought they knew is not determinative of fault. To take an example, a person may set fire to a house believing it was inhabited. If the house is in fact inhabited, we can say that the wrongdoer 'knew' of it. If it actually transpires that the inhabitants of the house had left by the back door before the fire was set, we cannot say that the wrongdoer 'knew' them to be inside, but we can say that the wrongdoer 'believed' them to be inside. In either case, we are concerned with attributing fault based on the wrongdoer's state of knowledge or belief, rather than the empirical correctness of their state of knowledge or belief. Secondly, there are varying degrees of knowledge that may be relevant in determining fault. For instance, we may define fault by reference to a wrongdoer's actual, subjective knowledge or belief. Or we may extend fault to also capture knowledge that has been wilfully disregarded, in the sense that a wrongdoer has 'shut their eyes' to information, in the manner of recklessness as discussed above. We may further extend fault into an objective enquiry, so as to capture information that we say a wrongdoer 'ought to have known', or further, by imputing a wrongdoer with information (for example, by finding that someone has constructive knowledge of information because of the manner or location in which it was held).²⁸⁴ Thirdly, we may think about knowledge as a temporal issue in defining fault. For example, we may impose fault on the basis of past matters (eg a visa applicant's prior serious offences), or present matters (eg that there is presently a contract on foot containing certain terms,

²⁸⁴ For example, a Minister may be taken to have constructive knowledge of information contained in a relevant departmental file: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 31.

Chapter 4: A Benchmark of Accountability

or the nature of a person's living accommodations),²⁸⁵ or even future matters (eg if a fire starts in a faulty fireplace, it is foreseeable that it will cause damage to that property and to the neighbouring property,²⁸⁶ or the impact of removal of a bat colony on the species as a whole).²⁸⁷

Sitting outside the concept of fault is the notion of strict liability. In circumstances where liability is strict, contravention of a prescribed norm will give rise to liability irrespective of whether or not the conduct coincides with fault, as defined by reference to intention, motives and knowledge. There are essentially four types of strict liability.²⁸⁸ The most commonly thought of variety is that of rights-based strict liability, which sees someone held liable for the infringement of a right irrespective of whether or not the infringement was intentional, reckless or negligent, as in the case of the tort of trespass. Activity-based strict liability arises where engagement in a particular activity (such as a relationship with another person, or activities prescribed in statutes) is seen as sufficient to impose liability, irrespective of fault. Outcome-based strict liability is the type of liability arising where a person is held responsible for being the cause of a particular consequence irrespective of their fault. Finally, passive strict liability sees a person obliged to give up a benefit irrespective of whether or not there was some fault on their part in receiving it (as in the case of receipt of mistaken payments).

Taking these various ideas as a whole, we can see that fault is an amalgam of various enquiries into a wrongdoer's mind. We might pull together these ideas to describe three categories of fault, as follows. The first category, of *subjective fault*, would capture intentional conduct undertaken out of an inherently wrongful motive, such as spite, or desire to harm. Irrespective of motive, we might also include intentional or reckless conduct undertaken in the belief that harm would, or was likely to, arise. The second category, of *objective fault*, would not be concerned with the subjective intention, motives and knowledge. Instead, it would be focused on what a person ought to have

²⁸⁵ *Moore v Secretary, Department of Social Services* [2015] AATA 669.

²⁸⁶ *Pyrenees Shire Council v Day* (1998) 192 CLR 330.

²⁸⁷ *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts* (2011) 180 LGERA 99.

²⁸⁸ These four categories are those identified by Cane: Cane, *Responsibility in Law and Morality*, above n 232, 82–84.

Accountability Deficits and Overloads: A Missing Framework

done, desired or known. Liability within this category of fault involves an implicit judgment that a person ought to have acted differently, or ought to have appreciated that their conduct was likely to have certain consequences for others. While it uses the label 'fault', what we are really dealing with in this category is a failure to comply with a standard of conduct.²⁸⁹ The final category, of *strict liability* is not a quality of fault, but instead reflects the proposition that liability attaches irrespective of fault. In this category, a wrongdoer's degree of intention, motives and knowledge are irrelevant, as is the question of whether the wrongdoer ought to have acted differently. Therefore, this category equally captures innocent and malicious contraventions of standards of conduct. It is important to note that these three categories of fault are not mutually exclusive. For example, a regulatory provision may make it an offence to cause water pollution in a certain area, irrespective of fault. If a person deliberately pollutes that river out of a desire to cause damage to a neighbour's property, we may not only conclude that they have contravened the strict liability provision, but also that their actions are intentionally malicious (subjective fault), and that they ought to have acted differently (objective fault).

Fault is a recurring theme in the literature on responsibility. Many explanations of responsibility employ as their starting point the idea that a person should only be held responsible in circumstances where they are culpable, and that a person can only be culpable in circumstances where they possessed a requisite level of mental engagement (usually that their conduct was intentional and the resulting consequences were intended, or at least foreseen).²⁹⁰ For example, in *R v G*, Lord Bingham made the comment that:

It is clearly blameworthy to take an obvious and significant risk of causing injury to another. But it is not clearly blameworthy to do something involving a risk of injury to another if one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment.²⁹¹

²⁸⁹ See eg Cane, 'Mens Rea in Tort Law', above n 276, 536.

²⁹⁰ H L A Hart, *The Concept of Law* (Clarendon Press, 1961) 173, cited in Cane, *Responsibility in Law and Morality*, above n 232, 95.

²⁹¹ [2004] 1 AC 1034, [32].

Chapter 4: A Benchmark of Accountability

If we were to adapt this line of thinking for the purposes of our accountability benchmark, the idea of restricting responsibility (or accountability) to cases in which a person acted intentionally is bound up in the notion of choice: it is appropriate to hold people accountable for the consequences of the choices that they have made.²⁹² For this reason, we have little difficulty holding a person responsible (or accountable) if they have acted on the basis of subjective fault, out of a desire to cause harm, or foreseeing but not caring that they will cause harm. The rationale becomes more tenuous the further we move away from deliberate choice, or subjective fault, however.²⁹³ On what basis can we impose liability where a person has not actually adverted to the possibility of harm in any subjective sense? Three possible justifications are the theories of unexercised capacity, outcome-responsibility and relational responsibility.

The idea of unexercised capacity informs Hart's justification of criminal punishment outside the realm of actual choices and deliberate conduct. The crux of the theory is that a person might be held responsible not only for their deliberate conduct, but for failing to exercise 'the capacities and powers of normal persons to think about and control their conduct'.²⁹⁴ In other words, if a person could have acted otherwise than they did, we can justify holding that person responsible (or accountable) for the consequences of their unexercised choice to have taken that alternative path. This enquiry becomes one part objective and one part subjective: we ask objectively whether a person has failed to act in accordance with reasonable standards, and then ask subjectively whether that person was in fact capable of meeting those standards. Such an approach excuses those who were unable to meet objectively established standards, by reason of physical or mental incapacity, for example, and has been described as the 'individualisation of the negligence standard'.²⁹⁵ It is in this respect that the unexercised capacity theory falls short of offering a complete explanation for the attribution of responsibility outside the context of deliberate wrongdoing. The enquiry into what an

²⁹² Cane, *Responsibility in Law and Morality*, above n 232, 95.

²⁹³ *Ibid.*

²⁹⁴ H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 2nd ed, 2008) 140.

²⁹⁵ See eg Michael Moore and Heidi Hurd, 'Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence' (2011) 5 *Criminal Law and Philosophy* 147, 151.

individual was capable of having done differently is essentially a subjective enquiry into the possible alternatives that were available to that individual. But the objective fault criteria considered in this thesis go further than this, being concerned with identifying what a reasonable person in the circumstances (not the individual in question) might have done differently. In this sense, when we say that a person ought to have acted differently than they did, it is not a complete answer to say that there were factors outside the person's control that influenced their inability to meet minimum accepted standards of conduct. Therefore, the idea of unexercised capacity does not take us much further than the notion liability based on subjective fault.

Outcome-responsibility, as posited by Honoré, provides a second possible justification for the imposition of responsibility outside the context of subjective choice. For Honoré, the notion of responsibility cannot be explained solely by reference to a person's behaviour, or fault, or choices.²⁹⁶ Rather, it is also an obligation that can be voluntarily assumed (as in the case of a business manager or political leader, who assumes responsibility in taking on that role), or may be imposed through societal norms (such as the responsibility owed to one's family).²⁹⁷ Irrespective of its source, responsibility for Honoré 'involves a combination of actual or assumed control and risk', and within that frame it is appropriate that a person who is entitled to take the credit arising from their conduct is also subjected to the blame (or 'discredit').²⁹⁸ In the context of his justification of non-fault-based liability, Honoré employs this notion of a credit-discredit balance book to argue that, when applied consistently and equitably over time, this broader framework of responsibility produces overall benefit for individual members of society.²⁹⁹ However, he distinguishes between the idea of allocation of outcome responsibility, and liability to compensate: some 'extra element' is needed in order to superimpose a legal sanction on the allocation of responsibility more generally.³⁰⁰ In addition to liability based on fault, Honoré argues that legal sanction may be appropriate where 'the conduct of the harm doer carries with it a special risk of

²⁹⁶ Tony Honoré, *Responsibility and Fault* (Hart Publishing, 1999) 126.

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.* 130.

²⁹⁹ *Ibid.* 26–27.

³⁰⁰ *Ibid.* 27.

Chapter 4: A Benchmark of Accountability

harm of the sort that has in fact come about'.³⁰¹ Again, this theory does not take us much further in our accountability analysis. The attribution of responsibility for outcomes does not of itself extend to an obligation to restore, and the search for Honoré's 'extra element' leads us into a circular analysis, searching for the elusive justification for the imposition of punitive and restorative remedial responses outside cases of subjective fault.

The third theoretical justification holds more promise. This view, proposed by Cane, relies on the relational nature of responsibility to justify remedial responses outside cases of fault.³⁰² Unlike the unexercised capacity and outcome-responsibility theories, which are essentially focused on the wrongdoer, Cane's argument is that responsibility is a two-sided affair, that should take into account not only the acts and mindset of the wrongdoer, but the interests of the victim and society more generally. Through a distributional analysis, a balance is struck between the interests of the parties, in some cases therefore supporting the imposition of obligations to repair in absence of fault.³⁰³ In other words, a person might be held responsible to repair outside cases of subjective fault by virtue of burdens inherent in the relationship between the parties. These observations take on particular significance in the context of accountability, which is by definition a relational concept. A relationship of accountability is one in which one party is entitled to hold another accountable for failure to meet defined standards of conduct. There is much to be said for viewing the operation of an accountability mechanism as the striking of a balance between the interests of the two parties to that relationship, which in some cases may justify the application of remedial responses from the courts outside cases of subjective fault.

Having explored what we mean by 'fault' and its potential relevance in the context of accountability, we can refer back to these ideas in thinking about the extent to which the various types of 'fault' should define the standards employed within our accountability benchmark.

³⁰¹ Ibid.

³⁰² Cane, *Responsibility in Law and Morality*, above n 232, 108.

³⁰³ Ibid 108–09.

2 Outcomes: defining standards by reference to whether outcomes ‘matter’

A second concept that we might refer to in defining the standards that constitute our accountability benchmark is that of ‘outcomes’, used here to refer to the often intersecting legal notions of causation and remoteness. Causation is a somewhat amorphous concept, which in the legal context devolves into a range of technical tests. This section does not propose to analyse those legal tests, but instead attempts to take the lead from Hart and Honoré to search out the ‘commonsense’ or ‘plain man’s notion of causation’.³⁰⁴ Hart and Honoré’s goal resonates strongly with the present accountability analysis. When viewed through the lens of accountability, the ultimate objective of the mechanisms discussed in this thesis are to support the legitimacy of government. It is not for lawyers and judges to determine whether or not an accountability mechanism succeeds in this task. Rather, it is a matter for the people. It is understandable that the ordinary person would not be much impressed by an accountability mechanism which sought to assign responsibility for outcomes by reference to technical tests that sit uncomfortably with common understandings of fairness and justice. In this context, Hart and Honoré’s goal of understanding causation by reference to ‘the ordinary person’s ideas of when it is fair to punish or seek compensation’³⁰⁵ would appear to be a better starting point. Against this background, this section seeks to unpack one of the core themes in the literature on personal responsibility: do outcomes ‘matter’? Is an agent to be held accountable based on their actions, or on the basis of the results of those actions? This question raises broad philosophical issues around the concept of moral luck.

In asking whether outcomes ‘matter’ in a given scenario, a common way to frame the debate is by reference to a hypothetical example:³⁰⁶ two individuals (here called

³⁰⁴ H L A Hart and Tony Honoré, *Causation in the Law* (Oxford University Press, 2nd ed, 1985) 1.

³⁰⁵ Jane Stapleton, ‘Law, Causation and Common Sense’ (1988) 8 *Oxford Journal of Legal Studies* 111, 112.

³⁰⁶ The hypothetical is framed in a variety of ways and with different names for the players, but is generally similar in all essentials. See eg Joel Feinberg, ‘Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It’ (1995) 37(1) *Arizona Law Review* 117, 117–18; David Lewis, ‘The Punishment that Leaves Something to Chance’ (1989) 18 *Philosophy and Public Affairs* 53, 53; Jeffrey Brand-Ballard, ‘Moral Emotions and Culpability for Resultant Harm’ (2011) 42 *Rutgers Law Journal* 315, 317.

Chapter 4: A Benchmark of Accountability

Attempter and Succeeder) independently make the decision to commit murder. Attempter decides to kill Lucky, and Succeeder decides to kill Unlucky. Both Attempter and Succeeder use the same type of gun, loaded with the same ammunition, position themselves the same distance from Lucky and Unlucky respectively, and fire their respective weapons with the same intention of causing their victims a fatal wound. As it transpires, Succeeder's bullet strikes and kills Unlucky, but Attempter's bullet misses and Lucky survives. While different explanations are offered for Lucky's survival (she happened to wear a bullet-proof vest that day, or to bend to pick something up from the ground at a fortuitous time, or Attempter was distracted at the final moment by an insect biting her hand), the underlying idea remains the same: the fact of Lucky's survival is attributable to luck and not to some action or inaction on Attempter's part. The relevant question for present purposes is whether Attempter and Succeeder ought to be held accountable solely by reference to the quality of their fault (ie their conduct undertaken with the intention to harm Lucky and Unlucky), or by reference to the outcome of their conduct (ie Lucky's survival and Unlucky's death). In other words, is Attempter less blameworthy than Succeeder on the basis that luck intervened and preserved Lucky's life? And if so, ought Attempter to be subject to a lesser sanction than Succeeder?

This conundrum is one that has attracted many theorists over many years.³⁰⁷ Those who advocate for equal sanction of Attempter and Succeeder believe that the outcomes of their respective actions are irrelevant to liability (equal sanction proponents). Those who advocate that Succeeder should be subject to a more severe penalty than Attempter believe that outcomes are relevant to the question of liability (differential sanction proponents). As a starting point in this debate, it is important to bear in mind that even amongst differential sanction proponents there is a general consensus that Attempter

³⁰⁷ See eg Sanford Kadish, 'Foreword: The Criminal Law and the Luck of the Draw' (1994) 84 *Journal of Criminal Law and Criminology* 679; Larry Alexander, Kimberly Kessler Ferzan and Stephen Morse, *Crime and Culpability: A Theory of Criminal Law* (Cambridge University Press, 2009); Michael Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (Oxford University Press, 2009); Lewis, above n 306; George Fletcher, *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial* (University of Chicago Press, 1988); Feinberg, above n 306; Thomas Bittner, 'Punishment for Criminal Attempts: A Legal Perspective on the Problem of Moral Luck' (2008) 38 *Canadian Journal of Philosophy* 51; Brand-Ballard, above n 306.

deserves to be sanctioned: '[t]here is no question that attempters and riskers deserve punishment even if they do not cause harm'.³⁰⁸ The crux of the debate is, therefore, not directed at the question of whether Attempter ought to be sanctioned, but whether Attempter deserves a more lenient sanction than Succeeder. The divergence in the literature between differential sanction and equal sanction proponents can often be traced to core disputes about identification of the underlying purpose of holding people responsible for their actions. In other words, the question of whether or not outcomes 'matter' is to a significant extent dependent on what objective we are seeking to achieve. These observations are particularly pertinent in thinking about defining standards of conduct for the purposes of the various rationales of accountability as explored below.

3 Defining standards: a rationale-based approach

Having discussed the notions of fault and outcomes at a high level, it is possible to start unpacking the possibilities of how we might frame our standards of conduct for the purposes of a benchmark of accountability.

(a) *Transparency: accountability for 'everything'*

Transparency has been described in Chapter 1 as a minimum defining feature of accountability. Its purpose is to make government activity accessible for public scrutiny, in order to facilitate public dialogue regarding both the ultimate outcomes of government activity and the processes that have been used to reach those outcomes. If our chief concern is to facilitate transparency, then we might reach the view that the government ought to be held accountable for 'everything'. We would not wish, for example, to limit access to information only to those circumstances where the government has already been shown to have breached some obligation or acted in a faulty way. In fact, if we were to limit access to circumstances where the government has already been 'caught out', we would severely inhibit our capacity to uncover wrongdoing, which is antithetical to the notion of accountability. The transparency

³⁰⁸ Alexander, Ferzan and Morse, above n 307, 172.

Chapter 4: A Benchmark of Accountability

rationale would likely demand a very open-ended response to the question of *for what* the government ought to be held accountable in order to support this investigatory role.

It is also relevant to note that facilitating transparency does not only support the goal of uncovering potential wrongdoing. There will be cases in which transparency reveals commendable behaviours, attitudes and reasoning in our government officials. We can contribute to accountability by bringing examples of good and sound administration to light, thereby reinforcing public trust in our system of governance. In fact, if we only used the transparency function to uncover wrongdoing, we might even risk undermining public trust in government, presenting a skewed image of the degree of wrongdoing and corruption present within our system of governance. Instead, using transparency to expose all machinations of government might present a more balanced and accurate picture by locating incidences of wrongdoing within the broader picture of otherwise acceptable day-to-day government operations. In this sense, there is much to be said for the notion that, when viewed through the lens of the transparency rationale, the question of *for what* the government *should* be accountable should be answered: everything.

Of course, this simplistic assessment does not take into account any of the circumstances in which some other concern or objective outweighs that of accountability. We might, for instance, think that concerns to protect individual privacy, or national security, or commercial interests (amongst others) justify narrowing the scope of information that ought to be made available within the confines of an accountability regime. One of the difficulties, then, in defining the benchmark of accountability is how to identify the full catalogue of competing interests that might pull against full transparency, and how to strike an appropriate balance between those interests. The extent of this difficulty is in part evidenced by the experience of crafting Australia's freedom of information regime. While the regime is primarily concerned with facilitating access to government information, the right of access has been restricted in a range of circumstances, including where the release of information could affect national security or public safety, or expose trade secrets, or reveal privileged

advice, or affect personal privacy.³⁰⁹ Similarly, the regime has built in a right of refusal in circumstances where responding to the request ‘would substantially and unreasonably divert the resources of the agency from its other operations’, or ‘would substantially and unreasonably interfere with the performance of the Minister’s functions’.³¹⁰ The effect of this right of refusal is to privilege efficiency and cost effectiveness over transparency in those circumstances. These limits to the transparency rationale in the context of freedom of information demonstrate the difficulty of crafting a regime that strikes a balance between competing interests. While we might say that a maximum transparency-oriented regime would facilitate accountability for ‘everything’, we might decide to temper this position to take into account other interests.

(b) Control: accountability for excess of power

The control rationale of accountability is reflected in the delegation model of government, its goal being to ensure that power is exercised by government agents in accordance with the interests of the citizens they represent. So, how would the concepts of fault and outcomes assist in determining whether the control objective of accountability is engaged?

Looking first at the concept of fault, we might reach the view that the control rationale would embrace a strict liability approach for two key reasons. First, if we agree that the control rationale is concerned with ensuring that public power is exercised within defined boundaries, to limit control only to subjectively faulty (eg intentional or knowing) contraventions would be to redefine those boundaries in purely fault-based terms. Instead of setting a rule requiring agents to afford fair hearings (a strict approach), our accountability regime would only require agents to avoid *intentionally* failing to provide fair hearings. In so doing, we would shift the focus away from the value underpinning the original boundary (ie to ensure that power is exercised fairly) and instead construct a fault-based boundary (ie to ensure that agents *try* to exercise power fairly). This would have potential ramifications for our ability to define boundaries in which power can be exercised, as we would only be able to police boundaries drawn on

³⁰⁹ *Freedom of Information Act 1982* (Cth) Part IV.

³¹⁰ *Ibid* ss 24 and 24AA.

Chapter 4: A Benchmark of Accountability

fault-based lines. A second reason we might adopt a strict liability approach to control is that it makes no real difference to our government agents, as it imposes no additional burden. As explored in Section E below, the means used to give effect to the control rationale are essentially concerned with reinforcing boundaries and requiring government agents to perform their roles within the confines of existing parameters. In circumstances where an agent is required to undertake some action, that action is, in essence, an existing, rather than new, obligation and redirects the official onto the path that they ought to have taken in the first place. For this reason, we might have no difficulty justifying control irrespective of an official's degree of fault; our benchmark of accountability might provide for control on a strict liability basis.

Looking, then, at outcomes, would we say that outcomes 'matter' for the purposes of attracting accountability's control objective? In answering this question, it is necessary to bear in mind the different ways of achieving control. As explored in Section E below, control may be achieved through reinforcing the boundaries of power, through unwinding expressions of incorrectly exercised power, or through requiring certain things be done, or not done, within permitted boundaries. For this reason, we can consider the suite of public law writs and remedies (certiorari, mandamus, prohibition, injunctive and declaratory relief) as various expressions of control over the exercise of public power (see Chapter 6). For the purposes of defining a benchmark of accountability, outcomes may play a role in deciding whether a control-based response is appropriate and, if so, of what type. So, for instance, we might say that, where an agent has already taken steps to bring the exercise of power back within permitted boundaries, control may be best achieved through a declaration of breach, thereby reinforcing those boundaries. Our benchmark would say, in such a situation, that there is no accountability deficit in not pursuing more intensive control-focused remedies, as there is no longer any transgression standing to be corrected. If there is no ongoing impact in a practical sense, there is nothing that needs to be 'controlled' in a forward-looking capacity. On the other hand, where an agent's decision has ramifications going forward (again determined by looking at the outcomes, or expected outcomes, of an agent's conduct), we might define our benchmark so as to allow nullification of that

decision. In yet other cases, where an agent's current course is likely to lead to particular outcomes (eg continued breaches), we might define our benchmark to allow more intense control-focused orders. So, for instance, where an agent has threatened to engage in conduct in excess of permitted boundaries, an order prohibiting that conduct may be the most appropriate expression of control.

Taking these ideas together, we might reach the conclusion that if we adopt the control rationale for accountability, a strict liability (rather than fault-based) approach is appropriate. The purpose of the control objective is to police the boundaries within which public power can be exercised and, viewed in that light, it is appropriate that any transgression, whether intentional, unreasonable or entirely innocent, is open to challenge: control is about accountability irrespective of fault. However, in exercising this control, the nature of the appropriate regulatory approach will be influenced by the second element of 'outcomes'; in some cases a mere declaration of breach will be sufficient to re-establish control, whereas in others a more coercive control-based approach will be appropriate. In determining which is the appropriate approach in a given case, it will be relevant to consider what impact the relevant remedy will have, an essentially outcome-focused enquiry.

(c) *Restoration: accountability for causing harm*

One of the more difficult aspects of the benchmark to grapple with is the question of *for what* the government ought to be accountable for the purposes of the restoration rationale. At first blush, the answer is quite a simple one: causing loss or damage. In this sense, it is possible that outcomes would play a critical role in defining the restoration rationale. Returning to the hypothetical above, Succeeder (and not Attempter) would be the subject of an obligation of repair, though both might warrant punishment—see discussion below. But on closer inspection there are a number of difficult choices that we must make in determining the circumstances in which loss or damage ought to be remedied. The first key decision to be made is in defining the *types* of loss or damage that the benchmark would encompass. For instance, would it be limited to personal injury? Mental harm? Property damage? Pure economic loss? Interference with valued rights and interests (eg reputation, liberty)? Hurt feelings? The most expansive form of

Chapter 4: A Benchmark of Accountability

accountability benchmark would define loss or damage in very broad terms, so as to encompass any and all negative impacts on citizens, while a more narrowly defined benchmark would seek to classify only certain losses as ‘worthy’ of restoration. As experienced in the law of tort, the task of in deciding where a line might be drawn in defining the categories of loss and damage that the benchmark would protect is a complex one.

A second key difficulty in defining the benchmark is in determining the manner in which outcomes are to be attributed to an agent. ‘[C]ausation is a precondition’ of obligations to repair harm,³¹¹ but the much more difficult aspect of the enquiry is deciding what counts as ‘causation’ in a given instance. If the experience of tort lawyers is anything to go by, our benchmark will need to be quite sophisticated in delimiting the outcomes for which the government ought to be held accountable. As tort lawyers understand it, analysis of legal causation comprises two stages.³¹² The first stage is a factual analysis, involving an objective enquiry into the factors that ultimately contributed to a particular outcome.³¹³ The second stage is one of attribution, requiring a value judgement as to whether an actor should be held responsible for the outcome.³¹⁴ Even the first, objective, stage of the enquiry is not an entirely straightforward matter. For the purposes of many torts, the Australian courts apply the ‘but for’ test of causation, pursuant to which a factor will qualify as a cause if the harm would not have been occasioned but for the conduct in question. In other words, the agent’s conduct is a necessary condition of that harm.³¹⁵ Though it is widely used, the ‘but for’ test has been criticised as a somewhat blunt test of factual causation, on the basis that it can be over-inclusive (eg a person would not have been injured *but for* the fact that they were born), or under-inclusive (eg if a person is struck simultaneously by two lethal gunshots, their death cannot be said to have been occasioned *but for* either gunshot).³¹⁶ Instead, it has been suggested that the so-called ‘NESS’ test of causation might offer a more nuanced

³¹¹ Cane, *Responsibility in Law and Morality*, above n 232, 139.

³¹² Jane Stapleton, ‘Perspectives on Causation’ in Jeremy Horder (ed), *Oxford Essays in Jurisprudence (Fourth Series)* (Oxford University Press, 2000) 61, 61–62.

³¹³ *Ibid* 62.

³¹⁴ Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 533.

³¹⁵ *Ibid*.

³¹⁶ *Ibid*.

Accountability Deficits and Overloads: A Missing Framework

approach.³¹⁷ Pursuant to this test, something will be a factual cause if it can be called a 'necessary element for the sufficiency of a sufficient set'.³¹⁸ Unlike the 'but for' test, the NESS test is more sophisticated in accommodating cases of over-determination, where two independent causes may alone have caused the harm. Rather than treating neither as a cause, the NESS test would treat both gunshots as sufficient to have caused the death.

Assuming that we can agree on the best way to identify factual causes of harm, we must then move into the second stage of the causation analysis, in deciding whether a particular cause ought to be singled out as a basis of holding an actor accountable. Problems of attributive causation are reflected in tort law through the use of tests such as those of *novus actus interveniens* (which considers whether a new event has 'broken' an existing chain of causation), remoteness of damage (which considers whether the nature or extent of damage is such that it should fall outside the scope of the defendant's liability), and apportionment of liability between concurrent tortfeasors. In defining a benchmark of accountability that required restoration of losses caused by the government, it would be necessary to grapple with these same issues.

A particularly curly question in connection with the outcomes of government activity (and one that has been raised against the introduction of a public law remedy in damages)³¹⁹ is how to determine when unlawful government activity can be said to have 'caused' loss. In some cases, the matter may be straightforward. So, for example, if there is only one legal way in which power might have been exercised, we would likely be able to say that any departure from that approach is causally linked to a plaintiff's loss. But what of a situation where the same outcome might have been reached lawfully?³²⁰ For instance, a decision reached following an unfair hearing might

³¹⁷ See eg Jane Stapleton, 'Choosing What We Mean by "Causation" in the Law' (2008) 73 *Missouri Law Review* 433. The 'NESS' algorithm was popularised by Wright, based on the original work of Hart and Honoré: Hart and Honoré, above n 304; Richard Wright, 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts' (1988) 73 *Iowa Law Review* 1001.

³¹⁸ Stapleton, 'Choosing What We Mean by "Causation" in the Law', above n 317, 472.

³¹⁹ See eg Paul Craig, 'Compensation in Public Law' (1980) 96 *Law Quarterly Review* 413, 438–39.

³²⁰ These difficulties have arisen in the context of false imprisonment cases, where the quantum of damages may be influenced by whether the plaintiff would in any event have been detained legally: see eg *Fernando v Commonwealth* (2014) 231 FCR 251, 269 [88] (the plaintiff 'could and would have been lawfully detained');

Chapter 4: A Benchmark of Accountability

potentially have been made the same way had the hearing been fair. And a decision reached having taken into account an irrelevant consideration might potentially have been made the same way even disregarding that consideration. In circumstances where we seek to ‘restore’ an individual who has suffered loss as a result of these decisions, we risk being drawn into the task of deciding how the case would, or perhaps even should, have been decided in absence of the procedural irregularity. If we wish to define our accountability benchmark so as to embrace this approach, we would need to think carefully about our answers to the question dealt with in Section C above, namely *to whom* an obligation of accountability is owed. In particular, in cases where the courts are the forum charged with enforcement of accountability standards, there is a real question as to whether determining loss arising from government illegality moves the courts into the territory of deciding the *correct and preferable* decision. This would present potential separation of powers concerns, as the courts will have been moved from a role of deciding the legality of a decision into the realm of its merits.

More complex still is the question of whether the benchmark would be limited to *unlawfully* caused loss, or whether a broader approach might be adopted that would also see the government liable for *lawfully* caused loss. Take, for instance, a circumstance in which a new law is introduced which has the effect of prohibiting a small number of individuals from carrying on their businesses. If we assume that the law is valid,³²¹ how would the accountability benchmark address that situation? If we elected to define the benchmark so as to capture lawfully caused loss, we might look to the French system of administrative law as an example. The plenary jurisdiction of the French administrative courts has expanded beyond the notion of fault (taken to include illegality) to allow indemnity on the basis of risk or equality before public burdens (*égalité devant les charges publiques*).³²² The underpinning rationale is that even lawful

R (Lumba) v Secretary of State for the Home Department [2012] 1 AC 245; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 610–11 [324] (Kiefel J), 656 [512] (Keane J). For a contrary view, see 569 [154] (Hayne and Bell JJ) in *CPCF*. The issue will be even more pertinent where damage is the gist of the action, as discussed below from page 232.

³²¹ Eg assume that the law does not fall foul of the constitutional guarantee of just terms for acquisition of property: *Australian Constitution* s 51(xxxi).

³²² L Neville Brown and John Bell, *French Administrative Law* (Clarendon Press, 5th ed, 1998) 193; Duncan Fairgrieve, *State Liability in Tort: A Comparative Study* (Oxford University Press, 2003) 137.

Accountability Deficits and Overloads: A Missing Framework

administration in the public interest may impose an unfair burden on an individual that ought to be made the subject of compensation.³²³ Thus, for example, where a port authority lawfully decides not to remove a blockade, a ship owner who suffers loss where it cannot move into port may recover compensation.³²⁴ Similarly, a company that is forced to discontinue sale of its products following the introduction of a valid law might be entitled to compensation for this loss of trade.³²⁵ In such cases, the French administrative courts are imposing an obligation to restore irrespective of the legality of the government decision or policy; the foundation of liability is to prevent an individual shouldering that burden alone. Would our benchmark of accountability encompass restoration in such circumstances? To say nothing of the legitimate concerns we may have about ‘legal transplants’,³²⁶ to adopt this approach in constructing our benchmark would have significant ramifications for our benchmark of accountability. Our question of ‘for what’ the government ought to be held accountable would move away from one of defining particular standards of conduct (eg harm-causing conduct must only be undertaken in particular ways), and into one that more closely represents absolute liability.³²⁷

Even assuming that we narrow the scope of the benchmark to limit restoration to cases of unlawfully caused loss, it is necessary to consider whether liability should be determined by reference to strict liability (ie liability for the outcomes of all unlawful conduct), objective fault (ie liability for the outcomes of breach of an expected standard of competence) or subjective fault (ie liability for the outcomes of only intentionally wrongful exercises of power). Again, our choice here will be guided by what we see as the core purpose of accountability. In adopting the restoration rationale, we would be unlikely to prefer subjective fault as a qualifying feature of our benchmark. To require wronged citizens to prove that the government acted with particular qualities of fault (eg that it knew its actions to be wrongful, or acted motivated by a wrongful motive, or

³²³ Brown and Bell, above n 322, 194.

³²⁴ *Sealkink UK Ltd* (CE 22 June 1984), cited in *ibid* 198.

³²⁵ *La Fleurette* (CE 14 January 1938), cited in *ibid* 199.

³²⁶ See eg Harlow, *State Liability: Tort Law and Beyond*, above n 231, 43.

³²⁷ It is worth noting here that the French system is not one of absolute liability. Even in that context, liability for lawfully caused loss is the exception rather than the rule: Fairgrieve, above n 322, 148–49.

acted unreasonably as well as unlawfully) would place significant hurdles in the way of an applicant, leaving many to bear their own loss. Instead, the approach that would be most conducive to serving the restoration rationale would be to make the obligation to restore applicable irrespective of the degree of fault on the part of the government. Of course, in adopting an essentially strict liability approach to restoration, we would be seen to be making choices that privilege restoration over other concerns. So, for instance, we might be concerned about opening the government up to a 'flood' of demands for compensation, or diverting public resources into fixing past wrongs rather than providing public services going forward.³²⁸ Ultimately, we are required to decide whether accountability through restoration must at some point give way to concerns about the efficient use of government resources, which is separate to the task of defining a benchmark of 'ideal' government accountability.

(d) *Desert: accountability for deliberate wrongdoing*

In determining when the desert rationale for accountability might be engaged for the purposes of defining our benchmark of accountability, we might conclude that fault would play a leading role. This rationale is concerned with marking public condemnation of inherently wrongful conduct; abuse of public power in the traditional sense. We might think it appropriate that the sanctions that attach to this rationale be similarly characterised by notions of stigma and public disapproval. In the legal context, punitive sanctions are of their nature highly intrusive, not only imposing an immediate burden on an official (eg imprisonment or punitive damages), but also condemning them. It is this condemnatory character of punishment that might lead us to conclude that, for the purposes of our accountability benchmark, the desert rationale would be confined to cases of subjective fault, in line with the choice theory. Where a person has acted maliciously, or knowing they are likely to cause harm, it may be appropriate to impose a sanction that signifies the inherent wrongfulness of their conduct. However, to go further and extend the reach of punishment into objectively faulty and unfaulty

³²⁸ In Cane's words, 'the more extensive governmental damages liability becomes, the more significant its implications for public spending': Cane, 'Damages in Public Law', above n 232, 491.

conduct would risk undermining this primary condemnatory characteristic of the sanction.

But would fault be only a necessary condition of liability, or determinative? Would we decide that outcomes ‘matter’ for the purposes of accountability’s desert rationale? In answering this question, it is useful to return to the Attempter and Succeeder hypothetical outlined above. Both Attempter and Succeeder have engaged in the same conduct with the same subjectively faulty mindset. Ought both receive the same punishment? Or should Succeeder be more roundly condemned on the basis that her desired outcome came about? Those who believe that punishment is based on desert take the view that we are entitled (or perhaps obliged) to punish someone because they ‘deserve’ to be punished. As noted above, the desert rationale for accountability is similarly grounded in the idea of condemning reprehensible conduct. What would be the relevance of outcomes in this context?

For differential punishment proponents, a person is more blameworthy if they cause harm than if they try but fail to cause harm; Succeeder is thought to have done worse than Attempter when it is discovered that Unlucky has died, and is worthy of greater condemnation as a result. If we accept this proposition, we might be led to think that outcomes *do* matter for the purposes of desert and would agree with Moore that “[c]ausation matters” seems a pretty good candidate for a first principle of morality.³²⁹ However, heeding Feinberg’s admonishment, we must not be ‘so fixated on actual harm that [we] keep ... searching for the question to which it is the right answer’.³³⁰ Instead, it is necessary to unpack the ‘moral magic’ or ‘moral power’ that would lead us to include outcomes in our determination of moral responsibility.³³¹

Differential punishment proponents have sought to bolster their argument that outcomes affect moral responsibility in a number of ways. This is not the place for a detailed discussion of this range of arguments,³³² and so only two of the more relevant

³²⁹ Moore, above n 307, 29.

³³⁰ Feinberg, above n 306, 132.

³³¹ Alexander, Ferzan and Morse, above n 307, 173.

³³² There is a range of additional arguments not canvassed in the discussion here. For example, Bittner quibbles with the design of the Attempter and Succeeder hypothetical, arguing that they are not representative of the population of people who attempt and complete crimes: Bittner, above n 307, 57, while

Chapter 4: A Benchmark of Accountability

are discussed here. The first centres around the idea that the unsuccessful attempter need not experience the same ‘moral feelings’ of shame, guilt and the like, that a successful actor does. Because the unsuccessful attempter has less to feel guilty about, the argument follows that they are therefore less blameworthy. Moore suggests that ‘we experience greater guilt ... when we have caused some harm ... than when we have been equally culpable, but we have not caused such a harm’.³³³ In his view, this leads to the conclusion that Succeder has done a greater wrong, and is therefore more culpable, than Attempter. There are two reasons we might doubt this ‘moral feelings’ argument. The first is a question of proportionality. Kadish maintains that, in order for punishments to be considered proportionate, they must ‘bear some relation to the degree of blameworthiness of the defendants’ actions, not to what they think of themselves or to what they have become in some existential sense’.³³⁴ If punishments were to be doled out by reference a person’s perceived degree of guilt associated with their conduct, there would be no consistent measure of blameworthiness, no yardstick against which we could determine which crimes warrant which punishments.

Another issue with the ‘moral feelings’ argument is that it does not entirely explain the relationship between these feelings and having caused harm. In some cases, there will be a disconnect between the two, which might call into question the soundness of the underlying principle. Brand-Ballard uses the example of a firing squad in which no member knows which rifle contains live ammunition.³³⁵ When the firing squad executes a prisoner, it is not possible to determine which member of the squad is factually the cause of the prisoner’s death. If the execution is subsequently discovered to have been wrongful, should only the actual killer feel guilt about their causal role in the death? Or should all members of the firing squad feel equally guilty? Brand-Ballard suggests the latter, arguing that whether or not a particular member’s rifle contained live

Fletcher argues that because of the popularity of the intuition that outcomes affect desert, there would be something anti-democratic in simply ignoring the view of the ‘sensibilities of the common people’ in favour of abstract philosophical reasoning about concepts of desert and moral luck: Fletcher, above n 307, 83, cited in Feinberg, above n 306, 126.

³³³ Moore, above n 307, 30.

³³⁴ Kadish, above n 307, 692.

³³⁵ Brand-Ballard, above n 306, 323-24.

Accountability Deficits and Overloads: A Missing Framework

ammunition 'is not a fact with any moral significance'.³³⁶ This might suggest that something other than causation is at play in the experience of moral feelings of guilt in such a case. This all casts doubt on whether the 'moral feelings' experienced by Attempter and Succeeder provide a sound basis on which to determine their respective desert.

The second argument frequently raised by differential punishment proponents is based on the concept of moral luck. Nagel's notion of 'moral luck' sees chance as a pervasive concept that arises in all aspects of our lives: '[w]hether we succeed or fail in what we try to do nearly always depends to some extent on factors beyond our control'.³³⁷ He identifies four categories of luck,³³⁸ being results-based (eg a bird happens to fly into the path of Attempter's bullet), constitutive (eg being a naturally jealous or greedy person), circumstantial (eg being thrust into a situation that provides the occasion for wrongdoing), and antecedent (ie that outcomes are the inevitable product of an agent's constitution and circumstances). Advocates of equal punishment are focused on results-based luck, arguing that Attempter should not escape punishment simply on the basis of luck attaching to the outcome of her conduct. However, differential punishment proponents would argue that to focus on results-based luck to the exclusion of other categories is inconsistent. Why should we be willing to ignore some matters that are attributable to luck (perhaps such as having a personality with a 'short fuse'), but not others (such as a mosquito distracting Attempter at the moment she squeezes the trigger)? Moore would say that we cannot have it both ways.³³⁹ A whole host of matters sit behind the wrongful act that we might term to be 'luck' of one sort or another; if a person deserves to be punished in spite of those matters, we should equally be willing to punish them in spite of the role that luck plays in determining the ultimate outcome.

³³⁶ Ibid 324.

³³⁷ Thomas Nagel, *Mortal Questions* (Cambridge University Press, 1979) 25.

³³⁸ Ibid 28.

³³⁹ Michael Moore, *Placing Blame: A General Theory of the Criminal Law* (Clarendon Press, 1997) 233–46. See also Cane, *Responsibility in Law and Morality*, above n 232, 138.

Chapter 4: A Benchmark of Accountability

But is there a valid reason to distinguish between outcome-based luck and the other 'lucky' factors that might arise in a given case? For the equal punishment proponents, the issue comes down to a question of choice and control.³⁴⁰ On this view, we can only really hold people responsible for matters over which they have control: choice is an active exercise of the control that we have over ourselves and our environment. If we choose to kick another person, we make a deliberate choice to move our leg so as to try and make contact with that person. Whether or not the person sees the kick coming and manages to dodge out of the way is not within our control, but our choice to try to kick them is. Because choice is something that is inherently within our ability to control, Alexander et al argue that it is 'something law and morality can influence'.³⁴¹ Similarly, Kadish takes the view that '[t]he settled moral understanding is that what you deserve is a function of what you choose'.³⁴² Equal punishment proponents believe that the quality of choice provides us with a basis on which to differentiate circumstantial luck from outcome luck. Kadish puts the position as follows:

It may be that you would not have had occasion to make a choice that revealed your badness if you had better luck. Nonetheless, you did make a choice -nobody made you- and it is that choice for which you are blamed. It is a different matter, however, to say that chance occurrences that follow after you have made your choice determine what you deserve, for that is to rest desert upon factors other than what you chose to do.³⁴³

For Alexander et al, choice is also the critical distinguishing feature between outcome luck and other lucky influences in our lives; they suggest that 'the control we have over our choices—our willings—is immune to luck and is thus qualitatively and morally different from our control or lack thereof over our heredity and environment, the situations in which we find ourselves, and the causal consequences of our choices'.³⁴⁴ For them, we have a kind of control over our choices that we do not have in respect of our makeup or circumstances, and this justifies treating results-based luck differently from other types. There is significant force in this argument. If we ascribe to the view that people are generally capable of making rational choice, the notion of choice

³⁴⁰ For perspective of differential punishment proponents on choice and control, see eg Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics*, above n 307, 29.

³⁴¹ Alexander, Ferzan and Morse, above n 307, 174.

³⁴² Kadish, above n 307, 690.

³⁴³ Ibid.

³⁴⁴ Alexander, Ferzan and Morse, above n 307, 190.

Accountability Deficits and Overloads: A Missing Framework

provides a point at which to draw a line between the luck that precedes that choice, and the luck that follows. Irrespective of how a person came to be in the position that they are currently in, we believe that people have the ability to reason and choose whether to comply with prescribed norms.³⁴⁵ In this sense, there would be no inconsistency in treating outcome-based luck as different from other types of luck.

Returning to the task of defining an accountability benchmark, we would need to make a decision to follow either the equal or differential punishment proponents. Would we define the benchmark so that the desert rationale would have a greater role to play in cases where wrongful conduct has resulted in loss? Inspired by the Attempter and Succeeder hypothetical, we might think about how this scenario could translate into the public law context. Imagine that a statutory power allows Officer Attempter and Officer Succeeder to direct the provision of road improvement services, with priority to be ascertained by reference to greatest need. Though other roads are in much greater need of repair, each Officer decides to direct the improvement of their own residential streets as a priority, in order to improve the values of their respective properties. The road crew directed by Officer Succeeder heads off immediately to repair the road as requested. Due to a GPS error, the road crew directed by Officer Attempter mistakenly repairs a neighbouring road, which turned out to in fact be in dire need of repair. As in the case of the attempted murder hypothetical, both Officers have engaged in precisely the same actions and with the same motives; both have exercised their public powers in bad faith. The only relevant difference between the two cases is that Officer Succeeder obtains the benefit she intended, while Officer Attempter is foiled by an accident of luck. Should Officer Attempter be treated with greater leniency than Officer Succeeder?

Differential punishment proponents would regard Officer Succeeder as more blameworthy than Officer Attempter on the basis that she has managed to obtain the personal advantage she desired. But we might question whether this approach is the best means of punishing the abuse of public power. The public law norm that best

³⁴⁵ Excluding questions of capacity (eg age or disability) that might otherwise influence our ability to make such choices.

encapsulates subjective fault—bad faith³⁴⁶—is not framed by reference to the notion of causing harm, but is instead concerned with constraining the *manner* in which power is exercised. Certainly, there might be cases in which an exercise of power in bad faith produces an outcome of which we may disapprove; in the above hypothetical Officer Succeeder obtains the advantage of improving her own street at the expense of others, and in other more sinister cases, a malicious exercise of public power may cause damage to person or property. But the norm itself is concerned with preventing the exercise of power accompanied by a dishonest or malicious mindset, not the exercise of power so as to achieve an impugned result. If we were to say that Officer Succeeder deserves greater punishment than Officer Attempter, we might risk undermining the importance of the norm itself. Adopting this approach, we might decide to follow the equal punishment proponents in demanding that both Officer Attempter and Officer Succeeder be punished according to their conduct, rather than the lucky result that followed it.³⁴⁷

(e) *Deterrence: accountability for excess of power*

Turning finally to the deterrence rationale for accountability, we encounter different considerations in defining the benchmark of ‘for what’ we would hold agents accountable. Unlike the desert rationale, deterrence is not concerned with condemning those who deserve it. Instead, its aim is to foster improvements in public governance going forward, both by targeting the instant case (specific deterrence) and by using that as an example to reach others (general deterrence). If this is our goal, there would seem little to be gained in restricting this rationale to cases of subjective fault. If we were to limit the reach of accountability in this way, we would reduce our capacity to influence future negligent or unintentional breaches (the question of how we might hope to

³⁴⁶ As I have argued in Ellen Rock, ‘Fault and Accountability in Public Law’ in Mark Elliot, Jason Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law* (Hart Publishing, 2018) 171, 186 and 190–91.

³⁴⁷ Even if we reach the view that outcomes do not ‘matter’ for the purposes of the desert rationale, this does not mean that they do not ‘matter’ at all. As Alexander et al argue, though outcomes are irrelevant to assessing ‘moral desert’, it ‘certainly matters whether actors succeed or fail’: Alexander, Ferzan and Morse, above n 307, 177. Rather, the point is that the relevance of outcomes would fall within one of the other grounds of liability (restoration being a key example).

Accountability Deficits and Overloads: A Missing Framework

achieve deterrence is separately addressed in Section E below). Accordingly, we might decide on a strict liability approach for the purposes of the deterrent rationale.

A more difficult question is the role outcomes should play in delimiting the deterrence rationale. Returning to punishment theory, this question has posed some difficulty. Is deterrence better served by imposing equal punishment, or by more severely targeting those who cause harm? Thinking first about general deterrence, if we want to make examples out of Attempter and Succeeder to deter others from committing the same crime, some might say that it makes little difference whether we impose equal punishment: ‘if the punishment for success does not deter [others], an equal punishment for failure certainly will not’.³⁴⁸ If this reasoning is correct, general deterrence would not be an adequate justification for imposing equal punishment. However, even if this reasoning is sound in the context of intentional wrongdoing, the same cannot be said in relation to reckless or unintentional conduct.³⁴⁹ Intentional wrongdoers (like Attempter and Succeeder) set out with the specific goal of bringing about a particular outcome, and so the prospect of equal punishment for trying but failing to achieve one’s goal is unlikely to have any impact on others considering the same activity. However, by definition, reckless and negligent actors are not attempting to achieve a particular outcome, but instead are acting without sufficient regard to the legality of their actions, or the outcomes that might follow. If a reckless or negligent actor does not have a harm-causing goal in mind, there is no deterrence gain in punishing an actor who causes harm more severely than an actor who (luckily) does not.

The same reasoning applies in respect of specific deterrence (ie deterring Attempter and Succeeder from re-offending in the future). If we wish to discourage an offender from engaging in the same conduct in the future, Kadish notes that it ‘makes no sense’ to impose different punishments for those who fail to cause harm and those who succeed.³⁵⁰ This must be correct. If we assume that a bird flies into the path of Attempter’s bullet, preventing Lucky’s death, the differential sanction proponents

³⁴⁸ Kadish, above n 307, 686.

³⁴⁹ Ibid.

³⁵⁰ Ibid 684–86.

would say that Attempter deserves a lesser punishment than Succeeder. How does this support the goal of specific deterrence? Attempter intended the same harm and engaged in the same conduct as Succeeder, but (through no credit of her own) failed to achieve her goal. Putting aside questions of reform or a sudden attack of conscience, why would Attempter be deterred by the prospect of a more severe punishment if she ultimately succeeds in her next attempt? On the basis of these observations, it appears that deterrence does not provide a basis on which to decide whether outcomes ‘matter’, as we lack the evidence need to confirm that the imposition of differential punishments either bolsters or undermines the deterrence rationale.

4 Summary

As demonstrated in this section, deciding ‘for what’ an agent should be held accountable is likely the greatest hurdle that we must surmount in defining a benchmark of accountability. It requires us to return to general propositions about how we conceptualise the government (ie as a group of individuals or a corporate entity),³⁵¹ and what we expect of the government and the manner in which it exercises its powers. Further, the choices that we make for the purposes of one aspect of the benchmark (eg adopting an individualist conception of government) will have knock-on effects for dealing with later questions of *for what* those actors are to be held to account. Perhaps most difficult is the task of articulating the manner in which we would link the standards we select to the rationales of accountability we choose to adopt. So, for instance, how would we decide whether a standard is one that warrants the extremity of the desert rationale, or the breadth of the control rationale? We would need to identify criteria that we might use to draw links between standards and rationales. Using the notions of fault and outcomes, this section has demonstrated that this is no small task, leading us into difficult territory of moral and legal philosophy.

³⁵¹ This was discussed above at page 54–55.

E HOW SHOULD THEY BE HELD ACCOUNTABLE?

The final question in the accountability framework set out in Chapter 1 was the question of ‘how is the agent held accountable’. In its descriptive context, this question is concerned with identifying the procedures and outcomes of the accountability mechanism under review. It is possible to point to three different phases in this respect: investigation (ie initial provision of information), discussion (ie assessment and debate) and rectification (ie imposition of sanctions or remedies).³⁵² In defining a normative benchmark of accountability, we can group together these phases to ask *via what procedures should an agent be held accountable?* and *with what consequences?* Again, our answers to these questions will differ depending on which rationale for accountability we choose to adopt.

1 Via what procedures?

The question of *via what procedures* an agent ought to be held accountable encompasses the two phases of ‘information’ and ‘discussion’ canvassed in the accountability literature. The information phase is an investigatory one, involving the initial provision of information by an agent to a forum, and initial investigation by the forum.³⁵³ This may be by way of prepared reports, through the production of documents, or through the provision of an oral account, for example. The second phase has been described as a ‘discussion’ phase.³⁵⁴ In this phase, the information is examined, debated and tested, and the agent is given the opportunity to justify their conduct. To these two process-oriented phases we might add a third, focusing on the process of adjudication pursuant to which the forum reaches its view as to whether the agent has complied with relevant

³⁵² Mulgan describes these as ‘information’, ‘discussion’ and ‘rectification’: Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 30. Brandsma and Schillemans use the language of ‘information’, ‘discussion’ and ‘consequences/sanctions’: Brandsma and Schillemans, above n 163, 955.

³⁵³ Referred to by some authors as the ‘information’ stage or phase: Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 30; Brandsma and Schillemans, above n 163, 955.

³⁵⁴ Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 30; see also Brandsma and Schillemans, above n 163, 955.

Chapter 4: A Benchmark of Accountability

standards. Though some include adjudication in the final rectification stage,³⁵⁵ this conceals the many procedural components that might influence the manner in which the forum adjudicates the question of whether an agent has complied with accountability standards. To take an example, legal proceedings involve a range of processes across these three categories. The information stage is reflected in pre-trial investigatory procedures, including discovery and interrogatories and the filing of pleadings and evidence. The discussion phase is reflected in the adversarial nature of the trial itself, through the processes of admission of evidence and cross-examination. The adjudication phase is then reflected in the processes that influence the court's ultimate decision, including for example the burden of proof and the extent of the court's discretion to refuse or award relief.

In defining a benchmark of accountability, we would need to transform these descriptive ideas of process into normative ideas, asking by what procedures *should* an agent be held accountable. As with the other sections in this chapter, the answer we might reach would largely depend on which rationale for accountability we choose to adopt. Looking first at the transparency rationale, procedures will play a very important role. This rationale is primarily concerned with facilitating public access to information for the purposes of maintaining the dialogue between government and citizen. While it may in some cases take on an investigatory function with a goal to uncovering evidence of wrongdoing, the transparency rationale can more generally be understood to play an important role in securing the legitimacy of government. In many ways, one of the most fundamental accountability mechanisms within our system of democracy—the electoral process—is underpinned by a requirement of transparency. As put by McHugh J in the *Australian Capital Television* case:

If the institutions of representative and responsible government are to operate effectively and as the Constitution intended, the business of government must be examinable and the subject of scrutiny, debate and ultimate accountability at the ballot box ... Before [the electors] can cast an effective vote at election time, they must have access to the information, ideas and arguments which are necessary to make an informed judgment as to how they have been governed and as to what policies are in

³⁵⁵ For example, Brandsma and Schillemans note that 'the forum will pass judgment on the behavior of the actor in the *consequences* phase and will punish, correct or reward the actor when needed': Brandsma and Schillemans, above n 163, 955.

Accountability Deficits and Overloads: A Missing Framework

the interests of themselves, their communities and the nation.³⁵⁶

The transparency function of accountability can be supported in a number of ways. What is critical is that the means of accessing and disseminating information are such that information is freely accessible. For instance, the process of securing access to information would ideally not involve a cost or administrative burden that operates to exclude some members of the public from participation. Ideally, the channels through which access is provided would also be inclusive—for example, by making provision for people with disabilities. In order to support the transparency function, it would likely be necessary that it be possible to compel the production of information. While the voluntary provision of information by government is no doubt capable of contributing to the overarching objective of fostering legitimacy, it is the obligatory nature of a process that transforms it into one of accountability.³⁵⁷ Accordingly, any limits on open access to information would only be relevant if there are other concerns that outweigh those of accountability (eg we might admit limits to freedom of information on the basis of national security).

Turning to the control rationale, its core concern is to ensure that power is exercised within legal boundaries. As noted below,³⁵⁸ the types of remedies that are well adapted to this purpose are those capable of confirming the legal boundaries within which power can be exercised, prohibiting excess of those boundaries and compelling the exercise of power within those boundaries. In order to achieve this purpose, the relevant procedures would likely need to be coercive in nature. We might, for example, doubt whether the recommendatory powers of an ombudsman rise to the level of ‘control’ envisaged by this rationale. Certainly, the ombudsman mechanism plays a role in securing government accountability (as discussed in Chapter 5); however, we would likely look elsewhere within our accountability system if our primary concern is to control the government.

³⁵⁶ *Australian Capital Television Pty Ltd v Commonwealth [No 2]* (1992) 177 CLR 106, 231.

³⁵⁷ Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 11.

³⁵⁸ See discussion of remedies and sanctions relevant to the control rationale below at page 119 below.

Chapter 4: A Benchmark of Accountability

Supporting the restoration rationale involves different considerations again. This rationale is essentially victim-oriented, requiring that harm be remedied. In thinking about the best means to achieve this goal, we might be concerned, for instance, if the burden of making a claim for restoration was of such a degree that it inhibited access to the mechanism. This might mean that we would favour minimised application fees and a simplified application process. We might also be disinclined to require a heavy burden of proof, or even go so far as to adopt a presumption in favour of restoration of the victim that must be dislodged by the government. Of course, there must be a limit to the extent to which our accountability benchmark would be tipped in favour of the victim. As noted elsewhere in this chapter, accountability (here through restoration) will not be our sole concern; we might also be interested in ensuring efficient use of public funds, amongst other matters. Again, the task of selecting the best means to facilitate this rationale of accountability while also giving due weight to other legitimate concerns is a difficult one.

Unlike the restoration rationale, the desert rationale is much more agent-focused, being concerned with condemning inherently wrongful conduct. The fact that the desert rationale is so tied up in notions of condemnation might lead us to be very careful in crafting the procedures used to impose punishment. We might, for instance, wish to ensure that the barriers to use of such an accountability mechanism are sufficiently high that only those with a particular interest are likely use it (eg a requirement of leave to proceed). We might also be concerned to ensure that the process through which punishment is delivered is a rigorous one, designed to ensure that the wrongdoer is in fact deserving of condemnation and that innocent parties are not mistakenly captured. This might lead us to impose a significant burden of proof,³⁵⁹ for example, or to pass the case through multiple rounds of judgment, or to provide a right to appeal any sanction imposed. These types of limitations would serve to limit the prospects of punishment being imposed in circumstances where it is not deserved, and to reinforce the seriousness of condemnation once it is determined to be warranted.

³⁵⁹ Alec Walen, 'Proof Beyond a Reasonable Doubt: A Balanced Retributive Account' (2015) 76 *Louisiana Law Review* 355, 362.

Accountability Deficits and Overloads: A Missing Framework

Finally, the deterrence rationale is concerned with facilitating improvements in public governance in the future, by disincentivising undesirable conduct and incentivising desirable conduct. As discussed below, there remains much debate as to the best means to achieve these ends.³⁶⁰ While deterrence remains in favour as a theoretical justification for the imposition of punitive sanctions,³⁶¹ many question whether punitive sanctions are in fact the best means to achieve those ends.³⁶² So, for instance, Braithwaite suggests that in place of highly punitive sanctions, deterrence might instead be better served through the imposition of 'broad, informal, weak sanctions'.³⁶³ If we were to adopt such an approach, we might also move away from the procedures that suit the desert rationale. In place of agent-friendly procedures that give effect to highly condemnatory sanctions, we might instead favour procedures that are more apt to facilitate dialogue.³⁶⁴ In that context, we would be less concerned with procedures that are directed at proving wrongdoing, and more concerned with flexible procedures that create an environment in which Braithwaite's 'soft target' will be more inclined to participate, listen and be open to taking steps to effect change in the future.³⁶⁵

To summarise, the accountability benchmark would likely anticipate different procedures for each of the rationales for accountability. For transparency, the most fitting procedures would be those that facilitate ease of access to information, while the control rationale would be best supported by coercive procedures that balance the interests of the parties. The restoration rationale might favour a prosecutor-friendly regime that limits the burden placed on the prosecutor to make good their claim for restoration (eg limited application costs). The desert rationale, in contrast, might favour an agent-friendly regime in recognition of the condemnatory character of the sanctions sought (eg protections afforded by a significant burden of proof and rights of appeal). Finally, the deterrence rationale might be best supported through the adoption of

³⁶⁰ See discussion of sanctions in the context of deterrence below from page 124.

³⁶¹ See discussion at page 49 above.

³⁶² Braithwaite explores these ideas in Braithwaite, 'On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers', above n 11.

³⁶³ *Ibid* 333. See discussion from page 124 below.

³⁶⁴ *Ibid*.

³⁶⁵ *Ibid*.

flexible procedures that facilitate dialogue with a view to fostering improvements in performance.

2 With what consequences?

The second aspect of the *how* component of the benchmark of accountability is concerned with identifying what consequences³⁶⁶ will follow the adjudication process. On adopting a rationale-based approach, the task becomes one of seeking to identify tools that are capable of securing the ends envisaged by each rationale. Because the transparency rationale is essentially process-driven, it is unnecessary to add anything to what has been said on this topic above.³⁶⁷ The following discussion instead centres on the outcome-oriented rationales of control, restoration, desert and deterrence.

(a) *Control: regulatory orders to enforce compliance with legal limits*

The control rationale for accountability is concerned with providing a means to ensure that public power is exercised within legal limits, and in accordance with the public interest. In thinking about control as a rationale of accountability, it is necessary to bear in mind that, while control is central to accountability, we cannot say that all expressions of control are accountability mechanisms.³⁶⁸ For example, the enactment of legislation may effect control or influence over conduct by demanding conformity to particular standards. However, the enactment of legislation is not itself an accountability mechanism; it is not premised on a relationship wherein one person is held accountable to another. Mulgan makes this point as follows:

[B]eing accountable for alleged breaches of the law does not mean that compliance with the law is also an act of accountability or that the law itself is an accountability mechanism.³⁶⁹

³⁶⁶ 'Consequences' when used here refers to intended consequences rather than to empirically provable outcomes.

³⁶⁷ See section commencing at page 114.

³⁶⁸ Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', above n 8, 454.

³⁶⁹ Mulgan, "'Accountability': An Ever-Expanding Concept?", above n 19, 564.

Accountability Deficits and Overloads: A Missing Framework

Bearing this in mind, our benchmark of accountability for the purposes of the control rationale would be more concerned with identifying mechanisms that operate to reinforce (rather than create) limits on the exercise of power.

Strom sees control-based sanctions as essential in an accountability relationship. He defines accountability as an agency-based relationship in which the principal should have a 'veto power' (a power to quash or amend the account-giver's decisions) as well as a power to 'deauthorise' the account-giver by removing them from office or restricting their authority to act.³⁷⁰ Sanctions of this nature potentially reinforce the control-based character of accountability relationships, in which a key goal is to place limits on the exercise of power by defining and reinforcing the boundaries within which the agent can act. It is possible to think about each of these two functions (that is, defining boundaries and policing boundaries) as two distinct aspects of the control rationale; indeed, the character of the remedies that might be employed to serve each of these aspects can take different forms. So, for example, an order declaring that an official's conduct is illegal, or which has the effect of nullifying an official's decisions (which Strom would refer to as a 'veto power')³⁷¹ is aligned with the goal of defining the legal boundaries within which power can be exercised. More coercive powers, such as injunctive relief, go further, regulating conduct in a prospective capacity so as to police those boundaries going forward. These forward-looking powers might take a number of different forms, depending on the situation. For instance, the process may be either mandatory (in requiring something to be done), or prohibitive (in preventing something from being done). It may be highly prescriptive (eg requiring a particular decision to be made in a particular way), or permissive (eg requiring a particular outcome without specifying the means, or requiring a particular procedure without specifying the outcome). Whatever form the mechanism takes, it would seem that in order to achieve the goal of 'control' the mechanism would need to have a compulsory nature.

³⁷⁰ Strom, above n 27, 62.

³⁷¹ *Ibid.*

(b) Restoration: remedies to restore

The restoration rationale is primarily victim-oriented, its main concern being to ensure that harm is remedied. The means by which this outcome might be achieved will depend on the nature of the harm suffered, and what is possible to repair that harm. From the perspective of this accountability rationale, the ideal scenario would be to place the victim in the position they were in prior to the harm. In some cases, it will be possible to achieve this goal by, for example, requiring repair of property damage or the reinstatement of a cancelled licence. In other cases, the nature of the harm may be such that it cannot be corrected. In such a case, it may be possible to provide the victim with restoration in a substitutionary form. So, for instance, a victim may receive a financial settlement in substitution for some impact on their health that cannot be remedied.

Restoration need not always be of such a formal type. It is well-documented that proffering an appropriate apology may in many cases go some way towards resolving a grievance. While the link between apologies and reduction in litigation remains unproven, Vines has noted that ‘people often sue wrongdoers because they are so enraged by the lack of an apology that a wrong which they would otherwise suffer without recourse to law becomes intolerable and litigation follows’.³⁷² The use of apologies may be particularly relevant in cases where the nature of the victim’s loss is of an intangible nature (eg pain, suffering, humiliation) rather than tangible (eg property damage, medical expenses).³⁷³ In such cases, the victim seeks ‘to publicly set the record straight by having the wrong acknowledged and to prevent further wrong doing’.³⁷⁴ In the context of government maladministration, an apology may be particularly well-adapted to serving the overarching objective of accountability. As recently noted in the Victorian Ombudsman’s *Apologies* report:

Apologising is a mark of integrity for public authorities. It shows that the authority is transparent and accountable, and treats members of the public with courtesy and respect.³⁷⁵

³⁷² Prue Vines, ‘Apologising to Avoid Liability: Cynical Civility or Practical Morality?’ (2005) 27 *Sydney Law Review* 483, 483.

³⁷³ Alfred Allan, ‘Functional Apologies in Law’ (2008) 15 *Psychiatry, Psychology and Law* 369, 374–75.

³⁷⁴ *Ibid* 375.

³⁷⁵ Victorian Ombudsman, *Apologies* Report under ss 25 and 25AA of the *Ombudsman Act 1973* (Vic) (2017)

Drawing these ideas together, it is possible to see that there is a range of different mechanisms that might be employed to facilitate restoration in the context of government accountability. The question of which approach is best suited to the task will naturally depend on the nature of the loss or damage, and the circumstances of the case. What is critical to bear in mind is that restoration is a victim-oriented rationale, and as such our focus is placed on the interests of the victim, rather than the impact on the wrongdoer.

(c) *Desert: sanctions to punish*

The desert rationale is in distinct contrast to the restoration rationale, being primarily focused on the wrongdoer. On this rationale, accountability is underpinned by a condemnatory approach, with a wrongdoer being punished on the basis that they deserve such treatment. Punishment is imposed as an expression of community outrage rather than with some extrinsic goal of facilitating future change (which is the concern of the deterrence rationale discussed below). This expressive function of punishment is often used to justify punishment in the public sphere.³⁷⁶ While many accountability theorists proclaim that punishment is an essential incident of accountability, most tend to gloss over the details of what that entails. Authors use ‘punishment’³⁷⁷ interchangeably with the language of ‘retribution’,³⁷⁸ ‘penalty’,³⁷⁹ ‘sanction’,³⁸⁰ ‘liability’,³⁸¹ and ‘suffering’³⁸² or ‘facing’³⁸³ consequences. Of those who engage in a more detailed analysis, a number refer to traditional remedies (such as termination of employment, fines, civil penalties and jail terms),³⁸⁴ in addition to less formal types of

5.

³⁷⁶ See eg Baer, above n 268, 603.

³⁷⁷ Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 9; Behn, above n 40, 3.

³⁷⁸ Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 9.

³⁷⁹ Ibid; Strom, above n 27, 62.

³⁸⁰ Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 9; Grant and Keohane, above n 8, 29; Strom, above n 27, 62.

³⁸¹ Koppell, above n 36, 96–97.

³⁸² Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness, and Citizenship*, above n 24, 22.

³⁸³ Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations*, above n 59, 39.

³⁸⁴ Behn, above n 40, 3.

Chapter 4: A Benchmark of Accountability

sanctions (such as embarrassment and humiliation,³⁸⁵ withholding of political support,³⁸⁶ and even the ‘painful’ nature of subjection to the accountability process itself).³⁸⁷ But when we approach accountability from the perspective of the desert rationale, we might doubt whether some of these sanctions fit with that goal.

Writing in the criminal context, Hart defines the ‘standard case’ of punishment as (1) the infliction of pain or unpleasant consequences; (2) on the offender; (3) for an offence against rules; (4) intentionally administered by others; (5) within an authority set up in the legal system.³⁸⁸ This definition encapsulates the process of punishment as Hart sees it, but what about its content? For Hart, the relevant content is the infliction of ‘pain’, or ‘unpleasant consequences’. Other authors do not go this far, arguing that that there must be something, if not painful, then intrinsically negative about a punishment in order for it to meet the definition. To this end, authors adopt the language of loss,³⁸⁹ ‘hard treatment’,³⁹⁰ and the like. But not every negative outcome is necessarily viewed as a punishment. Here, we may turn to Feinberg’s distinction between punishments and ‘mere penalties’.³⁹¹ In the latter category he places such outcomes as ‘parking tickets, offside penalties, sackings, flunkings, and disqualifications’.³⁹² The heart of the distinction between penalties and punishments, for Feinberg, is the condemnatory character of the latter.³⁹³ Adopting this rationale, there is substantial overlap between the rationales for the award of punitive sanctions and the desert rationale of accountability. As was noted in the previous section, condemnation is one of the defining features of the punitive function of accountability;

³⁸⁵ Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness, and Citizenship*, above n 24, 27; Behn, above n 40, 3; Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’, above n 8, 452; Schedler, above n 194, 16.

³⁸⁶ Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness, and Citizenship*, above n 24, 26.

³⁸⁷ Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations*, above n 59, 39–40. See also Behn, above n 40, 3.

³⁸⁸ Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, above n 294, 4–5. The five elements identified by Hart have been here paraphrased and placed in a different order.

³⁸⁹ See eg Thom Brooks, *Punishment* (Routledge, 2012) 5.

³⁹⁰ Joel Feinberg, ‘The Expressive Function of Punishment’ (1965) 49 *The Monist* 397, 397.

³⁹¹ *Ibid* 398.

³⁹² *Ibid*.

³⁹³ *Ibid* 400.

the imposition of punishment in appropriate cases serves an expressive purpose in marking disapproval and reinforcing the norm that was contravened.

Adopting this approach, we would likely have no difficulty concluding that the imposition of a jail term or a fine would qualify as a desert-oriented sanction.³⁹⁴ The recipient is branded as a wrongdoer and made to suffer loss of liberty or finances as a consequence. In contrast, we might be hesitant to characterise subjection to the accountability process as a fitting sanction for the purposes of the desert rationale. The fact that a wrongdoer has been called out for their infraction certainly goes some way towards contributing to government accountability more generally, but if they are left to then return to their lives with no repercussions we might doubt whether the desert rationale has been satisfied. Accordingly, in selecting sanctions for the purposes of the desert function, it would be necessary to consider whether the sanction in question provides the requisite degree of ‘tar and feathering’.

(d) Deterrence: influencing future choices

The final accountability rationale considered in this thesis is that of deterrence. Unlike the desert rationale, which is primarily retrospective in nature, the deterrence rationale is concerned with influencing future choices, not only of the individual who may have done wrong in the instant case (specific deterrence), but also of others who witness the outcome (general deterrence). The question of how best to influence future behaviour is one that has troubled social scientists for many years. While deterrence is frequently offered as a justification for punishment,³⁹⁵ there remain doubts as to whether punitive sanctions are necessarily the best means to achieve this goal. This may be particularly so in the public sphere. Braithwaite’s review of a range of empirical (primarily criminological) research led him to conclude that the threat of sanction may not be a useful deterrent in the context of deterring abuse of power.³⁹⁶ According to this research, there is a range of reasons why ‘big sticks often rebound’.³⁹⁷ For instance, in

³⁹⁴ Cane, *Responsibility in Law and Morality*, above n 232, 43.

³⁹⁵ See eg Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, above n 294.

³⁹⁶ Braithwaite, ‘On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers’, above n 11, 314–22.

³⁹⁷ *Ibid* 360.

Chapter 4: A Benchmark of Accountability

some cases an individual may respond to a threat of sanction with defiance: ‘getting mad rather than by ceasing to be bad’.³⁹⁸ The level of reactance (ie the motivation to act to regain a freedom that has been lost or threatened)³⁹⁹ may be affected by factors such as the actor’s level of emotionality or the importance of the freedom under threat.⁴⁰⁰ While the threat of sanction might produce gains in some contexts, the risk of backfire, Braithwaite concludes, leads to a potentially nil overall effect.

The threat of sanction is, of course, not the only possible means available to influence future behaviour. Other possible approaches include the promise of rewards (the opposite approach to threat of sanctions), reintegrative shaming strategies⁴⁰¹ and fostering dialogue. Braithwaite concludes that the dialogical approach is particularly promising,⁴⁰² wherein we ‘replac[e] narrow, formal, and strongly punitive responsibility with broad, informal, weak sanctions—by making the many dialogically responsible instead of the few criminally responsible’.⁴⁰³ By targeting a broad base of actors with weak sanctions, Braithwaite concludes that the risk of rebound is reduced. Brought into the present context of abuse of public power, this would involve targeting a broader range of actors (as discussed in Section B above) with weaker or non-punitive sanctions. On this approach, even the shame of being caught up in the accountability process itself might prove to be a sufficient incentive to engage in dialogue that could lead to improvements going forward.⁴⁰⁴

3 Summary

To summarise, we can see that there are a number of different means through which we might support the various rationales of accountability. As with the discussion of the other aspects of the accountability framework, it is also possible to identify tensions between these rationales. So, for instance, while highly punitive sanctions might be

³⁹⁸ Ibid 318.

³⁹⁹ See Jack Williams Brehm, *A Theory of Psychological Reactance* (Academic Press, 1966).

⁴⁰⁰ Braithwaite, ‘On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers’, above n 11, 322–24.

⁴⁰¹ Ibid 319–20.

⁴⁰² Ibid 333.

⁴⁰³ Ibid.

⁴⁰⁴ Ibid 327.

thought perfectly appropriate in the context of the desert rationale, such sanctions may potentially undermine the deterrent rationale if it produces a response of ‘reactance’. There is an inherent tension between these two goals, as the greater the degree of condemnation (desert), the greater the risk of producing an indignant or defiant response in the wrongdoer (counter-deterrence). We can see a further example of such tension between the transparency and deterrence rationales. It was suggested that the best means of achieving transparency would be to adopt a very *laissez-faire* approach that would place all government decision-making under a public microscope. However, this approach might decrease an otherwise effective actor’s internal motivation to perform; ‘[p]lants don’t flourish when we pull them up too often to check how their roots are growing’.⁴⁰⁵ If we cannot fashion a regime that is capable of meeting both demands, we must accept that one will fall by the wayside. And still, we must choose which of those rationales we will then prioritise. Here again we see that, in order to define a benchmark of accountability, we must not only carefully consider the best means to achieve our various goals but also make difficult choices about how to strike an appropriate balance between them when they come into conflict.

F THE DIFFICULTY OF DEFINING A BENCHMARK OF ACCOUNTABILITY

One of the key steps in seeking to map out potential accountability deficits and overloads in our system of governance is to define a benchmark of accountability. Without articulating what ‘enough’ accountability looks like, it is very difficult to point to areas where there is either not enough or too much accountability. One way of defining this benchmark is to transform the descriptive accountability framework employed by many theorists (ie who is accountable, to whom, for what and how) into a normative framework (ie who *should be* accountable, to whom, for what and how). Chapter 4 has set out the size of the challenge before us in seeking to define this normative benchmark. Each question is attended by its own complications. So, for

⁴⁰⁵ Onora O’Neill, *A Question of Trust* (Cambridge University Press, 2002) 19, cited in Jane Mansbridge, ‘A Contingency Theory of Accountability’ in Mark Bovens, Robert Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014) 55, 57.

Chapter 4: A Benchmark of Accountability

instance, in deciding *who* should be held accountable, we need to grapple with the complexity of the Australian system of government, the implications of outsourcing, and even the more theoretical question of how we conceptualise the government (ie as an entity or group of individuals). In deciding *to whom* the government should be accountable, we must think about the nature of the prosecution task and what motivates and allows individuals to take it on. In deciding *for what* the government should be held accountable, we need to return to difficult questions about the expectations we have of our government and the standards against which performance should be assessed. And in deciding *how* we should hold the government accountable, we need to return again to the question of what we are seeking to achieve.

What this chapter has demonstrated, in a more concrete sense, is that we would define our benchmark in different ways depending on the rationale we choose to assign to accountability. The rationales explored in this thesis are those of transparency, control, restoration, desert and deterrence. So, for instance, in asking *who* should be held accountable, the desert rationale might prompt us to target an individual wrongdoer, whereas the restoration rationale might prompt us to target the government itself (ie the entity with the greatest capacity to provide restoration). And in asking *how* the government should be held accountable, the desert rationale might see us adopt punitive sanctions to facilitate condemnation, whereas the deterrence rationale might see us look for weaker sanctions that have the greatest capacity to encourage dialogue. However, adopting a rationale-based approach does not lead us to a simple resolution to defining our benchmark. Even within a rationale we must sometimes make difficult choices between competing options. So, for example, in asking *who* should be held accountable for the purposes of the transparency rationale, we must choose between accessing the best source of information (ie the individual most closely connected with the decision or conduct), or the most authoritative source of information (ie the most senior official overseeing the matter), or the most coherent source of information (ie the government entity that can draw together all information and deliver it via a single channel).

Accountability Deficits and Overloads: A Missing Framework

A further challenge highlighted in this chapter is that, assuming we can identify a 'best' way to support a given rationale, tensions might then arise between the various rationales. So, for instance, this chapter suggests that the transparency rationale might be best promoted by adopting a very open approach to who should be accountable, to whom, for what and how. However, there is a risk that such an open regime might undermine the deterrence rationale, as some might say that constant interrogation might have negative impacts on performance (as opposed to encouraging improvements going forward). Similarly, while highly punitive sanctions might be thought to be the best means of supporting the desert rationale, there is a risk that the imposition of such sanctions on individuals may undermine the deterrence rationale if they lead to 'reactance', whereby the agent responds with defiance rather than improved performance. If we allow that the concept of accountability might embrace more than one rationale, we must therefore make choices about how best to define the benchmark in light of these tensions. For instance, we might decide to prioritise one rationale over another, in which case we would need to accept that one dimension of our accountability framework might be weakened over time in order to strengthen another. Another option would be to try and find a 'middle ground', where rather than searching for the 'best' way of supporting each rationale, we look for an option that is capable of simultaneously accommodating both.

In thinking about tension between accountability rationales, it is also important to consider whether tension might be avoided if we allow our benchmark to consist of multiple strands. So, rather than trying to find a single answer to the question of *who* should be accountable *to whom* etc, that will accommodate all rationales, we might instead provide a separate answer for each rationale. The following table breaks down some of the options we might choose to adopt for each of the *who*, *to whom* etc components of the benchmark by reference to each of the accountability rationales.

Rationale	Who	To Whom	For What	Consequences	Procedures
Transparency	All individuals/entities within government	All members of the public	All government activity	Explain and justify government decisions and conduct	Public dissemination of information
Control	The individual/entity charged with exercising power	All members of the public	Unlawful exercise of power	Regulatory orders	Coercive procedures that are equally balanced between the parties
Restoration	The government as an entity	Individuals who have suffered harm	Unlawful government activity causing harm	Restorative remedies	Prosecutor-friendly procedures
Desert	Individual public officials and government entities	A defined prosecutor (with residual rights for members of the public)	Deliberate wrongdoing (for an entity, where that conduct is engaged in in its name)	Punitive sanctions	Agent-friendly procedures
Deterrence	Officials or entities with the capacity to effect change	A defined prosecutor	Unlawful exercise of public power	Weak sanctions	Flexible procedures that facilitate dialogue

Accountability Deficits and Overloads: A Missing Framework

Framing these elements into words, we could structure a five-part benchmark in the following terms: (1) *All individuals/entities within government* would be accountable to *all members of the public* for *all government activity by explaining and justifying government decisions and conduct through public dissemination of information* (transparency rationale). (2) *The individual/entity charged with exercising power* would be accountable to *all members of the public* for *unlawful exercise of power through the imposition of regulatory orders imposed via coercive procedures that are equally balanced between the parties* (control rationale). (3) *The government as an entity* would be accountable to *individuals who have suffered harm due to unlawful government activity* through the imposition of *restorative remedies via prosecutor-friendly procedures* (restoration rationale). (4) *Individual public officials* would be accountable to *a defined prosecutor (with residual rights for members of the public)* for their *deliberate wrongdoing* through the imposition of *punitive sanctions via agent-friendly procedures* (desert rationale). (5) *Officials or entities with the capacity to effect change* would be accountable to *a defined prosecutor* for *unlawful exercise of public power* through the imposition of *weak sanctions via flexible procedures that facilitate dialogue* (deterrence rationale). There is still potential for tension between this series of benchmarks (eg there might be tension between the desert and deterrence rationales if the person who has best the capacity to effect change going forward is also the individual wrongdoer). However, allowing the benchmark to target different individuals, in different ways and for different conduct reduces the likelihood of such tensions arising.

Of course, the tentative benchmark set out in the preceding paragraph is merely one example of an approach we might adopt in describing the shape of an ‘ideal amount’ of government accountability. In order to reach a final landing on the ideal benchmark, it would be necessary to grapple with the difficult questions that have been raised, but not resolved, in this chapter. The reason this tentative benchmark is offered here is to allow us to explore how a benchmark such as this might assist us in our search for accountability deficits and overloads, as foreshadowed in Part III of this thesis.

CHAPTER 5: THE COMPLEXITY OF ACCOUNTABILITY SYSTEMS

Public accountability ... is not a simple quantum ... It consists of countless relationships, between different accountees and account-holders over different issues, not reducible to a single measure or variable. For any accountability deficit, as for any accountability relationship, we must always specify answers to the standard questions: who, to whom, for what, and in what way.⁴⁰⁶

The second main dilemma that must be confronted by those who wish to assess accountability deficits and overloads is the task of understanding accountability mechanisms not simply as a series of individual mechanisms in isolation, but as part of a system. This dilemma is evident in a number of different ways in claims about accountability deficits and overloads. For instance, a generalised claim that a government official has not been held accountable in a given situation involves an implicit reference to the universe of mechanisms pursuant to which that official *could* have been held accountable; in other words, this is a claim that this official has 'fallen through the net'. For obvious reasons, it is necessary to have some understanding about the shape and nature of this 'net' to make such a claim. It is also necessary to have some understanding of the wider accountability system in making claims about the limitations of a particular mechanism. If we focus on one style or group of accountability mechanisms to the exclusion of others, the identification of any accountability deficit must necessarily be a preliminary observation; after all, until we know whether other accountability mechanisms operate so as to ameliorate shortcomings in one mechanism, how can we know whether the perceived deficit is meaningful? To pick up the example mentioned in Chapter 3, some might make the argument that the unavailability of damages in judicial review proceedings represents an accountability deficit inasmuch as wronged individuals go unrestored. However, can we really describe this as a 'deficit' if we have not considered the role other mechanisms (for example, tort law and ex gratia compensation amongst others) might play in filling that gap? In Mulgan's words, to look for accountability gaps within a single or discrete set of

⁴⁰⁶ Mulgan, 'Accountability Deficits', above n 116, 553.

mechanisms is inclined to produce a 'distorted view' of the size or nature of any deficits that are identified.⁴⁰⁷

At the other extreme, failing to understand the nature and shape of the accountability system also affects our analysis of accountability overloads. Can we say that there is an accountability overload simply by pointing to the *quantity* of accountability mechanisms that potentially apply to a particular actor? It is one thing to note the potential for accountability overload by listing the number of mechanisms that potentially apply in the context of an exercise of statutory discretion by the Minister for Immigration (eg judicial review, merits review, tort liability, ministerial responsibility, party discipline, investigation by the ombudsman etc); it is quite another to explore the manner in which these various mechanisms coalesce to hold that Minister accountable. Is one mechanism a precondition of another? Will one mechanism fall away in the face of a conclusion reached pursuant to another? Is one mechanism thought to be a failsafe that applies where all other mechanisms fail? The position adopted in this thesis is that claims of accountability overload cannot simply point to the number of mechanisms in play but must also assess the interrelationship between them. As Elliot suggests, 'accountability can, and should, take several forms ... [which] demands that accountability be supplied by a range of functionally-complementary institutions applying a diversity of criteria and approaches'.⁴⁰⁸

Chapter 5 explores three key ideas we need to grapple with in building up a picture of the Australian accountability system. Section A commences with a high-level overview of a range of mechanisms that we might broadly think about as playing a role in holding Australian government officials and entities accountable. Sections B and C then go on to map out two ideas that contribute to our understanding of these mechanisms as a system of accountability. Section B explores the delicate balance of features between these various mechanisms. So, for instance, while some mechanisms are flexible, others are rigid. And while some are coercive, others are recommendatory. If we were to look at each mechanism only in isolation, it might be tempting to classify

⁴⁰⁷ Ibid 552.

⁴⁰⁸ Mark Elliot, 'Ombudsmen, Tribunals, Inquiries: Re-fashioning Accountability Beyond the Courts' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press, 2013) 233, 258.

Chapter 5: The Complexity of Accountability Systems

some features of mechanisms as ‘weaknesses’ (eg when looked at alone, the ombudsman’s lack of coercive powers might be thought to be a weakness of that mechanism: the ‘toothless tiger’). However, when understood as part of a wider accountability system in which other mechanisms (eg the courts) have more coercive powers, we can instead view the ombudsman’s recommendatory role as a potential strength, facilitating a more co-operative dynamic than might be achieved through the courts. For this reason, this thesis argues that it is crucial to understand accountability mechanisms as a system that contains a delicate balance of features. Section C goes on to look at the manner in which the various accountability mechanisms interlock within the system, and notes that we can observe a wide variety of relationships in play when these mechanisms perform their accountability roles. For instance, mechanisms may operate independently, mutually exclusively, in stages, interdependently, co-operatively, or as checks on one another. The nature of these relationship dynamics plays a key role in defining the shape of the accountability system. It is critical that we appreciate the nature of these relationships in order to have any hope of making good a claim of accountability deficit or overload.

A THE AUSTRALIAN ACCOUNTABILITY SYSTEM

A comprehensive analysis of the various mechanisms that we might view as comprising the Australian accountability system is beyond the scope of this thesis. This section instead offers a high-level overview of a range of mechanisms that we might view as forming part of this system, including brief observations on the nature of each mechanism and its alignment with the various rationales of accountability explored in this thesis. The purpose of this brief overview is to provide a foundation for the discussion that follows in the balance of this chapter, which considers the manner in which mechanisms such as these constitute an accountability ‘system’.

1 Legislative mechanisms

The legislative branch of government houses a number of mechanisms that we can view as contributing to the accountability of government. Arguably the most critical are the principles of representative and responsible government. The principle of

Accountability Deficits and Overloads: A Missing Framework

representative government reflects that the ultimate source of parliament's authority is the people: 'it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives'.⁴⁰⁹ This constitutional requirement is enshrined in the mandate that members of Parliament be 'directly chosen by the people',⁴¹⁰ which, in the Australian context, is expressed via the election process. As a tool of accountability, the election process aligns well with the control rationale. Chief Justice Mason put the position in the *Australian Capital Television Case* as follows:

[T]he representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.⁴¹¹

Citizens' power to remove a government from office might be classed as a deauthorising-type control sanction,⁴¹² revoking the power to act. In this respect, we might view elections as serving the deterrent rationale for accountability.⁴¹³ The election process 'provides an important incentive to those politicians to continue to take account of what the public wants once they are in office',⁴¹⁴ not least due to the threat of future elections in which those sanctions will again be brought to bear. The transparency rationale is further relevant to elections as an accountability mechanism. In the *Australian Capital Television* case McHugh J stated:

If the institutions of representative and responsible government are to operate effectively and as the Constitution intended, the business of government must be examinable and the subject of scrutiny, debate and ultimate accountability at the ballot box ... Before [the electors] can cast an effective vote at election time, they must have access to the information, ideas and arguments which are necessary to make an informed judgment as to how they have been governed and as to what policies are in the interests of themselves, their communities and the nation.⁴¹⁵

⁴⁰⁹ *Australian Capital Television Pty Ltd v Commonwealth [No 2]* (1992) 177 CLR 106, 137 (Mason CJ).

⁴¹⁰ *Australian Constitution* ss 7 and 24.

⁴¹¹ *Australian Capital Television Pty Ltd v Commonwealth [No 2]* (1992) 177 CLR 106, 138 (Mason CJ).

⁴¹² On control sanctions, see Strom, above n 27, 62.

⁴¹³ Franklin, Soroka and Wlezien frame this in the language of punishment: Mark Franklin, Stuart Soroka and Christopher Wlezien, 'Elections' in Mark Bovens, Robert Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014) 389, 389.

⁴¹⁴ *Ibid.*

⁴¹⁵ *Australian Capital Television Pty Ltd v Commonwealth [No 2]* (1992) 177 CLR 106, 231.

Chapter 5: The Complexity of Accountability Systems

In this sense, transparency is guaranteed within the election process (due to the implied freedom of political communication), but also serves as a foundation for the other rationales of control and deterrence.

While elections no doubt make important contributions to accountability, they have been described as a ‘blunt’ tool in this respect.⁴¹⁶ They occur infrequently, are defined by a schedule outside the control of voters, and reflect the decisions of millions of electors who may be utilising the mechanism to respond to a range of concerns about past performance or future promises.⁴¹⁷ As Franklin et al note, an election result may sometimes reflect a choice of the ‘least bad’ alternative rather than constituting some more nuanced commentary on the accountability of the incumbent government or legitimisation of the incoming government.⁴¹⁸

The principle of responsible government can be viewed as a further accountability mechanism reflected in the Australian constitutional structure and conventions of Parliament.⁴¹⁹ We can conceive of responsible government as an extension of the chain of accountability established by the principle of representative government. Power is transferred up the chain through representative government, with electors authorising members of parliament, who in turn authorise members of the executive. Accountability is reflected back down the chain through responsible government, as the executive is responsible to the parliament, members of which are in turn responsible to the electors. In a practical sense, responsible government is facilitated through principles of collective and individual ministerial responsibility. The link between responsible government and accountability has been recognised in a number of Australian cases. In *Egan v Chadwick*, Spigelman J described the ‘enforcement of the accountability of the Executive’ as a ‘high constitutional function’ of the New South Wales upper house.⁴²⁰ In *Egan v Willis*, Gaudron, Gummow and Hayne JJ referred with

⁴¹⁶ Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 228; Franklin, Soroka and Wlezien, above n 413, 389.

⁴¹⁷ Franklin, Soroka and Wlezien, above n 413, 389–90.

⁴¹⁸ *Ibid* 390.

⁴¹⁹ *Williams v Commonwealth* (2012) 248 CLR 156, 350–51 [51]–[515]. Eg *Australian Constitution* s 64 (a Minister of State cannot hold office for more than three months unless they are a member of parliament), s 6 (Parliament must meet at least annually), s 83 (the legislature controls supply), s 49 (parliamentary privilege and the legislature’s power to coerce the provision of information from the executive): *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559.

⁴²⁰ (1999) 46 NSWLR 563, 574 [54].

Accountability Deficits and Overloads: A Missing Framework

approval to Kinley's description of responsible government as 'the means by which Parliament brings the Executive to account, or, to put it another way, the Executive's primary responsibility in its prosecution of government is owed to Parliament'.⁴²¹ Another description of responsible government which found favour with Gaudron, Gummow and Hayne JJ was that of Mill. The full extract from which their Honours quoted is as follows:

[T]he proper office of a representative assembly is to watch and control the government: to throw the light of publicity on its acts: to compel a full exposition and justification of all of them which any one considers questionable; to censure them if found condemnable, and, if the men who compose the government abuse their trust, or fulfil it in a manner which conflicts with the deliberate sense of the nation, to expel them from office.⁴²²

These characterisations of responsible government align well with a number of the rationales for accountability considered in this thesis. In particular, Mill's passage links to notions of transparency, control and desert. These same links between responsible government and accountability appeared to influence Crennan J in *Williams v Commonwealth*.⁴²³ In considering the scope of the executive's spending power, Her Honour described the range of constitutional provisions and conventions that constitute the doctrine of responsible government as 'mechanisms and layers of accountability [that] permit the ventilation, accommodation, and effective authorisation of political decisions'.⁴²⁴ Her Honour further referred to Parliament's 'power to scrutinise and authorise [executive] policy'.⁴²⁵ These ideas of 'ventilation', 'scrutiny' and 'authorisation' resonate with the accountability rationales of transparency and control.

As noted in Chapter 3, changes in the practical operation of responsible government in the context of modern politics are sometimes raised as a potential source of

⁴²¹ (1998) 195 CLR 424, 451, citing David Kinley, 'Governmental Accountability in Australia and the United Kingdom: A Conceptual Analysis of the Role of Non-Parliamentary Institutions and Devices' (1995) 18 *University of New South Wales Law Journal* 409, 451 [42]. See also *Egan v Chadwick* (1999) 46 NSWLR 563, 574 [54], where 'the enforcement of the accountability of the Executive' was described as a 'high constitutional function' of the upper house of the New South Wales Parliament.

⁴²² John Stuart Mill, *Considerations on Representative Government* (Parker, Son, and Bourn, 1861) 104. The portion of this extract quoted in *Egan v Willis* (1998) 195 CLR 424 was 'to watch and control the government: to throw the light of publicity on its acts', at 451 [42].

⁴²³ (2012) 248 CLR 156.

⁴²⁴ *Ibid* 351 [516].

⁴²⁵ *Ibid* 350-51 [511]-[515].

Chapter 5: The Complexity of Accountability Systems

accountability deficit.⁴²⁶ One notable difficulty is the impact of a dominant party system: 'As long as the governing party holds its majority, the government and its Ministers are more accountable to their party than to the Parliament'.⁴²⁷ A further significant limitation on the utility of individual ministerial responsibility is that (whatever may have been the position in the past), individual Ministers in modern government are generally not directly involved in the implementation of government policy.⁴²⁸ The chain of command under which the executive government operates can be viewed as insulating those who actively exercise public power (ie public servants and ministerial staff) from the direct scrutiny of Parliament,⁴²⁹ with the result that Parliament's ability not only to scrutinise but also to control, sanction and remedy such conduct is limited. This insulation also operates in reverse, as Ministers are not expected to tender their resignation in reaction to departmental or systemic failings.⁴³⁰ Instead, the day-to-day implications of individual ministerial responsibility are reflected in the answerability of Ministers to Parliament, and in the expectations that Ministers will not 'pass the buck' to their subordinates and will correct failings once identified.⁴³¹ However, as Mulgan notes, it is important to appreciate that ministerial responsibility is only one of many components of the wider accountability system:

[Ministerial responsibility] does not purport to be the sole channel of executive accountability and should not be criticised on these grounds. Instead, it needs to be seen simply as one element within an extensive range of accountability mechanisms to which executive government is now subject. Its effectiveness is therefore to be judged within this wider context in terms of its contribution to a general structure of accountability.⁴³²

This is the point drawn out in Sections B and C of this chapter.

A further important accountability mechanism sitting within the legislative branch is the parliamentary committee system. The committee system in Australian Parliament was relatively weak throughout the first six decades following federation, with the only

⁴²⁶ See above page 31.

⁴²⁷ Alan Fenna, Jane Robbins and John Summers, *Government and Politics in Australia* (Pearson Australia, 10th ed, 2014) 37.

⁴²⁸ See eg Mulgan and Uhr, above n 115, 157; Allars, above n 116, 18.

⁴²⁹ Mulgan and Uhr, above n 115, 157.

⁴³⁰ Ibid 156; Appleby, Reilly and Grenfell, above n 137, 206–07. Mulgan makes the point that this is not a new development but reflects long-standing practice: Richard Mulgan, 'Assessing Ministerial Responsibility in Australia' in Keith Dowding and Chris Lewis (eds), *Ministerial Careers and Accountability in the Australian Commonwealth Government* (ANU E Press, 2012) 177, 180–81.

⁴³¹ Mulgan and Uhr, above n 115, 156.

⁴³² Mulgan, 'Assessing Ministerial Responsibility in Australia', above n 430, 180.

Accountability Deficits and Overloads: A Missing Framework

real interest in committees arising in the context of joint committees that facilitated co-operation between the two houses.⁴³³ From the late 1960s onwards, however, the Senate in particular invested in the creation of a strong and comprehensive committee system, with the House of Representatives following suit in the mid-1980s.⁴³⁴ The current Commonwealth model comprises a number of permanent (standing) and ad hoc (select) committees sitting within each of the two Houses of Parliament, as well as joint committees comprising members from both Houses. Parliamentary committees play an important day-to-day accountability role in scrutinising legislation, regulating parliamentary processes and monitoring assets and interests of members of parliament.⁴³⁵ Committee inquiries may also play an important role in scrutinising government activity. For instance, the Senate Select Committee on a Certain Maritime Incident was established to investigate the so-called ‘children overboard’ incident, with the Committee reporting on (amongst other things) ‘accountability issues arising from the ... incident, including the adequacy of administrative practices in certain Commonwealth agencies, and the accountability framework for Ministers and their staff’.⁴³⁶

Perhaps one of the most important roles performed by parliamentary committees is consideration of Senate Estimates, which has been described as ‘the best accountability mechanism of any Australian Parliament’.⁴³⁷ Senate Estimate hearings provide for the scrutiny of government expenditure, allowing the Senate to question Ministers regarding financial and related areas of performance in the departments and programs for which they are responsible. Previously, this scrutiny function was performed by dedicated Estimates Committees; however the task is now divided between the various Senate standing committees, each tasked with review of one or

⁴³³ John Halligan, John Power and Robin Miller, ‘The Three Committee Systems of the Australian Parliament—A Developmental Overview’ in Paul Reynolds (ed), *Parliament 2000—Towards a Modern Committee System* (Queensland Parliamentary Library, 2001) 111, 112.

⁴³⁴ *Ibid* 113–14.

⁴³⁵ The Committee of Privileges and Members’ Interests for the House of Representatives and the Senators’ Interests Committee for the Senate. These committees were established as a part of a ‘package of “accountability measures”’ following controversy over alleged mismanagement of sporting grants by a Minister in 1994: Harry Evans and Rosemary Laing (eds), *Odgers’ Australian Senate Practice* (Department of the Senate, 14th ed, 2016) 472.

⁴³⁶ Select Committee on a Certain Maritime Incident, Senate, *A Certain Maritime Incident* (2002) xix.

⁴³⁷ Commonwealth, *Parliamentary Debates*, Senate, 13 May 2004, 23209 (Senator Faulkner, Leader of the Opposition in the Senate).

more particular portfolios.⁴³⁸ In an accountability context, the Senate Estimates process presents one of the clearest examples of ‘accounting’ for performance, harking back to the original idea of bookkeeping and audit of finances.⁴³⁹ Members of government are required to produce documents detailing their financial performance and committees scrutinise those documents, demanding answers about areas of discrepancy as well as related performance matters. Because proceedings are conducted in public, estimates hearings become an important tool in facilitating transparency in government expenditure and performance.

2 Executive mechanisms

Under the traditional conception of the separation of powers, the executive branch of government houses the bulk of mechanisms that we might think about as forming part of the Australian accountability system. Efforts to catalogue the number of mechanisms engaging in integrity oversight and performance functions across Australia reveal that there are dozens and perhaps even hundreds which might meet this description.⁴⁴⁰ This thesis offers an overview of some of the more well-known and used: *ex gratia* compensation, merits review tribunals, ombudsmen regimes, anti-corruption bodies, and freedom of information regimes.⁴⁴¹

In the Australian context, there is a range of mechanisms that provide for the payment of *ex gratia* compensation at Commonwealth, state and territory level. For the purposes of this thesis, the two mechanisms considered by way of example are payments under the Compensation for Detriment caused by Defective Administration scheme (‘CDDA’), and act of grace payments. The former is a non-statutory scheme established

⁴³⁸ Evans and Laing (eds), above n 435, 478.

⁴³⁹ Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’, above n 8, 448–49.

⁴⁴⁰ Robin Creyke, ‘An “Integrity” Branch’ (2012) 70 *AIAL Forum* 33, 36–37. A number of these descriptions incorporate the courts as members of the integrity branch, though this thesis considers this role separately below.

⁴⁴¹ Note that some would advocate conceiving of such mechanisms as a ‘fourth branch’ of government rather than as part of the Executive: see eg Bruce Ackerman, ‘The New Separation of Powers’ (2000) 113 *Harvard Law Review* 633; The Hon JJ Spigelman, ‘The Integrity Branch of Government’ (2004) 78 *Australian Law Journal* 724; Creyke, above n 440; John McMillan, ‘Re-thinking the Separation of Powers’ (2010) 38 *Federal Law Review* 423; A J Brown, ‘Putting Administrative Law Back into Integrity and Putting Integrity Back into Administrative Law’ (2006) 53 *AIAL Forum* 32, 34; A J Brown, ‘The Integrity Branch: A “System”, an “Industry”, or a Sensible Emerging Fourth Arm of Government?’ in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 301.

Accountability Deficits and Overloads: A Missing Framework

under s 61 of the *Constitution*, while the latter are provided for under s 65 of the *Public Governance, Performance and Accountability Act 2013* (Cth) ('**PGPA Act**'). The link between ex gratia compensation and the concept of accountability is acknowledged in the legislation which gives effect to the latter of these two payments. The title of the PGPA Act includes the word 'accountability', and its objects include 'to establish a coherent system of governance and accountability across Commonwealth entities' and 'to require the Commonwealth and Commonwealth entities ... to meet high standards of governance, performance and accountability [and] to provide meaningful information to the Parliament and the public'.⁴⁴² The core contribution made via these mechanisms to government accountability is, of course, restoration of harm occasioned by the government. In a report prepared in 1999, the Commonwealth Ombudsman acknowledged the link between ex gratia compensation and accountability. In recommending the adoption of a more flexible approach to the award of compensation pursuant to such mechanisms,⁴⁴³ the Ombudsman indicated that this was consistent with the existing trend towards viewing 'compensation for service delivery failures as a way of strengthening accountability for service delivery'.⁴⁴⁴ One of the core limitations of ex gratia compensation as an accountability mechanism is that its availability is inherently discretionary.⁴⁴⁵ While this mechanism is capable of contributing to the restoration rationale, there are limits to its utility.

Ombudsmen regimes have long been linked with the concept of accountability.⁴⁴⁶ McMillan has described the office as one of 'accountability "watchdog"',⁴⁴⁷ viewing it as one of the 'non-judicial accountability bodies' that supplement the courts' role in 'controlling government and ensuring integrity'.⁴⁴⁸ The functions of the Commonwealth Ombudsman are set out in section 5 of the *Ombudsman Act 1976* (Cth) as investigating

⁴⁴² *Public Governance, Performance and Accountability Act 2013* (Cth) s 5.

⁴⁴³ Commonwealth Ombudsman, *To Compensate or Not to Compensate* Report under s 35A of the *Ombudsman Act 1976* (Cth) (1999) 7 [9].

⁴⁴⁴ *Ibid.*

⁴⁴⁵ Eg the *Public Governance, Performance and Accountability Act 2013* (Cth) s 65 provides that the Finance Minister 'may' authorise a payment. See also Department of Finance, *Scheme for Compensation for Detriment Caused by Defective Administration*, Resource Management Guide No 409, May 2017 [18]; Department of Finance, *Requests for Discretionary Financial Assistance under the Public Governance, Performance and Accountability Act 2013*, Resource Management Guide No 401, April 2018 [8].

⁴⁴⁶ See Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing, 2016) Ch 11.

⁴⁴⁷ McMillan, above n 441, 437.

⁴⁴⁸ *Ibid.* 423–24.

Chapter 5: The Complexity of Accountability Systems

the administrative action of a department or prescribed authority either in response to a complaint or on their own motion. The investigatory power is quite broad, though there are limits as to who⁴⁴⁹ and what⁴⁵⁰ may be investigated. The Ombudsman also retains a discretion to refuse to investigate a complaint in a range of circumstances.⁴⁵¹ Following an investigation, the Ombudsman has a limited range of powers to follow through on the outcome of the investigation, including to report on their findings⁴⁵² and to make recommendations, including that a decision be referred for further consideration, cancelled or varied, or ‘any other thing should be done in relation to a decision, recommendation, act or omission to which this section applies’.⁴⁵³ The Ombudsman’s recommendations are not coercive, though non-compliance may be followed up.⁴⁵⁴ In terms of contribution to government accountability, ombudsmen have an important role to play in facilitating transparency. Unlike courts, ombudsmen have general inquisitorial and investigatory powers which may be of particular use in discovering maladministration and wrongdoing. However, the requirement that the Ombudsman’s investigations be conducted in private⁴⁵⁵ limits the reach of transparency in this respect. The ombudsman regime is perhaps also well-aligned with the deterrent rationale for accountability, as the investigatory and recommendatory powers would fit well with Braithwaite’s suggested approach of applying ‘weak sanctions’ to ‘soft targets’.⁴⁵⁶

Other accountability mechanisms in the executive branch include ad hoc and permanent commissions of inquiry, which can be established at both Commonwealth and state level.⁴⁵⁷ Such bodies can be seen to play an important role in supporting the

⁴⁴⁹ Eg investigatory powers do not extend to the actions of Ministers, members of Parliament or judges: *Ombudsman Act 1976* (Cth) s 5(2).

⁴⁵⁰ Eg a distinction is drawn between policy and administration; while the latter is amenable to review, the former is thought to be beyond the scope of the responsibilities of the Ombudsman: Appleby, Reilly and Grenfell, above n 137, 227.

⁴⁵¹ *Ombudsman Act 1976* (Cth) s 6(1).

⁴⁵² See eg *ibid* s 15(1) and (6).

⁴⁵³ *Ibid* s 15(2).

⁴⁵⁴ *Ibid* ss 16–17.

⁴⁵⁵ *Ibid* s 8(2).

⁴⁵⁶ Braithwaite, ‘On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers’, above n 11, 318.

⁴⁵⁷ Traditionally termed ‘Royal Commissions’, the power to establish such bodies is conventionally considered to fall within the prerogative power of the executive, though if a commission is to have coercive powers, these must be conferred by legislation (at the Commonwealth level, coercive powers are conferred by the *Royal Commissions Act 1902* (Cth)). Royal Commissions are established by letters patent, which set

Accountability Deficits and Overloads: A Missing Framework

accountability of government.⁴⁵⁸ A well-known example of the use of a commission of inquiry for such a purpose was the Fitzgerald Inquiry, which inquired into systemic police and government corruption in Queensland in the late 1980s.⁴⁵⁹ The inquiry ultimately led to a series of criminal prosecutions and gave rise to systemic changes to prevent such corruption going forward. Standing anti-corruption commissions have since been rolled out in a number of jurisdictions.⁴⁶⁰ At the Commonwealth level, the topic is presently live in calls for the establishment of a generalist national anti-corruption commission.⁴⁶¹ Depending on the terms of reference and powers afforded to such commissions, they can have an important role to play in connection with securing government accountability. For instance, the New South Wales Independent Commission Against Corruption ('NSW ICAC') was established 'to promote the integrity and accountability of public administration'.⁴⁶² Its information-gathering and investigatory powers extend to compelling the production of documents and the provision of evidence at compulsory examinations.⁴⁶³ Though inquiries may be conducted in private,⁴⁶⁴ reports and findings are ultimately made publicly available, in line with the transparency rationale. The NSW ICAC is also charged with functions that are more closely aligned with the deterrent rationale, in providing education and advice to public authorities and public officials on areas for improvement in preventing corruption going forward.⁴⁶⁵

Merits review tribunals are a further mechanism within the executive branch which can be viewed as playing an accountability role. In particular, the Administrative Appeals Tribunal ('AAT') is empowered to review categories of decisions referred to it through legislation.⁴⁶⁶ It is intended that the AAT conducts its review in a less formal

out the terms of reference and therefore the scope of the inquiry.

⁴⁵⁸ Elliot, above n 408, 255.

⁴⁵⁹ Bannister et al, above n 275, 189.

⁴⁶⁰ Eg the New South Wales Independent Commission Against Corruption, the Victorian Independent Broad-Based Anti-Corruption Commission, the Queensland Crime and Misconduct Commission, the South Australian Independent Commissioner Against Corruption, the Western Australian Corruption and Crime Commission, and the Tasmanian Integrity Commission.

⁴⁶¹ Select Committee on a National Integrity Commission, Senate, *Report* (2017).

⁴⁶² *Independent Commission Against Corruption Act 1988* (NSW) s 2A.

⁴⁶³ *Ibid* ss 21–22, 30, 31.

⁴⁶⁴ *Ibid* s 31(2)(a).

⁴⁶⁵ *Ibid* s 13.

⁴⁶⁶ *Administrative Appeals Tribunal Act 1975* (Cth) s 24.

Chapter 5: The Complexity of Accountability Systems

manner than a court, with proceedings before it to be ‘conducted with as little formality and technicality’ as possible, and without the constraints of the rules of evidence.⁴⁶⁷ The powers of the AAT when engaging in its review are the same as those of the original decision-maker, allowing it to affirm, vary or set aside the decision under review.⁴⁶⁸ In setting aside a decision, the AAT has the power to either make a new decision in substitute for the original, or remit the matter back to the decision-maker for reconsideration.⁴⁶⁹ It is these powers that are at the heart of characterising the AAT as a ‘merits’ review tribunal. The courts have described this as a power to decide the ‘correct or preferable’ outcome,⁴⁷⁰ or to ‘stand in the shoes’ of the original decision-maker,⁴⁷¹ or to ‘do over again’ the original decision-maker’s task.⁴⁷² Tribunals share many commonalities with courts that render them a useful vehicle for the delivery of government accountability, particularly in respect of the transparency objective. For instance, an applicant before the AAT is entitled to seek reasons from a decision-maker,⁴⁷³ and the AAT has the power to compel the production of information and documents relevant to the proceedings.⁴⁷⁴ Further, like courts, tribunals are public forums which publish the reasons for their decisions,⁴⁷⁵ again facilitating transparency. Because the AAT has the power to remake the decision under review, this mechanism has some capacity to achieve restoration of an individual who has been wronged by a decision. So, for instance, a licence wrongly revoked may be restored. However, there are limits to the utility of these powers, as discussed in more detail in Chapter 6.⁴⁷⁶

Freedom of information regimes are a further mechanism that contributes to the accountability of government. Such regimes are in place across Australia at both Commonwealth and state levels,⁴⁷⁷ and while rights of access differ slightly between

⁴⁶⁷ Ibid s 33.

⁴⁶⁸ Ibid s 43(1).

⁴⁶⁹ Ibid s 43(1)(c).

⁴⁷⁰ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, 68.

⁴⁷¹ *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139, 143.

⁴⁷² *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, 315 [100].

⁴⁷³ *Administrative Appeals Tribunal Act 1975* (Cth) s 28.

⁴⁷⁴ Ibid ss 40–40B.

⁴⁷⁵ Ibid ss 43(2) and 66B.

⁴⁷⁶ See page discussion from 187 below.

⁴⁷⁷ *Freedom of Information Act 1982* (Cth); *Government Information (Public Access) Act 2009* (NSW); *Freedom of Information Act 1982* (Vic); *Freedom of Information Act 1991* (SA); *Freedom of Information Act 1992* (WA); *Right to Information Act 2009* (Qld); *Right to Information Act 2009* (Tas); *Freedom of Information Act 1989* (ACT); *Information Act* (NT).

jurisdictions, they all offer a right of public access to government documents, with exceptions for certain categories of documents and information.⁴⁷⁸ Enhancing the accountability of government was identified as one of the key rationales underpinning the introduction of freedom of information regimes in Australia, with the Senate Standing Committee on Constitutional and Legal Affairs citing as one of the justifications for introducing the legislation: ‘when government is more open to public scrutiny, it in fact becomes more accountable’.⁴⁷⁹ The most relevant contribution of freedom of information regimes is in connection with the transparency rationale for accountability. Access to government information assists the public to engage in a dialogue with the government about the legality of its decisions and conduct, and to confirm whether there are breaches of norms for which the government ought to be held accountable. The threat of transparency may itself be considered to contribute to improved public governance, as officials may be more inclined to exercise their powers appropriately if they are aware that maladministration may become public knowledge. While ‘transparency as such is not enough to qualify as a genuine form of accountability’,⁴⁸⁰ it does provide an important foundation from which other mechanisms within the accountability system might proceed.

3 Judicial mechanisms

The final category of mechanisms surveyed in this section are enforced by the courts. The term ‘enforced’ is used here to distinguish these mechanisms from those which might more properly be described as being ‘supervised’ by the courts, such as review by tribunals (which is dealt with above).⁴⁸¹ There is a range of judicial mechanisms that we can conceive of as playing a role in holding the government to account, comprising causes of action that are available as against the government, and providing remedies that broadly align with one or more of the accountability rationales of transparency, control, restoration, desert and deterrence. At a more general level, we can note that the nature of the court forum and processes make an important contribution to

⁴⁷⁸ Eg access may be refused where release of document affects national security, prejudices the enforcement of the law etc: *Freedom of Information Act 1982* (Cth) Part IV, Division 2.

⁴⁷⁹ Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978* (1979) 21 [3.4].

⁴⁸⁰ Bovens, Curtin and ‘t Hart, above n 5, 38.

⁴⁸¹ See above page 142.

Chapter 5: The Complexity of Accountability Systems

government accountability. Pre-trial evidentiary procedures allow an applicant to gather information from the government and to draw out the government's position on a particular issue, with the coercive backing of the courts. Principles of open justice facilitate public dissemination of both the adjudication process (open courtrooms) and findings in relation to a dispute (publication of reasons). All of these procedures and processes provide important contributions to the transparency rationale. And the courts' remedial powers provide a means to facilitate the various goals of control, restoration, desert and deterrence, again backed with the courts' coercive powers. The particular details of the nature of these contributions are explored in more detail in Part III below.

Perhaps the most widely recognised tool of government accountability falling within the purview of the judicial branch is that of judicial review. For Mulgan, judicial review 'is in some respects the most powerful form of external review of executive action' and a 'fundamental prerequisite for effective executive accountability'.⁴⁸² While the courts do not tend to use the language of 'accountability' when describing their role in adjudicating these cases, the concept of accountability is manifest in two of our fundamental constitutional principles: the rule of law and the separation of powers.⁴⁸³ We can view these three concepts as overlapping and interdependent on one another; the rule of law requires that government officials be bound by the law, accountability is the machinery for enforcement of that principle, and the separation of powers provides the framework through which that enforcement can take place.⁴⁸⁴ In *Corporation of the City of Enfield v Development Assessment Commission*, Gaudron J linked the concepts of accountability and the rule of law in the following terms:

'[A]ccountability' can be taken to refer to the need for the executive government and administrative bodies to comply with the law and, in particular, to observe relevant limitations on the exercise of their powers. Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of their jurisdiction and

⁴⁸² Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 75–76. See also Brown, 'Putting Administrative Law Back into Integrity and Putting Integrity Back into Administrative Law' above n 441, 32, describing administrative law as 'the law of public accountability'.

⁴⁸³ This is an idea I have expanded on more fully elsewhere: Rock, 'Accountability: A Core Public Law Value?', above n 1, 190–92. See also Janina Boughey and Greg Weeks, 'Government Accountability as a "Constitutional Value"' in Rosalind Dixon (ed), *Australian Constitutional Values* (Cambridge University Press, 2017) 99.

⁴⁸⁴ Rock, 'Accountability: A Core Public Law Value?', above n 1, 190.

Accountability Deficits and Overloads: A Missing Framework

consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less.⁴⁸⁵

Judicial review encompasses the body of law that provides for judicial review of executive, legislative and judicial power. The common law, the *Constitution*, and state and federal legislation each confer jurisdiction on the courts to review excess of public power, and to order relief.⁴⁸⁶ Common law judicial review jurisdiction is an essentially remedial model, meaning that questions of standing and grounds of review are inextricably linked with the nature of the relief sought. Its origins can be traced to the English prerogative writs, initially employed by superior courts to control inferior courts, and subsequently adapted to control the exercise of quasi-judicial and then administrative power.⁴⁸⁷

The standards that are enforced via judicial review are derived from various sources, including the *Constitution*, the common law, or arising through statutory interpretation.⁴⁸⁸ Broadly speaking, they can be placed into three categories. The first category focuses on reasoning processes, in the sense of prohibiting certain types of motive or intent in the exercise of a power. Grounds of this nature include bad faith, bias, improper purpose and failure to exercise discretion. The second category of standards is concerned with procedure, governing the process through which power is exercised. Grounds of this nature include manner and form requirements, procedural requirements imposed by statute, natural justice requirements and restrictions on the information that can be taken into account when making a decision (that is, the considerations and no evidence grounds). The third category of standards is concerned with providing limits on the substance of the decision reached or the consequences that it can produce. These standards include constitutional limitations on the manner in which the government can alter its own structure and powers, or interfere with certain

⁴⁸⁵ (2000) 199 CLR 135, 157.

⁴⁸⁶ At the Commonwealth, statutory jurisdiction to engage in judicial review is established under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

⁴⁸⁷ See eg Bradley Selway, 'Of Kings and Officers: The Judicial Development of Public Law' (2005) 33 *Federal Law Review* 187; S A De Smith, 'The Prerogative Writs' (1951) 11 *Cambridge Law Journal* 40.

⁴⁸⁸ Depending on which side of the argument about the source of judicial review power one sits: for an overview see Stephen Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?' (2000) 28 *Federal Law Review* 303. It is unnecessary to resolve the question for the purposes of this thesis.

Chapter 5: The Complexity of Accountability Systems

categories of protected rights. Other standards of this nature include the requirement to reach the ‘correct’ conclusion in relation to jurisdictional facts, and the requirements that decisions not be wholly unreasonable or uncertain. Each of these three categories of standards apply in different ways to officials within each of the three branches of government. For example, the enactment of legislation by Parliament cannot be challenged on the basis of reasoning processes grounds like bad faith. Further, the standards that govern an executive official’s exercise of power will differ depending on whether they are exercising a prerogative power, statutory power or delegated legislative power. Finally, judicial officials are afforded a greater degree of leeway in their decision-making than executive officials, as (at least on the current state of authorities) the categories of jurisdictional error on the part of an inferior court are narrower than those that apply to executive officials.⁴⁸⁹ If the government fails to observe the boundaries set out by these public law principles, the validity of its actions may be the subject of review by the courts. The form of challenge and applicable remedies again depend on both the source of the power and the identity of the person exercising it. Available remedies include the prerogative and constitutional writs, as well as a range of statutory remedies. As explored in more detail in Chapter 6,⁴⁹⁰ these remedies are essentially regulatory in nature, most relevantly aligning with the accountability rationale of control. Judicial review offers very little (if any) contribution to the accountability rationales of restoration, desert or deterrence.

The criminal law can be viewed as a further important mechanism in support of accountability’s overarching objective of securing the legitimacy of government. The notion of accountability is implicit in many descriptions of the criminal offences that apply in the context of the exercise of public powers by government officials. Two of the main types of offence that can be understood as performing an accountability function are abuse of office and receipt of bribes.⁴⁹¹ The receipt of bribes category of offences

⁴⁸⁹ *Craig v South Australia* (1995) 184 CLR 163.

⁴⁹⁰ See section commencing at page 187 below.

⁴⁹¹ A third major category of offences is breach of secrecy obligations. For reasons of space these offences are not considered in this thesis. For detail, see *Crimes Act 1914* (Cth) ss 70 and 79; *Criminal Code 1899* (Qld) s 85; *Criminal Code* (Tas) s 110; *Criminal Code* (WA) s 81; *Crimes Act 1900* (ACT) s 153(1); *Criminal Code* (NT) s 76. In addition to those offences relating specifically to the exercise of public powers, government officials are also subject to the ordinary criminal law, with the proviso that certain actions may be the subject of an immunity not available to private citizens. For example, the actions involved in undertaking

Accountability Deficits and Overloads: A Missing Framework

prohibits an official from offering to accept, or accepting, inducements for the performance of their public functions.⁴⁹² Abuse of office (which is the focus of the analysis in Part III of this thesis) is more broadly concerned with public corruption. The detailed elements of the abuse of office offence vary depending on jurisdiction,⁴⁹³ with New South Wales and Victoria retaining the common law offence of misconduct in public office. That offence is made out where a public official, ‘in the course of or connected to his public office ... wilfully misconduct[s] himself ... without reasonable excuse or justification’ in light of the ‘responsibilities of the office’.⁴⁹⁴ Alder advocates the adoption of accountability as the ‘guiding principle’ in connection with this offence,⁴⁹⁵ noting that it hinges on the notion that ‘the public has an interest in ensuring that anyone acting on behalf of the state, performs all their duties properly’.⁴⁹⁶ Describing the offence as ‘a constitutional fundamental’,⁴⁹⁷ and a ‘hybrid, public-criminal law remedy’,⁴⁹⁸ Horder also points to accountability as its underpinning rationale:

[The offence] provides an essential way in which, as a last resort, prosecutors and the courts can deter and punish (with an appropriate label) corrupt conduct on the part of legislators and other officials, and thereby make the use of power accountable by reference to the standards of ordinary people.⁴⁹⁹

In this respect, it is possible to view such offences as contributing to the accountability rationales of desert and deterrence.

an arrest might ordinarily constitute criminal assault. However a police officer’s position as a public official offers protection against that offence: Cane, *Responsibility in Law and Morality*, above n 232, 265.

⁴⁹² *Criminal Code* (Cth) ss 141.1(3) and 141.2(3); *Criminal Code 1899* (Qld) s 87; *Criminal Code* (Tas) s 83; *Criminal Law Consolidation Act 1935* (SA) s 249(2); *Criminal Code* (WA) s 82; *Criminal Code* (NT) s 77 and 78. In NSW, Victoria and ACT, the offence extends to private sector dealings: *Crimes Act 1900* (NSW) s 249B(1); *Crimes Act 1958* (Vic) s 176; *Criminal Code 2002* (ACT) ss 356(2) and 357(2).

⁴⁹³ *Criminal Code* (Cth) s 142.2(1); *Criminal Code 1899* (Qld) ss 92 and 92A; *Criminal Law Consolidation Act 1935* (SA) s 251(1); *Criminal Code* (WA) s 83; *Criminal Code 2002* (ACT) s 359; *Criminal Code* (NT) s 82. No such offence presently exists in Tasmania, where the adoption of the *Criminal Code* (Tas) abolished the common law offence without putting an equivalent code offence in its place: Integrity Commission, *Prosecuting Serious Misconduct in Tasmania: The Missing Link*, (October 2014) 7.

⁴⁹⁴ *R v Quach* (2010) 27 VR 310, 323 [46], cited with approval by the New South Wales Court of Criminal Appeal in *Obeid v The Queen* (2015) 91 NSWLR 226, 252–54 [133] and [139].

⁴⁹⁵ John Alder, ‘Misconduct in Public Office: Modernising the Law’ [2014] *Public Law* 369, 371.

⁴⁹⁶ *Ibid* 370.

⁴⁹⁷ Jeremy Horder, *Criminal Misconduct in Office: Law and Politics* (Oxford University Press, 2018) 2.

⁴⁹⁸ *Ibid* 10–11.

⁴⁹⁹ *Ibid* 2.

Chapter 5: The Complexity of Accountability Systems

A further category of legal causes of action that can be understood as contributing to government accountability are tort claims. Though traditionally framed as a tool of corrective justice or economic deterrence,⁵⁰⁰ we can also view tort law as a means by which individuals can hold the government accountable for its wrongdoing.⁵⁰¹ Indeed, the use of tort law as a vehicle to challenge the legality of government activities and decisions can be viewed as the earliest beginnings of modern judicial review.⁵⁰² In 1973, Allen Linden wrote on the topic of 'tort law as ombudsman', viewing it as serving a similar, and perhaps even more effective, 'watchdog' function as an ombudsman: 'every court and lawyer in the land may be called on to participate in this noble work'.⁵⁰³ Linden argued that, irrespective of what we think of tort law's ability to serve deterrent and corrective functions, tort law served a separate and independent role that we may now describe as an accountability function:

When a tort suit is launched, the glare of publicity may be focused upon it. The officials of the defendant government or company are drawn into the litigation. They are publicly under attack and are required to justify their conduct and their methods of operation to the judge and the jury.⁵⁰⁴

In similar terms, Harlow has noted that one way of thinking about tort claims is as a 'tin-opener' that may be put to use by 'pressure groups and crusading lawyers hoping to open up dark and windowless areas of public administration'.⁵⁰⁵ These views afford tort law an important role to play within the context of the transparency rationale for accountability. However, the remedies available in tort actions also have a role to play in connection with the accountability rationales of restoration (compensatory and restitutionary damages awards), desert (punitive or exemplary damages awards)⁵⁰⁶ and deterrence.⁵⁰⁷ While there might be concerns about the extent to which tort law

⁵⁰⁰ Barker et al, above n 314, 21–22.

⁵⁰¹ Peter Cane, 'Tort Law and Public Functions' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press, 2014) 148, 164. Cane suggests that adopting an accountability rationale for tort claims against government may well accommodate the fact that (unlike tort claims as between individuals on 'juridically equal' footing) government liability in tort is by nature a matter of juridical inequality (at 148–49). See also Carol Harlow, *Understanding Tort Law* (Sweet and Maxwell, 3rd ed ed, 2005) 139–40.

⁵⁰² Rock and Weeks, above n 144.

⁵⁰³ Allen Linden, 'Tort Law as Ombudsman' (1973) 51 *Canadian Bar Review* 155, 156.

⁵⁰⁴ *Ibid.*

⁵⁰⁵ Harlow, *State Liability: Tort Law and Beyond*, above n 231, 51.

⁵⁰⁶ Carol Harlow, 'A Punitive Role for Tort Law?' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 247.

⁵⁰⁷ See discussion in Harlow, *Understanding Tort Law*, above n 501, 139–42.

Accountability Deficits and Overloads: A Missing Framework

succeeds in serving all of these various accountability objectives as an empirical matter,⁵⁰⁸ at least from a symbolic perspective the role of tort as an accountability mechanism is important. In Diceyan terms, government officials are bound by the ‘ordinary law of the realm’,⁵⁰⁹ and ‘are accountable for their conduct to a Court of Law’.⁵¹⁰

There are a large number of torts that may potentially be commenced against government defendants. Indeed, because the government engages in many activities that are akin to private parties (including owning land, running businesses, acting as an employer, using roads etc) we can broadly conceive of just about all torts as potentially applying to government defendants in some manner. However, there are some torts that are particularly relevant to peculiarly governmental functions: misfeasance in public office, malicious prosecution, negligence, breach of statutory duty and trespass to the person. Misfeasance in public office (considered in more detail in Chapter 6) is a tort that is directly concerned with misuse or abuse of public power, and has been described as a ‘public tort’ given that its application is limited to public officers.⁵¹¹ It allows individuals to recover damages for loss sustained where an official has acted maliciously, or knowing that they are likely to cause loss while acting in excess of their powers. The tort is derived from the historical ‘action on the case’, meaning that proof of harm is necessary in order to make out the claim. Malicious prosecution is likewise dependent on proof of harm. It may be relevant where proceedings (usually criminal)⁵¹² have been initiated or maintained maliciously and without reasonable or probable cause, and have ultimately been terminated in favour of the accused.⁵¹³

Negligence is also a tort often raised in the context of the exercise of government powers;⁵¹⁴ for example, where the government has failed to regulate certain activities,

⁵⁰⁸ See examples of unsuccessful tort claims cited in Harlow, *State Liability: Tort Law and Beyond*, above n 231, 49–53.

⁵⁰⁹ A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 8th ed, 1915) 198.

⁵¹⁰ *Ibid* 392.

⁵¹¹ Donal Nolan, ‘A Public Law Tort: Understanding Misfeasance in Public Office’ in Kit Barker et al (eds), *Private Law and Power* (Hart Publishing, 2017) 177.

⁵¹² The tort is also applicable to procedural aspects of proceedings (such as procuring a warrant to arrest a witness: (*Dunshie v Ryan* (1901) 1 SR (NSW) 163), and to the commencement of bankruptcy and winding up of petitions (*Johnson v Emerson* (1871) LR 6 Exch 329).

⁵¹³ *A v New South Wales* (2007) 230 CLR 500, 502–01 [1].

⁵¹⁴ Of course, negligence is relevant also in connection with the ‘day-to-day’ operations of government, such as occupier’s liability for injuries suffered on public land, liability for harm caused by the negligent driving of a government employee, and liability for harm occasioned by a government employee due to failure to

Chapter 5: The Complexity of Accountability Systems

or to use statutory powers so as to prevent harm, or has caused harm through the use of statutory powers.⁵¹⁵ To succeed, a plaintiff must establish that they have suffered loss as a result of the government's act (or failure to act) in breach of a duty of care. The tort of breach of statutory duty is distinct from the tort of negligence, though the two torts involve similar concepts. In its earlier form, this tort was premised on the 'simple principle that the breach of a duty created by a statute, if it results in damage to an individual, is a tort for which an action for damages will lie at his suit'.⁵¹⁶ On that approach, the government would be liable for any loss occasioned as a result of the failure to perform a duty set out in legislation. However, Harlow describes breach of statutory duty as a 'missing tort' because its scope has been so hedged about with qualifications that it is now of little meaningful value for the purposes of government accountability.⁵¹⁷ The most problematic aspect of the modern tort is its focus on parliamentary intention, as the tort is relevant only where it can be said that Parliament intended that a breach of the relevant duty would sound in a private cause of action. This may be the case, for instance, if a statute can be said to impose a duty for the benefit of a particular class of persons, as opposed to protecting the 'general public interest'.⁵¹⁸ In the context of government liability, the court may also take into account competing interests:

[T]here is a need to balance the protection of liberty and due process with the need for public officials to carry out their obligations honestly and in good faith free from the fear of actions for damages, either against themselves or their employers who would normally be vicariously liable.⁵¹⁹

Ultimately, the task of divining parliamentary intention and balancing competing concerns such as these has left the tort with little role to play in the context of government liability.

provide a safe system of work.

⁵¹⁵ See eg *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; *Pyrenees Shire Council v Day* (1998) 192 CLR 330.

⁵¹⁶ Sir John William Salmond, R F V Heuston and R A Buckley, *Salmond and Heuston on the Law of Torts* (Sweet and Maxwell, 21st ed, 1996) 247, cited in Carol Harlow, *Compensation and Government Torts* (Sweet and Maxwell, 1982) 68 (citing previous edition).

⁵¹⁷ Harlow, *Compensation and Government Torts*, above n 516, 68–70.

⁵¹⁸ *Chordas v Bryant (Wellington) Pty Ltd* (1988) 20 FCR 91, 102.

⁵¹⁹ *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1991) 31 FCR 29, 38.

Accountability Deficits and Overloads: A Missing Framework

The intentional torts of battery, assault and false imprisonment are also potentially relevant in the context of government activities. They respectively provide recourse in cases involving physical contact, threats of physical contact, and restriction of liberty. Though they protect against different forms of interference, the torts share a number of common elements, including that the acts taken by the defendant are *direct, intentional* and lacking in *legal authority*. These torts have an important role to play in connection with government activities, as arrests, detention and imprisonment are all activities that place government officials in direct coercive contact with individuals. In this context, frequently the most difficult question to grapple with is whether an official had legal authority for their actions, particularly in circumstances where an individual has been detained pursuant to a form of authority (eg a warrant) that is later discovered to be invalid. So, for instance, in *Ruddock v Taylor* there were questions as to whether an individual who was detained following the Minister's (invalid) cancellation of his visa was able to mount a claim of false imprisonment.⁵²⁰

There is a range of further causes of action we might view as contributing to government accountability. So, for instance, a claim of breach of contract against the government may support the restoration rationale for accountability, by providing an individual with restoration where the government has failed to perform its contractual obligations. Restoration may also be supported through a claim for restitution of payments made to the government based on principles of unjust enrichment—for instance, on the basis of mistake or compulsion (including demands made *colore officii*). While not as yet forming part of Australian law, the adoption of the *Woolwich* principle would further see the expansion of restitution to all payments made pursuant to invalid demands, irrespective of whether the payment was made by mistake or pursuant to compulsion.⁵²¹ A full catalogue of the ways in which legal causes of action might support the various rationales of accountability would take up unnecessary space in this thesis. The foregoing discussion serves to highlight the salient points.

⁵²⁰ (2005) 222 CLR 612.

⁵²¹ Named for the decision of *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70.

4 Summary

Section A of this chapter has provided a (necessarily) high-level overview of a range of mechanisms from across the three branches of government in Australia that can be viewed as contributing to the accountability of government. It goes without saying that there are other mechanisms, both within and outside government, that could have been included in this catalogue. So, for instance, we might note that the nature of the employment relationship and organisational hierarchies within government provide a form of internal accountability (eg a Head of Department has the ability to supervise the performance of their employees, to direct them to exercise their responsibilities in particular ways and to hold them accountable for poor performance).⁵²² There is also an important accountability role to be played by the Auditor-General. We might also include the media as an accountability forum, noting the contribution of investigative journalism in uncovering government wrongdoing.⁵²³ At the international level, failure to comply with treaty obligations might expose the Australian government to political pressure and even economic sanctions. We could even look to social and market forces as serving a potential accountability function.⁵²⁴ This section has not sought to offer a comprehensive overview of every element comprising our Australian accountability system. Rather, it highlights the importance of thinking about accountability as the product of a multi-layered collection of mechanisms. Accountability in Australian governance is not achieved via a ‘one-stop-shop’ approach, but through a range of different entities and institutions across the three branches of government.

B FEATURES IN BALANCE

The discussion in Section A revealed that the various tools and mechanisms that make up the accountability system in Australia operate in quite different ways. One set of differences relate to the circumstances in which the mechanisms apply (for example,

⁵²² Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 105: he cites accountability of public servants via the administrative hierarchy as ‘the single most important accountability relationship’ in which those individuals operate.

⁵²³ See eg Pippa Norris, ‘Watchdog Journalism’ in Mark Bovens, Robert Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014) 525.

⁵²⁴ Mashaw, above n 8, 132.

Accountability Deficits and Overloads: A Missing Framework

differences in the classes of government officials and entities that can be held accountable, and differences in the standards against which they are judged). But, putting these differences to one side, we can also observe a range of differences in the *features* of the various mechanisms, including their cost, duration, degree of flexibility and independence, amongst others. Sometimes these features are viewed in terms of 'strengths' and 'weaknesses' of the various mechanisms. So, for example, some might suggest that there is a potential accountability deficit arising out of the cost and duration of legal proceedings.⁵²⁵ The argument made in this section is that, rather than thinking about these features in terms of 'strengths' and 'weaknesses' of individual mechanisms, it is more instructive to think about these features as forming part of a patchwork of interacting and overlapping mechanisms. On this view, we may determine that traditionally conceived 'weaknesses' of individual mechanisms may be framed in less negative terms by viewing them as part of the larger systemic picture.

The first differentiating feature that we can observe between the mechanisms is their *accessibility*. Are these mechanisms designed for access by individuals, or must we rely on others to initiate the mechanism? In comparing the various mechanisms, we can see that there is a mixture of access entitlements. Some mechanisms are designed so as to be directly accessible by individuals (for example, elections, courts, tribunals, freedom of information etc). Other mechanisms are designed to be operated by the government (most notably, the mechanisms of responsible government and parliamentary committees). This is not to say that one approach is more valuable than another. Certainly, there might be accountability concerns if all mechanisms were entirely within the hands of government, with citizens left to trust that they will be utilised. However, there might equally be concerns if all mechanisms required input from citizens in order to operate. Some issues may not attract the attention of particular individuals, or might only affect individuals who lack the means to air their concerns through available mechanisms. In such cases there is great utility in having mechanisms designed for use by government officials, such as the role of the Attorney-General in judicial review proceedings where others lack standing.⁵²⁶

⁵²⁵ This is an example tested by Mulgan: Mulgan, 'Accountability Deficits', above n 116, 554.

⁵²⁶ This is discussed in more detail from page 202 below.

Chapter 5: The Complexity of Accountability Systems

A second differentiating feature is the *cost* of utilising particular mechanisms, both in terms of time and resources. While some mechanisms are free to access (for example, elections and complaints to the ombudsmen), others require significant financial resources (for example, court proceedings). Similarly, while some have a fairly quick turnaround time (for example, election results are relatively immediate), others, such as legal proceedings, are far more time-consuming. On one view, we might think that all accountability mechanisms ought to be efficient in their operation and freely accessible to anyone. Certainly, there are valid criticisms of the enormous financial and time burden of bringing legal challenges before the courts and consequent limitations on access to justice.⁵²⁷ However, when we view the collection of mechanisms as a system, some of these concerns may be alleviated. So, while an individual may not have the resources to bring a claim before the courts, they may potentially be able to air their concerns through less expensive and more efficient mechanisms, such as tribunals (which are assigned the objectives of operating in a manner that is ‘economical’ and ‘quick’).⁵²⁸ Indeed, putting to one side concerns about limits on access to justice, there might be views that the immense time and financial cost of legal proceedings is useful from the perspective of diverting individuals into less extreme mechanisms, leaving legal challenge as a tool of last resort. Irrespective of whether we believe that the substantial costs of access to some of the ‘big ticket’ accountability mechanisms are justified, some of our concerns about the costs of such mechanisms can be alleviated when we see that others are available free of charge.

The *flexibility* of the mechanisms is also a point of differentiation. Some mechanisms operate according to strictly defined rules of practice and procedure. So, for example, there are clearly defined protocols that confine the operation of elections, and the management of legal proceedings through the courts. At the other end of the spectrum, some mechanisms are inherently flexible and discretionary in nature. Tribunals, for example, are intended to operate ‘with as little formality and technicality, and with as much expedition’ as possible.⁵²⁹ Ex gratia compensation also falls squarely

⁵²⁷ See eg Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) Ch 4.

⁵²⁸ *Administrative Appeals Tribunal Act 1975* (Cth) s 2A(b).

⁵²⁹ *Ibid* s 33(1)(b).

Accountability Deficits and Overloads: A Missing Framework

at this end of the spectrum, with decision-makers having very broad discretion to determine entitlements to compensation informed only by non-binding guidelines. Ombudsmen regimes are also inherently flexible in nature, having broad discretion in terms of the manner in which investigations are conducted.

Similarly, there are differences between the *coerciveness* of the various mechanisms. Some mechanisms are able to use legal force to compel compliance with accountability objectives. Many, for example, are able to compel compliance with the accountability objective of transparency. Courts and tribunals can require the production of documents and provision of reasons both prior to and during trial. Parliament can hold a Minister in contempt for failure to produce documents,⁵³⁰ and individuals can use freedom of information regimes to compel the production of documents held by government departments and agencies. Royal commissions and ombudsmen are conferred powers that give them legal force in the course of conducting their investigations. However, there are far fewer mechanisms that can act coercively in pursuit of the remaining objectives of accountability. The courts have coercive accountability powers, in being able to make orders mandating or prohibiting conduct (control), imposing fines and terms of imprisonment (punishment) and requiring payment of compensation or rectification (restoration). To a certain degree, the doctrine of ministerial responsibility entails a degree of coercion. Convention requires the resignation of a government that lacks the confidence of the lower house and, should the government refuse to comply with the convention, the Governor-General has coercive reserve powers to dismiss the government on that basis. However, other mechanisms are far less coercive in their nature. So, for example, the NSW ICAC has power only to make findings and recommendations in relation to issues of corruption, not to prosecute or impose penalties. Similarly, ombudsmen have powers only to recommend particular courses of action (including the provision of restoration) to government. Failure to comply leads only to reporting ‘up the chain’, rather than to the imposition of any more coercive sanction.

Again, however, we should not view lack of coerciveness necessarily as a ‘weakness’ in terms of accountability functions. As many have noted, the fact that ombudsmen lack

⁵³⁰ *Egan v Willis* (1998) 195 CLR 424.

Chapter 5: The Complexity of Accountability Systems

coercive powers can in fact lead to greater likelihood of compliance with investigations.⁵³¹ Therefore, far from being a weakness, the lack of coercion may in fact be viewed as a strength of the model. Of course, if ombudsmen were the only available accountability mechanism within our system of government, we might be concerned that they lack the power to achieve the results-focused accountability objectives of control, restoration and punishment. However, when we take a systemic approach, we are able to appreciate that a varying degree of coercion across the system is important to achieving accountability on a wholesale basis. This point is reflected in Schedler's description of accountability as a 'radial concept', pursuant to which the various stages of the accountability process—from information gathering through to the imposition of sanctions—are continuous variables that show up to different degrees, with varying mixes and emphases'.⁵³² We can therefore appreciate the important accountability role played by a non-coercive mechanism, provided that coercion exists somewhere else within the system.

A further feature that differs between mechanisms is their degree of *autonomy*; are the mechanisms proactive or reactive? Some mechanisms are engaged only through specific procedures. So, for example, the courts can adjudicate only on cases that are brought before them. Indeed, at the federal level, the separation of powers prevents the conferral of non-adjudicatory power (such as advisory roles) on Chapter III courts.⁵³³ This is a significant limit on the operation of the courts as an accountability mechanism, as they can operate in that capacity only when called on to adjudicate a dispute about existing rights. Similarly, freedom of information and ex gratia compensation regimes are engaged only when an individual seeks to use them. In comparison, other mechanisms are able to play a far more proactive role. So, for example, ombudsmen have the power to investigate matters of their own volition, rather than waiting for a complaint to be made. Similarly, the NSW ICAC is able to investigate 'on its own

⁵³¹ Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 97; Harlow, *State Liability: Tort Law and Beyond*, above n 231, 122; Harlow and Rawlings, above n 61, 555; Appleby, Reilly and Grenfell, above n 137, 228; Elliot, above n 408, 246.

⁵³² Schedler, above n 194, 17.

⁵³³ Such is the effect of the High Court's jurisdiction with respect to 'matters': *Australian Constitution* s 75.

Accountability Deficits and Overloads: A Missing Framework

initiative' as well as in response to complaints,⁵³⁴ and also performs an ongoing educative role.⁵³⁵

There are also differences in terms of the *independence* of the various mechanisms. For instance, the courts are regarded as distinctly independent from the other branches of government. 'Judicial independence is an assumption which underlies Ch III of the Constitution',⁵³⁶ supporting a delineation between the role of the courts and the other institutions of government. The concept of judicial independence requires the courts to remain free of influence from the political branches of government:

At the heart of judicial independence, although not exhaustive of the concept, is decisional independence from influences external to proceedings in the court, including, but not limited to, the influence of the executive government and its authorities.⁵³⁷

Accordingly, the courts exercise their accountability function entirely independently of the other branches of government. The importance of judicial independence was recently highlighted in the context of criticisms made by three Commonwealth Ministers regarding the sentencing approach of the Supreme Court of Victoria in terrorism cases that were sub judice.⁵³⁸ In light of the threat of prosecution for contempt, the Ministers withdrew their comments and eventually made apologies to the Court. The Court ultimately accepted these apologies and declined to pursue contempt charges. However, in connection with handing down sentences in the relevant cases, the Victorian Court of Appeal published a statement in which it emphasised that the rules of contempt of court 'exist to protect the independence of the judiciary in making decisions that bind governments and citizens alike ... [and] to protect public confidence in the judiciary'.⁵³⁹ Thus, judicial independence is not merely an aspiration but a fundamental ideal enforceable through principles of contempt.

Although not to the same fundamental degree as the courts, there are other institutions within the accountability system that enjoy a degree of independence. Tribunals and ombudsmen are considered to be independent of the executive,

⁵³⁴ *Independent Commission Against Corruption Act 1988* (NSW) s 20(1).

⁵³⁵ *Ibid* s 13.

⁵³⁶ *South Australia v Totani* (2010) 242 CLR 1, 20 [1].

⁵³⁷ *Ibid* 43 [62].

⁵³⁸ Relevantly, *DPP (Cth) v MHK (a pseudonym)* [2017] VSCA 157 and *DPP (Cth) v Besim* [2017] VSCA 158.

⁵³⁹ *Ombudsman Act 1974* (NSW).

Chapter 5: The Complexity of Accountability Systems

notwithstanding that the orthodox view of the separation of powers places them within the executive branch of government. This independence is established by providing some security of tenure, as, like judges, these office-holders can be removed during the term of their appointment only following resolution by both Houses of Parliament on defined grounds, including misbehaviour or incapacity.⁵⁴⁰ However, there are limits to this independence, demonstrated through government influence on resourcing⁵⁴¹ and appointments. The independence of the AAT was recently brought under threat in the context of comments made by the Minister for Immigration and Border Protection, the Hon Peter Dutton MP. During a media interview, Mr Dutton intimated that decisions of the AAT that went against the government may have been influenced by political appointments, describing this as 'a frustration we live with'.⁵⁴² Seemingly in response to these criticisms, Logan J, as Acting President of the AAT, noted that:

The very existence of the Tribunal and the independent, quasi-judicial model adopted for it means that, inevitably, there will be tension from time to time between Ministers and others whose decisions are under review and it ... They can be lessened if each element of our system of government understands and respects the role of the other.

That does not mean that Tribunal decisions are immune from criticism. It does mean that ... any member who allowed himself or herself to be persuaded as to an outcome by partisan or political rhetoric by a Minister, any other administrator or the popular press would be unworthy of the trust and confidence placed in him or her by His Excellency the Governor-General and untrue to the oath or affirmation of office which must be taken before exercising the Tribunal's jurisdiction. For those members who do not enjoy the same security of tenure as judges, that may call at times for singular moral courage and depth of character.⁵⁴³

The subsequent round of appointments to the AAT has since been criticised as being substantially political in character.⁵⁴⁴ Despite some of these concerns, the role of the AAT can be viewed as entailing a degree of independence and impartiality. At the other end of the spectrum, there are mechanisms that cannot be viewed as independent. So,

⁵⁴⁰ *Administrative Appeals Tribunal Act 1975* (Cth) s 13; *Ombudsman Act 1976* (Cth) s 28.

⁵⁴¹ See eg Brogan Elliot, 'The Hidden Influences That Limit Governmental Independence: Controlling the Ombudsman's Apparent Independence' (2013) 21 *Australian Journal of Administrative Law* 27, 33–34.

⁵⁴² Caitlyn Gribbin, 'Peter Dutton Blames "Politics" as Bid to Deport Six Refugees Fails', *ABC News Online*, 16 May 2017 <<http://www.abc.net.au/news/2017-05-16/peter-dutton-blames-politics-over-blocked-bid-to-deport-refugees/8530060>>, referring to comments made by Mr Dutton in an interview with radio station 2GB.

⁵⁴³ *Singh (Migration)* [2017] AATA 850, [17]–[18].

⁵⁴⁴ Michael Koziol, 'George Brandis Clears out "Infuriating" Administrative Appeals Tribunal', *The Sydney Morning Herald Online*, 28 June 2017 <<http://www.smh.com.au/federal-politics/political-news/george-brandis-clears-out-infuriating-tribunal-20170628-gx071l.html>>.

Accountability Deficits and Overloads: A Missing Framework

for example, the dominance of the party system might be viewed as curtailing the independence of the legislative branch in utilising principles of responsible government to hold the executive to account. Further, some mechanisms are embedded within the institutions being held to account, with the effect that they take on the character of ‘self-regulatory’ mechanisms. Thus, parliamentary committees facilitate accountability from within Parliament, and the availability of ex gratia compensation from the executive branch is determined *by* the executive branch.

A further differentiating feature between the various mechanisms is their *permanence*, in the sense that some mechanisms are enduring or open-ended while others are convened for a term or purpose or subject to being diminished or abolished. At the permanent end of the spectrum we might place the mechanism of judicial review. The High Court has held that it is beyond the power of Parliament to legislate so as to exclude the High Court’s power to engage in review for jurisdictional error.⁵⁴⁵ For this reason, judicial review for jurisdictional error can be regarded as a foundational accountability mechanism in Australian governance. Accountability via criminal and tort law is of a less permanent character, as the government can legislatively confine or remove the availability of these mechanisms (as demonstrated through civil liability reforms throughout Australia in the early 2000s). Representative government supported via popular election is a further permanent mechanism; because the *Constitution* requires that members of Parliament be ‘directly chosen by the people’,⁵⁴⁶ Parliament’s power to limit the right to vote is limited.⁵⁴⁷ Accountability via responsible government is of a less permanent character than these first two mechanisms. As a matter of convention, this doctrine is subject to alteration over time, rather than operating as a permanent guarantee. At the other end of the spectrum sit those mechanisms that are essentially creatures of statute. Tribunals, commissions of inquiry, ombudsmen and freedom of information regimes are all inherently subject to substantial alteration, and even abolition, in accordance with the will of parliament. This impermanence is exacerbated by the government’s ability to withhold resources from these bodies.

⁵⁴⁵ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

⁵⁴⁶ *Australian Constitution* ss 7 and 24.

⁵⁴⁷ *Attorney-General (Ex rel McKinlay) v Commonwealth* (1975) 135 CLR 1.

Chapter 5: The Complexity of Accountability Systems

This discussion has demonstrated that there is indeed a range of differences between the features of the various mechanisms constituting the accountability system set out in Chapter 4. Some are more independent than others, some are more flexible, some have more coercive powers and so on. However, the argument drawn out here is that it is a mistake to describe these features as ‘strengths’ and to therefore criticise lack of these features in a particular mechanism as a ‘weakness’. Certainly, it is a good thing from an accountability perspective to have a permanent, independent, cheap, efficient, flexible and coercive means of securing accountability. However, these features need not all exist within a single mechanism. In fact, by spreading out these features amongst various mechanisms, we can introduce a degree of ‘give and take’ within the system that enhances accountability overall. Picking up the example set out above, an ombudsman’s lack of coercive powers may limit the extent to which they can compel the government to restore an individual who has suffered loss. However, that lack of coerciveness may lead to greater likelihood of compliance during ombudsmen investigations. Provided that there is coerciveness somewhere else within the system (for example, through the courts), the ombudsman’s lack of coercive powers contributes to, rather than detracts from, accountability. This demonstrates the fundamental importance of viewing accountability across the whole of the system, rather than focusing on mechanisms in isolation. By focusing on mechanisms rather than systems, we risk misunderstanding the contribution of various features of the mechanisms when taken as a whole.

C RELATIONSHIP DYNAMICS IN THE SYSTEM

One of the most critical ideas to capture in looking at accountability mechanisms as constituting a system is to understand the dynamics of the relationships between those mechanisms. This idea was explored by Scott in his well-known article on accountability in the regulatory state, in which he put forward two models of extended accountability systems: interdependence and redundancy.⁵⁴⁸ The interdependence model refers to the ways in which mechanisms operate to hold one another accountable. The redundancy model, in contrast, employs the idea of ‘overlapping (and ostensibly superfluous) accountability mechanisms’, which operate so as to ‘reduce the centrality of any one of

⁵⁴⁸ Scott, above n 8.

Accountability Deficits and Overloads: A Missing Framework

them'.⁵⁴⁹ For Scott, this model represents a 'belt and braces' approach,⁵⁵⁰ in which 'two independent mechanisms are deployed to ensure the system does not fail, both of which are capable of working on their own'.⁵⁵¹ On closer analysis of the mechanisms described in Section A, it is apparent that there are in fact many more nuances in the relationship dynamic between mechanisms within the accountability system.⁵⁵² As Scott's redundancy model envisages, some of the mechanisms are indeed designed to operate simultaneously and entirely independently. However, others are interdependent, in the sense that they interact and interlock in some way. Others have a staged relationship, where one operates as a precondition of another. Conversely, in others the operation of one precludes the operation of another. Another style of relationship is a co-operative type, where the mechanisms complement and assist one another. Importantly, it is necessary to accept that, while some mechanisms have been designed to operate in harmony with one another, others are in positions of competition or tension. The overall structure is strengthened through the interplay between opposing forces that weigh against one another to hold it in balance. This idea of tension is critical in Scott's analysis, as he views conflict or tension between mechanisms as an inevitable by-product of employing a system approach to accountability. Our goal, according to Scott, should not be to 'iron out' that conflict, but instead 'to exploit it to hold regimes in appropriate tension'.⁵⁵³

It is convenient to start with the most straightforward type of accountability relationship, that between *independent* mechanisms. Mechanisms in this style of relationship can be viewed as operating in parallel to one another; two trains travelling under their own steam whose paths do not cross. This is not to say that there is *no* relationship between them. To remove one may disrupt the status quo in a manner that has a knock-on effect on the other. However, in terms of their day-to-day operation, mechanisms in an independent relationship may operate without regard to one other. As noted above, this dynamic relevantly aligns with Scott's redundancy, or 'belt and

⁵⁴⁹ Ibid 52.

⁵⁵⁰ Ibid 53.

⁵⁵¹ Ibid.

⁵⁵² This possibility is explicitly acknowledged by Scott, indicating that there are 'at least two different models':
ibid 50.

⁵⁵³ Ibid 57.

Chapter 5: The Complexity of Accountability Systems

braces' model.⁵⁵⁴ The availability of multiple mechanisms provides a sense of safeguard, ensuring that where one mechanism falls short, others are available to take up the slack. Redundancy in mechanisms, as Scott reminds us, offers important benefits in terms of operating as a 'failsafe'; 'where one fails the other will still prevent disaster'.⁵⁵⁵ This independent type of accountability dynamic treads a fine line between patching up potential accountability deficits, on the one hand, and creating accountability overloads on the other. While there is a safeguard benefit where numerous mechanisms operate in parallel, there is also a greater risk of them overlapping at some stage. As highlighted in Chapter 1, where an agent is subject to numerous competing accountability demands, this may lead to an overall reduction in their performance.⁵⁵⁶ It is, therefore, necessary to closely examine independent mechanisms to determine whether they strike the correct balance between failsafe and overload. Looking at the accountability system outlined in Section A, it is possible to identify a number of ways in which the system establishes independent mechanisms. So, for example, the fact that a person has been acquitted in the context of disciplinary or criminal proceedings via legal mechanisms does not preclude an investigation by an ombudsman.⁵⁵⁷ Further, in circumstances where a senior official within a government department bungles an important decision, there is nothing to prevent members of the House of Representatives employing mechanisms of ministerial responsibility to hold the relevant Minister accountable, at the same time that the official is the subject of review via disciplinary proceedings, while the affair is simultaneously scrutinised via the media. These three accountability mechanisms are able to operate largely in parallel, with each serving its own independent accountability function. If one falls short in its operation, the remaining mechanisms operate as 'failsafes'.

A second type of relationship dynamic is the *mutually exclusive* variety. This dynamic is the opposite of the independent style of relationship. Rather than both mechanisms being able to operate independently in parallel, in a mutually exclusive dynamic the operation of one mechanism precludes the operation of another. This may

⁵⁵⁴ Ibid 53.

⁵⁵⁵ Ibid.

⁵⁵⁶ See discussion at page 32 above.

⁵⁵⁷ *K v NSW Ombudsman* [2000] NSWSC 771 [88] (Whealy J): 'The functions performed by the Ombudsman are quite different and distinct from the disciplinary function'.

Accountability Deficits and Overloads: A Missing Framework

occur in a number of different ways. First, an individual may ‘succeed’ via one accountability mechanism, causing another to be redundant. So, for example, if an investigation by the ombudsman led to compensation of loss suffered as a result of maladministration, other mechanisms (such as legal liability and ex gratia compensation) would thereby become irrelevant. Secondly, this type of relationship might arise where an individual ‘fails’ in the context of one mechanism, leading to the unavailability of another. So, for example, if an individual cannot establish that an official has exceeded the scope of their powers in a public law sense, they will not thereafter be able to claim that the official has committed trespass without legal authority. Failure at the first hurdle precludes success at the second. Thirdly, there might be some mechanisms that cannot operate simultaneously. A prime example of this type of mutually exclusive relationship is in the context of contempt of court. Where a matter is before the courts, this may preclude the operation of other mechanisms such as media scrutiny and consideration by Royal Commissions,⁵⁵⁸ for example. Similarly, if criminal proceedings are on foot, the NSW ICAC is entitled to continue its investigation but must do so in private and defer reporting on its findings until after the conclusion of those legal proceedings, thereby limiting its contribution as an accountability mechanism during that period.⁵⁵⁹ In a similar vein, the New South Wales Court of Criminal Appeal in *Obeid v The Queen* was recently called on to determine whether the misconduct of a member of the New South Wales Parliament was within the ‘exclusive cognisance’ of the Parliament, thereby precluding the prosecution of the offence of misconduct in public office before the courts.⁵⁶⁰ The Court noted that there might be some circumstances in which the courts should stay proceedings, for example, where parliamentary privilege prevents determination of the issues between the parties.⁵⁶¹ In that situation, the mechanisms of criminal proceedings and parliamentary proceedings would be mutually exclusive. However, the Court held that, aside from those limited cases, there is no reason why criminal proceedings cannot

⁵⁵⁸ Fiona Roughley, ‘Royal Commissions and Contempt of Court: The Effect of Curial Proceedings’ (2015) 38 *University of New South Wales Law Journal* 1123.

⁵⁵⁹ *Independent Commission Against Corruption Act 1988* (NSW) s 18.

⁵⁶⁰ *Obeid v The Queen* (2017) 350 ALR 103 [134]–[147] (Bathurst CJ). See also [292]–[320] (Leeming JA).

⁵⁶¹ *Ibid* [135].

Chapter 5: The Complexity of Accountability Systems

take place alongside parliamentary proceedings.⁵⁶² Accordingly, we ought not to regard these two mechanisms as mutually exclusive, as a general rule.

A third type of relationship is the *staged* dynamic. This type of relationship will be relevant where the engagement of one mechanism is viewed as a precondition of another. Structuring mechanisms in a staged way can assist in resolving some of the tension between them; as Mulgan argues, ‘potential conflict between competing accountability demands can be mitigated by establishing clear priority between them’.⁵⁶³ So, for example, an applicant might be required to have their grievance considered by a particular body before alternative avenues of appeal become available.⁵⁶⁴ The staged dynamic may also be relevant in a more theoretical (rather than procedural) way, where a finding of one type operates as a precondition to a finding of another. For example, there have been times where the courts have restricted government liability in negligence by imposing a precondition which required a plaintiff to demonstrate that the government had acted *ultra vires* in a public law sense before opening up the negligence enquiry.⁵⁶⁵ These types of constraints require a plaintiff to meet one accountability hurdle before being eligible to confront another. It is important to note that, in the context of these staged dynamics, success at one hurdle is a threshold issue and does not necessarily imply success at the next.

The staged dynamic may also be evident where certain types of mechanisms are classified as being of a ‘gap-filling’, or ‘last resort’ variety, to be employed only after other options are exhausted. Thus, *ex gratia* compensation is intended to operate in a gap-filling capacity, with non-binding guidelines prepared for decision-makers under the relevant schemes indicating that in circumstances where the government would otherwise be legally liable, these payments are not appropriate.⁵⁶⁶ For example, the CDDA Scheme is ‘not to be used in relation to ... claims in which it is reasonable to

⁵⁶² Ibid.

⁵⁶³ Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 222.

⁵⁶⁴ This style of staged review procedure is set out in the context of review of freedom of information decisions at the Commonwealth level, where an applicant must first seek review by the Information Commissioner before taking the matter to the AAT, except in limited circumstances: *Freedom of Information Act 1982* (Cth) s 57A.

⁵⁶⁵ For further detail, see Rock and Weeks, above n 144.

⁵⁶⁶ Department of Finance, ‘Scheme for Compensation for Detriment Caused by Defective Administration’, above n 445, [23]; Department of Finance, ‘Requests for Discretionary Financial Assistance under the *Public Governance, Performance and Accountability Act 2013*’, above n 445, [3]–[6].

Accountability Deficits and Overloads: A Missing Framework

conclude that the Commonwealth would be found liable, if the matter were litigated'.⁵⁶⁷ For act of grace payments, '[i]f a person is claiming that a decision is incorrect at law, existing legal review mechanisms must be used'.⁵⁶⁸ This type of gap-filling dynamic is also evident in the Commonwealth Ombudsman's power to decline to investigate a matter in circumstances where an individual has not availed themselves of an available legal challenge.⁵⁶⁹ Similarly, the NSW ICAC is required to take into account 'the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct' in exercising its functions.⁵⁷⁰

A fourth type of relationship dynamic is that where mechanisms are *interdependent* with one another. Mechanisms in this type of relationship can be viewed as symbiotic, as they interact at various points without one overtaking the other. So, for example, a merits review tribunal may overturn a government decision, and then remit that decision back to the original decision-maker to be retaken. There is a degree of inter-relationship between the two mechanisms in such a context, as the end outcome for the applicant is driven by the collective interaction between these two mechanisms. Similarly, the mechanism of public protest is interdependent upon the media in performing its accountability function. Protesters may rely on traditional or social media to communicate their intention to demonstrate, and the impact of the demonstration is then amplified via media publicity after the fact. Interdependency may also arise in an institutional sense, where functions and roles are intertwined in some way. An example of this can be seen in relation to the judicial accountability mechanisms addressed in this thesis. Judicial review, criminal law, and tort law are all separate causes of action. However, in an institutional sense they are all managed by the courts. In some cases, there is a divisional separation between the causes of action, with defined procedures allocating certain types of matters to certain courts, or divisions within courts. However, there may also be degrees of inter-relationship in some cases. We can also observe a degree of institutional interdependence where

⁵⁶⁷ Department of Finance, 'Scheme for Compensation for Detriment Caused by Defective Administration', above n 445, [23].

⁵⁶⁸ Department of Finance, 'Requests for Discretionary Financial Assistance under the *Public Governance, Performance and Accountability Act 2013*', above n 445, [6].

⁵⁶⁹ *Ombudsman Act 1976* (Cth) s 6(2).

⁵⁷⁰ *Independent Commission Against Corruption Act 1988* (NSW) s 12A.

Chapter 5: The Complexity of Accountability Systems

officers from one mechanism are employed to perform roles within another. A good example of this is the operation of parliamentary committees, which are by their nature staffed by members of the legislative branch. Within the limits of the *persona designata* doctrine, judges may also be 'borrowed' from the courts to act as tribunal members, or to head commissions of inquiry, for example.

A fifth type of relationship is that between *co-operative* mechanisms. This type of relationship may exist where various mechanisms exchange information and resources in working towards a common goal. This dynamic is seen, for example, in the legislative requirement that the NSW ICAC is to work in co-operation with that State's Ombudsman and other government agencies.⁵⁷¹ Similarly, while the NSW ICAC is not entitled to commence criminal proceedings of its own volition,⁵⁷² it is able to recommend such action to the Director of Public Prosecution and, in doing so, will provide evidence gathered during the course of its investigation.⁵⁷³ Co-operation may also be more subtle than these examples. It may be that there are instances in which the mere operation of one mechanism facilitates the operation of another, even without deliberate co-operation between the mechanisms. Scott has noted this style of relationship in discussing the system of accountability applicable in the context of prisons regulation:

With prisons, the development of litigation strategies has been both supportive of and supported by the work of the prisons humanity regulators, and notably the inspectorate and the ombudsman, the regulators providing better information which may be used in litigation, litigation providing more robust definitions of appropriate norms relating to the treatment of individual prisoners.⁵⁷⁴

We can view this as an almost cyclical relationship, where results of one mechanism feed into the practices of another, gradually enhancing the performance of the agent being held to account.

The final type of relationship dynamic explored in this thesis is that of *reciprocity*,⁵⁷⁵ pursuant to which mechanisms can be understood as holding one another accountable. In the literature, this dynamic is referred to in a variety of ways, as relationships of

⁵⁷¹ Ibid s 16(1)(b).

⁵⁷² *Criminal Procedure Act 1986* (NSW) s 14A.

⁵⁷³ *Independent Commission Against Corruption Act 1988* (NSW) ss 14 and 37(2).

⁵⁷⁴ Scott, above n 8, 56.

⁵⁷⁵ This label is adopted by Schedler, above n 194, 26.

Accountability Deficits and Overloads: A Missing Framework

'compounded accountability',⁵⁷⁶ 'mutual accountability',⁵⁷⁷ 'circles of guardianship'⁵⁷⁸, 'interdependency'⁵⁷⁹ or a 'lattice of leadership'.⁵⁸⁰ The common thread in these various theories is that accountability may be enhanced by arranging institutions into relationships of reciprocal or mutual scrutiny. Unlike a linear approach, which would simply layer a new guardian to guard existing guardians, the reciprocity approach evident within the accountability system involves creating and reinforcing relationships between existing mechanisms in the system. Adopting Scott's language, this type of model views the regime as being held 'in a broadly acceptable place through the opposing tensions and forces generated'.⁵⁸¹ At its core, the tripartite separation of powers model is an accountability structure of this type, with powers being divided between institutions who are then charged with responsibility for scrutinising one another's exercise of those powers. The accountability system approach discussed in this chapter involves layering further accountability mechanisms on top of this base-level separation of powers, resulting in more comprehensive and nuanced layers of checks and balances. There are two key benefits arising out of these relationships of reciprocity. The first is that the presence of external checks may improve the performance of an accountability mechanism. In Mulgan's words, '[h]ow well they perform their function as agents of public accountability depends very heavily on how accountable they are themselves for their own performance'.⁵⁸² In essence, it can be anticipated that an accountability mechanism will function more effectively in its role when the performance of that role is also subject to external scrutiny. A second key benefit arising out of this relationship dynamic is the establishment of legitimacy. As noted in Chapter 4, the government is more likely to be regarded as legitimate if it is accountable. The same goes for accountability mechanisms themselves; these mechanisms are more likely to be regarded as legitimate if they are held accountable for

⁵⁷⁶ Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 230.

⁵⁷⁷ Bruce Stone, 'Administrative Accountability in the "Westminster" Democracies: Towards a New Conceptual Framework' (1995) 8 *Governance* 505, 518; A J Brown, 'The Integrity Branch: A "System", an "Industry", or a Sensible Emerging Fourth Arm of Government?' above n 441, 315-16.

⁵⁷⁸ Braithwaite, 'On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers', above n 11, 349.

⁵⁷⁹ Scott, above n 8, 50-52.

⁵⁸⁰ John Uhr, *Terms of Trust: Arguments Over Ethics in Australian Government* (UNSW Press, 2005) 78-81.

⁵⁸¹ Scott, above n 8, 52.

⁵⁸² Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 230.

the way in which they perform their accountability functions.⁵⁸³ Because of the role relationships of reciprocity play in improving performance and fostering legitimacy, this dynamic is an important feature of the accountability system.

D SUMMARY

This chapter has explored the complexity of the system of mechanisms that we can understand as contributing to the accountability of the Australian government. This complexity arises for three key reasons. The first reason is the sheer volume of mechanisms that we need to consider in our discussions about government accountability, located not only within the various branches of the Australian state and federal governments but also outside government and internationally. The second reason for complexity is that the various mechanisms explored involve a delicate balance of features, including in relation to their degree of accessibility, cost, flexibility, coerciveness, autonomy, independence, and permanence. While it may be tempting to point to limitations of these features as a potential accountability deficit (eg the ombudsman cannot coerce the government into providing restoration), we must appreciate that these limitations may be balanced against a strength somewhere else in the system. The third reason for complexity is the range of inter-relationships between mechanisms within the system, including dynamics of independence, mutual exclusivity, staging, interdependency, co-operativeness and reciprocity.

Only by coming to grips with each of these areas of complexity can we build up a picture of accountability mechanisms as a 'system' rather than an ad hoc collection of paths toward government accountability. And understanding accountability mechanisms as a system is critical to the broader project of identifying potential accountability deficits and overloads. It makes no sense to point to a 'gap' by reference to a single mechanism without considering whether that gap is plugged by an alternative mechanism. It is also no answer to point to an alternative mechanism without first understanding whether the dynamic between those mechanisms allow it

⁵⁸³ This is an idea explored by Black in the context of polycentric regulatory regimes: Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation and Governance* 137, 149.

Accountability Deficits and Overloads: A Missing Framework

to perform a relevant 'gap-filling' role. Similarly, it makes no sense to point to 'overlaps' simply by noting the existence of numerous mechanisms that target similar actors or conduct. Rather, we need to think about the dynamics between those mechanisms to determine if they do indeed operate simultaneously. In other words, potential gaps and overlaps may be ameliorated when we adopt a systemic approach to understanding accountability.

PART III: THE DIFFICULTY EXPLORED

The core argument of this thesis is that, despite their popularity, the concepts of accountability deficits and overloads have not been fully explained in the existing literature. Part II of this thesis suggested two possible reasons for this limitation. The first (and most difficult to overcome) is that, in order to measure an accountability deficit or overload, we need first to be able to define a benchmark of accountability. This benchmark would need to explain what an ‘ideal amount’ of accountability might look like, with the goal of then being able to demonstrate the circumstances where that benchmark has not been met. One way of defining this benchmark would be to transform the descriptive framework used to define accountability mechanisms (who is accountable to whom, for what, and how?) into a normative framework (who *should* be accountable to whom, for what, and how?) But on moving into that normative territory, we are drawn into complex debates about our conception of the government and are forced to make difficult choices about the best means by which to hold the government to account. In sum, the reason why we do not already have an accountability benchmark is that we are awaiting the resolution of philosophical and legal debates that have exercised minds for decades, if not centuries.

The second possible reason that we struggle to articulate the concepts of accountability deficits and overloads is that we must be able to conceive of accountability mechanisms not simply as isolated tools, but as part of a complex system. We cannot identify a gap arising from one mechanism without appreciating whether another mechanism exists to ameliorate that gap, and cannot claim that the existence of two mechanisms represents an accountability overload without appreciating the nature of the relationship between them. As explored in Chapter 5 of this thesis, we can observe a range of different patterns of relationships between mechanisms within accountability systems. Mechanisms might operate independently, or mutually exclusively, or independently, or co-operatively, or in a staged or reciprocal manner. In order to appreciate whether or not a deficit or overload exists at a *systemic* level, it is necessary to map out the full range of available mechanisms by reference to these

Accountability Deficits and Overloads: A Missing Framework

various types of accountability dynamics. It is only once we can locate a particular mechanism within the wider system that can we begin to appreciate whether that mechanism represents a potential gap or overlap.

In summary, then, Part II of this thesis has demonstrated that there is much work remaining in the accountability space if we wish to more fully harness the concepts of accountability deficits and overloads, first in defining a benchmark of accountability, and secondly in mapping out the relationships between the mechanisms that we conceive of as forming part of our accountability system. This thesis cannot hope to finally resolve these two large projects. However, it has sought to explore a number of the possibilities and to highlight some of the potential implications of our choices. The purpose of Part III of this thesis is to demonstrate what we might gain if we were able to resolve these two limitations of the existing accountability literature, through use of a hypothetical.

The hypothetical exercise undertaken in Part III involves four stages. First, we must adopt an assumed resolution to the problem of defining our accountability benchmark. Secondly, we must define a small subset of mechanisms that we can assume to constitute our accountability system. Having narrowed down the scale of the project in this way, we can (thirdly) use the benchmark to measure each mechanism in the system to identify any failings in the mechanisms against that benchmark and, fourthly, map out the relationships between those mechanisms. In so doing, it would be possible to say something about the presence of potential accountability gaps and overlaps within this small-scale system:

STAGE ONE: THE ACCOUNTABILITY BENCHMARK. For the purposes of this hypothetical, it is assumed that we would define the accountability benchmark (*who should be accountable to whom* etc) as follows. (1) *All individuals/entities within government would be accountable to all members of the public for all government activity by explaining and justifying government decisions and conduct through public dissemination of information* (transparency rationale). (2) *The individual/entity charged with exercising power would be accountable to all members of the public for unlawful exercise of power through the imposition of regulatory orders imposed via coercive procedures that are equally balanced between*

Part III: The Difficulty Explored

the parties (control rationale). (3) The government as an entity would be accountable to individuals who have suffered harm due to unlawful government activity through the imposition of restorative remedies via prosecutor-friendly procedures (restoration rationale). (4) Individual public officials and government entities would be accountable to a defined prosecutor (with residual rights for members of the public) for their deliberate wrongdoing (for an entity, deliberate wrongdoing performed in its name) through the imposition of punitive sanctions via agent-friendly procedures (desert rationale). (5) Officials or entities with the capacity to effect change would be accountable to a defined prosecutor for unlawful exercise of public power through the imposition of weak sanctions via flexible procedures that facilitate dialogue (deterrence rationale).⁵⁸⁴

STAGE TWO: THE ACCOUNTABILITY SYSTEM. The mechanisms selected to represent the accountability system for the purposes of the hypothetical are (1) common law judicial review, (2) the tort of misfeasance in public office, and (3) the criminal offence of misconduct in public office. These mechanisms are chosen for two reasons. First, they are closely related to one another in the sense that they are all employed by the same forum and are implemented through use of similar (legal) procedures. Secondly, because these mechanisms are implemented by the courts, we have access to a rich source of case law that can be drawn on in exploring these ideas.

STAGE THREE: MEASURING MECHANISMS AGAINST THE BENCHMARK. Having articulated a narrow benchmark of accountability, and narrowing down the universe of accountability mechanisms to three that are closely related to one another, it is possible to attempt to measure the mechanisms against that benchmark. Areas where the mechanisms fall short of the benchmark represent potential accountability deficits, and areas where multiple mechanisms serve the benchmark in a similar way represent potential accountability overloads.

⁵⁸⁴ As noted in the concluding comments in Chapter 4, this model is not offered as an answer to the problem of defining an accountability benchmark. This model responds to some of the difficulties highlighted in that chapter; however, there are areas that remain the subject of dispute. This benchmark should, therefore, be understood as being used only for the purposes of this hypothetical, rather than representing my final views on the appropriate structure of an accountability benchmark.

Accountability Deficits and Overloads: A Missing Framework

STAGE FOUR: MAPPING THE SYSTEM. The three mechanisms constituting the accountability system for the purposes of the hypothetical are analysed to identify the nature of the relationships between them. In particular, any potential accountability deficits and overloads identified in Stage Three will be analysed to determine whether the system dynamics ameliorate those concerns.

This hypothetical demonstrates that, were we able to come to a landing on our definition of a benchmark of accountability and to map out the dynamics of the relationship between the universe of mechanisms, we might be in a better position to articulate the presence of accountability deficits and overloads within our system of governance. However, the hypothetical also demonstrates that the enormity of that task. Even in selecting a simplified benchmark and a 'universe' of three closely-related accountability mechanisms, the extent of the analysis required to form tentative conclusions about accountability deficits and overloads is no small undertaking. To expand the task out to capture a more nuanced benchmark and a more complicated system would be an exponentially larger project.

CHAPTER 6: ALIGNING THE HYPOTHETICAL SYSTEM WITH THE BENCHMARK

As noted in the introductory section of this Part, the hypothetical exercise being undertaken rests on two key assumptions. The first is the content of the benchmark. For the purposes of the hypothetical, a benchmark is selected that offers some contribution to each of the accountability rationales explored in Chapter 4. The content of this hypothetical benchmark is set out in the introduction to this Part III. If each of the five aspects of the hypothetical benchmark were satisfied, we would say for the purposes of the hypothetical that we have achieved an ‘ideal amount’ of government accountability. The second key assumption underpinning this hypothetical relates to the content of the accountability system. To simplify matters, three closely related mechanisms have been selected: (1) common law judicial review, (2) the tort of misfeasance in public office, and (3) the common law criminal offence of misconduct in public office. The purpose of this chapter is to explore the extent to which the selected mechanisms align with the accountability benchmark. Areas in which the mechanisms underperform represent potential accountability deficits, while areas in which multiple mechanisms perform represent potential accountability overloads.

This chapter is organised as follows. Section A commences with a general overview of the ways in which court processes and procedures can be understood to contribute to the transparency rationale of accountability, noting in particular the nature of the principles of open justice and the extent to which court proceedings encourage the provision of reasons by government. The remaining sections then look at each of the particular mechanisms comprising our hypothetical accountability system, with Section B addressing judicial review, Section C the tort of misfeasance in public office, and Section D the criminal offence of misconduct in public office. Though a little counter-intuitive given the structure of Chapter 4, it actually makes sense to begin the analysis of each mechanism by looking at the final question comprising our accountability benchmark: ‘how are agents held accountable’? This is because, in adopting a rationale-based approach to accountability, we are chiefly concerned with considering whether

Accountability Deficits and Overloads: A Missing Framework

the desired outcome (ie transparency, control, restoration, punishment or deterrence) is capable of being delivered via an accountability mechanism. It is only after we have identified the potential end product of a mechanism that we can consider whether the other aspects of the mechanism fit with that rationale. So, for instance, if we know that a mechanism is potentially capable of delivering a restoration outcome (*with what consequences?*),⁵⁸⁵ we will then direct our question to whether that restoration is delivered by the right agent (*who?*), to the right recipient (*to whom?*), in the right circumstances (*for what?*), and pursuant to the right processes (*via what procedures?*) for the purposes of that rationale.

What this chapter establishes, as a starting point, is that no one mechanism in our hypothetical accountability system is capable of serving the benchmark as a whole. This means that if we were to focus only on a single mechanism in our analysis (for instance, judicial review) we would inevitably reach the conclusion of an ‘accountability deficit’, because that mechanism fails to contribute to the rationales of restoration and desert, for instance. As set out in more detail in Chapter 7 below, this is one of the reasons why it is critical to adopt a systemic approach in mapping out potential accountability deficits. A second key take-away point from this chapter is that it is very difficult to articulate the contribution that a mechanism makes to the benchmark. So, for instance, we see in the following analysis that each mechanism takes one aspect of the benchmark as its predominant focus: judicial review broadly aligns with the control rationale, the criminal offence of misconduct in public office with the desert rationale, and the tort of misfeasance in public office with the restoration rationale. However, while we might say that these are the predominant features of each mechanism, we can also see that they contain reflections of other rationales. So, for instance, judicial review may have a role to play in connection with the deterrence rationale, and the tort of misfeasance in public office has a desert-oriented dimension. As put by Glanville Williams, ‘[w]here possible the law seems to like to ride two or three horses at once’.⁵⁸⁶ In circumstances where a cause of action is put to more than one purpose, however, we begin to see evidence of

⁵⁸⁵ This thesis defines outcomes in the sense of goals, rather than empirically provable facts. So, for instance, we may impose a sanction with the *goal* of deterrence, though ultimately the sanction proves an ineffective deterrent. The broader question of proving that the particular means selected are the best way of achieving desired ends is an important one to be considered in future research.

⁵⁸⁶ Glanville Williams, ‘The Aims of the Law of Tort’ (1951) 4 *Current Legal Problems* 137, 172.

some of the tensions highlighted in Chapter 4. So, for instance, we see below that difficulties arise where the predominantly restoration-oriented tort of misfeasance moves into desert territory through the provision of punitive damages. The restoration aspect of the benchmark requires plaintiff-friendly procedures, whereas the desert aspect of the benchmark requires defendant-friendly procedures; the restoration aspect ought to target the government as an entity, whereas the desert aspect ought to target individual wrongdoers. Because of these tensions, we will inevitably reach the view that this cause of action falls short when measured against one or other of these aspects of the hypothetical benchmark. Again, this highlights the importance of adopting a systemic approach, as we will see in Chapter 7 that some of these tensions are potentially ironed out through the adoption of certain relationship dynamics.

A TRANSPARENCY VIA THE JUDICIAL PROCESS

The universe of accountability mechanisms selected for the purposes of this hypothetical are all legal causes of action that are implemented through the courts. Some accountability theorists characterise the courts as the ultimate account-holder in the context of legal accountability mechanisms.⁵⁸⁷ Returning to the discussion of the features of accountability mechanisms set out in Chapter 5, we can understand why this might be the case. As an accountability forum, we would describe the courts as highly coercive, permanent and independent. To a large extent, this is due to the separation of powers. The separation of powers is a core feature of Australian constitutionalism. By dividing the *Constitution* into three chapters that specify the powers of each of the Parliament, executive and judicature, the framers of the *Constitution* were taken to have established a functional separation of powers.⁵⁸⁸ The strongest feature of this separation is in respect of judicial power,⁵⁸⁹ as the *Boilermaker's* principle prevents the conferral of non-judicial power on a Chapter III Court, and the conferral of judicial power on any

⁵⁸⁷ See eg Mark Bovens, Thomas Schillemans and Robert Goodin, 'Public Accountability' in Mark Bovens, Robert Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014) 1, 11 and Grant and Keohane, above n 8, 36.

⁵⁸⁸ *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529, 537.

⁵⁸⁹ The division between the legislative and executive branches is far less strict, as s 64 of the *Constitution* requires Ministers to be members of Parliament.

Accountability Deficits and Overloads: A Missing Framework

individual or body other than a Chapter III Court.⁵⁹⁰ While the states do not recognise a strict separation of powers, the *Kable* principle extends some of the implications of the federal separation of judicial power to state level.⁵⁹¹ In the context of discussing government accountability, the separation of judicial power has an important role to play. By insulating the courts from legislative and executive interference and supporting their ongoing impartiality from politics, we can view the courts as an independent promoter of government accountability, and we are more likely to trust the courts to perform their accountability role because they are institutionally and functionally 'separate' from the policy-driven mechanics of government. As Harlow has observed, while the separation of powers is not an 'accountability principle' in its own right, it 'provides a framework in which accountability can flourish'.⁵⁹²

The powers and procedures employed by courts are also well-adapted to support the rationales of accountability. The courts hold powers to impose legal remedies that provide a concrete contribution to the rationales of accountability: regulatory orders to facilitate control and deterrence, reparative remedies to facilitate restoration, and punitive sanctions to facilitate desert. The nature of these various remedies is discussed in the context of the causes of action set out in the following sections of this chapter. Importantly, the remedial powers of the court are coercive; the court is able to punish failure to comply with court orders as contempt of court, meaning that the courts are in a position to compel the government to perform its accountability obligations. One of the other important accountability contributions made by the courts is in respect of the transparency rationale. The transparency rationale is concerned with fostering an ongoing dialogue between government and citizens and laying bare the machinations of government decision-making for public scrutiny. There are a number of features of courts that are capable of supporting this objective.

⁵⁹⁰ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

⁵⁹¹ The principle derived from *Kable v DPP (NSW)* (1996) 189 CLR 51, as refined in subsequent cases: see eg *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181 and *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

⁵⁹² Harlow, 'Accountability and Constitutional Law', above n 23, 199.

1 Transparency through open courts

At the broadest level, the fact that court proceedings are open to the public serves an important transparency function. There have been various formulations of the idea that the courts are, by their nature, open forums. One of the more well-known is that expressed by Lord Hewart in *R v Sussex Justices; Ex parte McCarthy*:

[I]t is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done.⁵⁹³

In other words, it is a 'fundamental rule of the common law is that the administration of justice must take place in open court'.⁵⁹⁴ This 'visible assurance of independence and impartiality' has been described as an "essential aspect" of the characteristics of all courts'.⁵⁹⁵ This may not only curtail Parliament's ability to limit the public nature of court hearings, but also the courts' powers to do so:

[T]here is no inherent power in a Court of justice to exclude the public, inasmuch as one of the normal attributes of a Court is publicity, that is, the admission of the public to attend the proceedings.⁵⁹⁶

The fundamental requirement that cases are heard in an open court can be departed from only in exceptional circumstances, where the principle of open justice needs to give way to the general requirement that 'justice be done',⁵⁹⁷ which may be the case where public attendance affects the conduct of proceedings in a practical sense (eg overcrowding), or would deter a witness or prosecutor from participating in proceedings, or may prejudice the fairness of the trial.⁵⁹⁸ A corollary of the requirement that the courts perform their work in public is that interested members of the public and the media have access not only to attend but also to publicise the content of proceedings. Again, the general freedom of publication may be hindered only in circumstances where the interests of justice justify suppression. Beyond the common law, statutory provisions provide the courts with powers to make a variety of orders that

⁵⁹³ [1924] 1 KB 256, 259, cited in The Hon JJ Spigelman, 'Seen To Be Done: The Principle of Open Justice' (2000) 74 *Australian Law Journal* 290, 290.

⁵⁹⁴ *John Fairfax & Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, 476 (McHugh JA).

⁵⁹⁵ *South Australia v Totani* (2010) 242 CLR 1, 43 [62] (French CJ).

⁵⁹⁶ *Dickason v Dickason* (1913) 17 CLR 50, 51 following *Scott v Scott* [1913] AC 417, 441, cited in Spigelman, 'Seen To Be Done: The Principle of Open Justice', above n 593, 290.

⁵⁹⁷ *Scott v Scott* [1913] AC 417, 437.

⁵⁹⁸ Garth Nettheim, 'Open Justice Versus Justice' (1985) 9 *Adelaide Law Review* 487, 487-88.

may have the effect of reducing the transparency of proceedings (for example, powers to close the court, prohibit publication and restrict access to documents).⁵⁹⁹

A final aspect of ‘open justice’ that is relevant in this context is the courts’ publication of reasons. Judges provide reasons for their decisions in all cases where their decisions are subject to an appeal.⁶⁰⁰ The rationale for that position is to allow both the parties and the superior court to ascertain the existence of errors that might found a ground of appeal, and justify the superior court’s intervention.⁶⁰¹ The Hon Michael Kirby notes that while the original justification for this requirement stemmed from concerns about appellate rights, the High Court has more recently linked the judicial obligation to provide reasons with the administration of justice.⁶⁰² In his view, ‘[t]he obligation to state reasons, and to publish them, is a healthy corrective against the arbitrary exercise of judicial power’.⁶⁰³ By laying bare the reasons that underlie judicial decisions, they can be scrutinised not only by the individuals who are immediately affected by the outcome of the case, but also by other members of the bench, academics, the media, and members of the public more generally. This goal is furthered by the fact that, in most cases, unreported judgments are published in accessible formats that can be widely accessed online. As has been argued above, this transparency process is a valuable means of securing the legitimacy of government.

2 Procedural contributions to transparency

A number of procedural aspects of court proceedings also contribute to transparency. Depending on the nature of the proceedings, pre-trial investigatory procedures may be used to compel officials to provide information, for example through discovery, subpoenas and interrogatories. These mechanisms are coercive in nature, allowing a prosecutor to bring the power of the court to bear in demanding the production of information that is relevant to the case (subject to claims of privilege and the like). Depending on the type of proceedings, pleadings and evidence may further define the boundaries of the dispute between the parties and allow a prosecutor to draw the

⁵⁹⁹ See eg *Court Suppression and Non-publication Orders Act 2010* (NSW).

⁶⁰⁰ H P Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2012) 259.

⁶⁰¹ *Ibid.*

⁶⁰² Michael Kirby, ‘Judicial Accountability in Australia’ (2003) 6 *Legal Ethics* 41, 46.

⁶⁰³ *Ibid.*

Chapter 6: Aligning the Hypothetical System with the Benchmark

government out on a particular issue. At the trial itself, a prosecutor may have the opportunity to cross-examine and test the stories of officials involved in the dispute, clarifying outstanding questions about facts that may previously been unclear. Again, because the courts adjudicate in public and the court's reasons are ultimately published, these procedural contributions can be viewed as playing a significant role in facilitating transparency not only within the confines of the courtroom, but more broadly. There are, of course, differences in approach to these procedural matters between mechanisms comprising the hypothetical accountability system explored in this Part. In comparison to civil proceedings, investigatory and evidentiary procedures in public law cases are significantly more limited.⁶⁰⁴ We would say, therefore, that in this respect, judicial review offers a potentially smaller contribution to transparency than criminal and tort proceedings.

In the context of government litigation, a further important feature of proceedings that potentially contributes to transparency is the government's model litigant obligations. As articulated in the relevant *Legal Services Directions*, these obligations include the requirements that the government not put a litigant to proof on a matter the government 'knows to be true'.⁶⁰⁵ At common law, the courts have further articulated the content of the obligation as including a requirement for the government to produce relevant evidence adverse to its own case,⁶⁰⁶ to provide accurate information in response to factual enquiries from the other party,⁶⁰⁷ and to inform the court of the full circumstances of the case.⁶⁰⁸ There are limits as to the enforceability of these statutory and common law obligations.⁶⁰⁹ However, if complied with, model litigant obligations have a potentially positive role to play in contributing to government transparency, by ensuring that the courts and other parties have access to a full and accurate picture of relevant material in the hands of the government.

⁶⁰⁴ See eg *Uniform Civil Procedure Rules 2005* (NSW) r 59.7.

⁶⁰⁵ *Legal Services Directions 2017* (Cth) Appendix B, item 2(e)(i).

⁶⁰⁶ *Australian Securities and Investments Commission (ASIC) v ActiveSuper Pty Ltd [No 1]* (2012) 92 ACSR 614, 625 [63]. See further Gabrielle Appleby, 'The Government as Litigant' (2014) 37 *University of New South Wales Law Journal* 94, 107.

⁶⁰⁷ *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330, 416 [298].

⁶⁰⁸ *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* (2012) 203 FCR 166, 175-76 [40]-[42].

⁶⁰⁹ See Appleby, above n 606.

3 Access to reasons

A further matter to consider for the purposes of the transparency rationale is the extent to which judicial processes may promote the provision of reasons by government officials. The provision of reasons has been linked with the concept of accountability; reasons are ‘a necessary condition for securing the accountability and legitimacy of government action’.⁶¹⁰ At common law, there is no entitlement to reasons in respect of the decisions of executive officials. In what has subsequently been criticised as a lost opportunity,⁶¹¹ the High Court in *Public Service Board (NSW) v Osmond* declined to recognise any such common law right. Justice Deane put the position in the following terms:

[T]he stage has not been reached in this country where it is a general prima facie requirement of the common law rules of natural justice or procedural fair play that the administrative decision-maker, having extended to persons who might be adversely affected by a decision an adequate opportunity of being heard, is bound to furnish reasons for the exercise of a statutory decision-making power.⁶¹²

Notwithstanding the absence of a blanket common law right to reasons, in many cases reasons may be available either based on common law⁶¹³ or statutory requirements.⁶¹⁴ However, the fact remains that there will be some cases in which reasons are not available.

⁶¹⁰ Peter Cane, Leighton McDonald and Kristen Rundle, *Principles of Administrative Law* (Oxford University Press, 3rd ed, 2018). See also David Dyzenhaus and Michael Taggart, ‘Reasoned Decisions and Legal Theory’ in Douglas Edlin (ed), *Common Law Theory* (Cambridge University Press, 2007) 134, 144.

⁶¹¹ Michael Taggart, ‘Osmond in the High Court of Australia: An Opportunity Lost’ in Michael Taggart (ed), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, 1986) 53.

⁶¹² (1986) 159 CLR 656, 676 (Deane J).

⁶¹³ For instance, it has been held that statutes oblige decision-makers to provide reasons if they hold judicial or quasi-judicial functions (See eg *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372, 394–96), if a statutory right of appeal lies from their decision (*T v Medical Board (SA)* (1992) 58 SASR 382, 408–10) and, in certain limited cases, where a failure to provide reasons might amount to procedural unfairness (Chen cites two examples of such cases as *Croatia Sydney Soccer Football Club Ltd v Soccer Australia Ltd* (Unreported, Supreme Court of NSW, Einstein J, 23 September 1997) and *McIlraith v Institute of Chartered Accountants* [2003] NSWSC 208: Bruce Chen, ‘A Right to Reasons: Osmond in Light of Contemporary Developments in Administrative Law’ (2014) 21 *Australian Journal of Administrative Law* 208, 218).

⁶¹⁴ See eg *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13; *Administrative Law Act 1978* (Vic) s 8; *Administrative Decisions (Judicial Review) Act 1989* (ACT) s 13; *Judicial Review Act 1991* (Qld) ss 31–40; *Judicial Review Act 2000* (Tas) ss 3, 31; *Administrative Appeals Tribunal Act 1975* (Cth) s 28(1). Procedural rules also confer an entitlement to call for reasons in certain states: see eg *Uniform Civil Procedure Rules 2005* (NSW) r 59.9.

Chapter 6: Aligning the Hypothetical System with the Benchmark

One matter that bears consideration is whether the mechanisms forming our hypothetical accountability system might have any potential impact on a decision-maker's *likelihood* of providing reasons, absent any legal obligation to do so. There are two alternative views we might take on this point. On the one hand, we might wonder whether the prospect of being challenged on judicial review, prosecuted for a criminal offence or sued in tort might negatively impact a government official's willingness to 'go into writing', or to explain themselves. In other words, will the prospect of being challenged, sued or prosecuted encourage government defendants to remain silent on the reasons for their decisions and actions, for fear of those reasons being later used against them? Intuitively, we might suspect that this could be the case, and perhaps all the more so for severe sanctions (ie in connection with criminal and tortious liability). On the other hand, we might wonder whether the prospect of legal proceedings may go the other way, and encourage officials to be transparent in the first instance. If an official believes that their decision or conduct is legally sound and that they have good reasons for so acting, might the official be prompted by the threat of legal proceedings to make those reasons clear?

There are certainly arguments to the effect that this might be the case in relation to the provision of reasons for administrative decisions. In *Li*, the High Court was tasked with reviewing the reasonableness of the Migration Review Tribunal's decision not to adjourn its proceedings.⁶¹⁵ A key aspect of the High Court's conclusion that the decision was in fact unreasonable was that it 'lack[ed] an evident and intelligible justification'.⁶¹⁶ On one view, this approach might be thought to *discourage* the provision of reasons, in the belief that the reviewing court will closely scrutinise those reasons for the purposes of determining whether they are sufficiently 'intelligible' to justify the decision ultimately reached. However, this case can also be read as an *incentive* to provide reasons. The Court's ability to apply 'unreasonableness [as] a conclusion'⁶¹⁷ was based on the proposition that 'where no good reason has been given by a decision-maker, a

⁶¹⁵ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

⁶¹⁶ *Ibid* 367 [67].

⁶¹⁷ *Ibid*.

judicial review court may conclude that one did not exist'.⁶¹⁸ In commentary on the decision, Groves and Weeks put the position as follows:

The application of *Wednesbury* in *Li* may indicate that the High Court sanctions a wider application of that ground in order to ensure that a greater number of non-judicial decisions are supported by reasons. While this may not amount to a back-door way around *Osmond*, it may nonetheless reduce the circumstances in which administrative decision-makers can safely exercise discretion without supporting their decision by an extensive statement of reasons.⁶¹⁹

If the *Li* decision does ultimately go some way to fostering a greater attention to adequately explaining the reasons for a decision, this can be viewed as an important contribution to accountability's transparency function. Having said this, there might also be some concern about whether, by requiring decision-makers to provide an acceptable justification for their decision, we risk asking the courts to move their enquiry into a review of the merits rather than the legality of the decision.⁶²⁰ However, the question here is not whether reasons ultimately produce better reasoning. As expressed by Endicott, 'a requirement of reasons does not tell the public authority how to decide, but only requires it to be candid about its *own* reasons'.⁶²¹ In the context of the transparency rationale for accountability, this is the core value of requiring the provision of reasons; requiring the government to lay bare its reasoning processes for public scrutiny facilitates trust in the government. Even if the reasons are ultimately determined to be inadequate or unacceptable (within the legitimate boundaries of legality/merits review), this is a valuable end in and of itself.

4 Application of the benchmark: transparency

This discussion demonstrates that all of the causes of action comprising the hypothetical accountability system have a role to play in contributing to the transparency of government. Court processes and procedures facilitate public access to information before, during and after proceedings. Backed by the coercive powers of the courts, litigants are able to compel the production of information relevant to a dispute,

⁶¹⁸ Matthew Groves and Greg Weeks, 'Substantive (Procedural) Review in Australia' in Hanna Wilberg and Mark Elliot (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing, 2015) 133, 147

⁶¹⁹ *Ibid* 148.

⁶²⁰ This is a concern canvassed by McDonald: Leighton McDonald, 'Reasons, Reasonableness and Intelligible Justification in Judicial Review' (2015) 37 *Sydney Law Review* 467.

⁶²¹ Timothy Endicott, *Administrative Law* (Oxford University Press, 2nd ed, 2011) 187; emphasis in original.

Chapter 6: Aligning the Hypothetical System with the Benchmark

which within the limits of the principle of open justice, may then be made publicly available. However, while these mechanisms can be viewed as contributing to transparency in a general sense, we would not say that they satisfy our hypothetical benchmark of accountability for the purposes of the transparency rationale.

The hypothetical benchmark required that, for the purpose of the transparency rationale, *all individuals/entities within government* would be accountable to *all members of the public* for *all government activity by explaining and justifying government decisions and conduct* through *public dissemination of information*. It is immediately apparent that court proceedings cannot hope to satisfy this broadly framed benchmark. A person wishing to access these legal mechanisms must demonstrate that they have standing to bring a claim, and that their grievance falls within the nature of a justiciable dispute. As discussed in more detail in the following sections in this chapter, access to each cause of action is limited to particular categories of prosecutor, with particular types of grievances. While there is no doubt that prosecution of each of the three causes of action comprising our hypothetical accountability system make valuable contributions to the transparency of government, we cannot say that they satisfy the transparency aspect of the hypothetical benchmark.

Before moving on to look at the accountability contribution made by each of the causes of action comprising our hypothetical system, it is important to take note of some of the limitations on the accountability contribution of the courts. Most notably, the courts are not an independent arbiter of accountability, able to intervene wherever they suspect a breach of standards for which the government ought to be held to account. They are able to intervene only in circumstances where they are called on to do so—that is, where a plaintiff brings a justiciable dispute before them for determination. Indeed, in the Australian federal context the separation of powers prevents Chapter III courts from being conferred any more general investigatory or advisory role.⁶²² For this reason, we would conclude that the courts lack any significant degree of *autonomy*, as outlined in Chapter 5. Further, the significant costs of legal proceedings and the time required to see a matter to completion would lead us to characterise the courts as a comparatively *expensive* and *inefficient* source of accountability. While there is no doubt

⁶²² *Re Judiciary and Navigation Acts* (1921) 29 CLR 257.

that the courts represent a very important piece of the accountability puzzle, it is necessary to bear these limitations in mind in thinking about the need for an accountability system to contain a balance of features.

B JUDICIAL REVIEW: CONTROL OF PUBLIC POWER

The first cause of action that stands to be measured against our hypothetical benchmark of accountability is that of common law judicial review. This cause of action can be understood to be a keystone of both the hypothetical system and the broader accountability system in Australia.⁶²³ In part, this is because the court has a constitutional mandate to perform this role. With the principle in *Marbury v Madison*⁶²⁴ regarded as ‘axiomatic’ in the Australian context,⁶²⁵ the courts have the exclusive role of determining the legality of legislative and executive action. This position is reflected in the acceptance of jurisdictional error as a touchstone on which judicial review rests in Australia, representing a minimum content of review power that cannot be withdrawn from the courts or abrogated over time.⁶²⁶ We can compare this position with the gradual alteration or erosion of other accountability mechanisms that enjoy a lesser degree of permanence, such as responsible government (which as a constitutional convention has evolved to be less effective over time), and creatures of statute such as tribunals, commissions of inquiry and ombudsmen (which can be de-funded or legislated away). The power of the courts to engage in judicial review is therefore an important foundational accountability mechanism of a *permanent* character.

The following analysis demonstrates that the nature of the remedies available in judicial review proceedings means that this cause of action most closely aligns with the

⁶²³ Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, above n 8, 75–76.

⁶²⁴ 5 US (1 Cranch) 137 (1803), 177 and 180 (Marshall CJ): ‘It is emphatically the province and the duty of the judicial department to say what the law is ... [T]he particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that the courts, as well as other departments, are bound by that instrument’.

⁶²⁵ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262.

⁶²⁶ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. The encroachment of ‘no-invalidity’ clauses may make some inroads into the area: see eg Leighton McDonald, ‘The Entrenched Minimum Provision of Judicial Review and the Rule of Law’ (2010) 21 *Public Law Review* 14.

control rationale for accountability, though it is possible also to identify reflections of the deterrence rationale in these remedies. As per the hypothetical benchmark, control requires that regulatory orders be imposed on *the individual/entity charged with exercising power by all members of the public for unlawful exercise of power via coercive procedures that are equally balanced between the parties*. When measured against these aspects of the benchmark, it can be seen that, despite some deviations, judicial review is quite closely aligned with this accountability expectation.

1 Judicial review: remedies of control

The hypothetical benchmark requires control to be effected through the imposition of regulatory orders. Looking at the remedies and procedures in judicial review proceedings, these appear to align with the control rationale. Depending on the nature of the claim, the available remedies include declaratory and injunctive relief, and the writs of certiorari, prohibition and mandamus. A declaration has the effect of pronouncing on the validity or legality of official conduct. Declarations can be issued both in combination with other remedies, and on their own. In either case, declaratory relief is non-coercive; it ‘change[s] nothing’.⁶²⁷ In essence, declaratory relief does nothing more than define the bounds of legal conduct. The prohibitory remedies are more coercive in nature. They have the effect of preventing public officials from exceeding the bounds of legal conduct. The ‘primary purpose’ of the writ of prohibition is to ‘prevent an inferior court or tribunal from exceeding its jurisdiction’.⁶²⁸ It can do so either by preventing an official from making an invalid decision (though in many cases the court may decline to intervene on the basis that the matter should be finally determined prior to judicial review),⁶²⁹ or from taking steps in reliance on an invalid decision. The public law injunction serves an equivalent purpose when taking the form of a prohibitory injunction,⁶³⁰ though is potentially available not only where an official threatens to exceed jurisdiction, but also where they threaten to breach non-jurisdictional norms.⁶³¹ The mandatory orders operate to a similar end as the prohibitory

⁶²⁷ Cane, McDonald and Rundle, above n 610, 110.

⁶²⁸ *King-Brooks v Roberts* (1991) 5 WAR 500, 504.

⁶²⁹ Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 848–50.

⁶³⁰ Cane, McDonald and Rundle, above n 610, 109.

⁶³¹ For discussion of the link between jurisdictional error and remedies, see page 204.

Accountability Deficits and Overloads: A Missing Framework

orders, policing the boundaries of the exercise of public power. While they do not enable a court to require the exercise of a power in a particular manner, they do allow the court to compel a duty to be exercised (or at least to consider its exercise, as the case may be). The order of mandamus is available where an official's failure to exercise a duty amounts to jurisdictional error, while the public law mandatory injunction is potentially available outside the scope of jurisdictional error. Judicial review remedies further allow the courts to nullify an act taken outside of the legal boundaries of public power. The writ of certiorari is used to 'quash' or 'annihilate'⁶³² the 'legal effect or the legal consequences of the decision or order under review'.⁶³³ This means that certiorari is relevant only in circumstances where it can be used to nullify the practical effects of an illegal decision, and therefore is limited to an 'ultimate decision' and is not available in the context of 'preliminary or recommendatory' aspects of a decision-making process.⁶³⁴ Certiorari is available in respect of jurisdictional error and (unless it is sought only on ancillary basis in conjunction with an order for mandamus or prohibition in constitutional review) is also available in relation to non-jurisdictional errors appearing on the face of the record.

Taken together, the functions of the remedies available in judicial review proceedings are to prohibit illegal conduct, to mandate required conduct, to nullify an illegal decision, and to pronounce on the validity or invalidity of a particular course. These functions are essentially regulatory in nature. They target the future behaviour of an official, restricting or mandating a course of conduct so as to confine it within legal bounds. A writ of prohibition and a prohibitory injunction each play a role of preventing an official from acting in reliance on an impugned decision or instrument, or (less frequently), from making the decision or instrument in the first place. A writ of mandamus or mandatory injunction also perform a forward-looking role. While the courts (particularly in the public law context) will be very reluctant to mandate a particular course of conduct, they will make an order that has the effect of coercing an official to do something that they are already obliged to do. In this way, both the mandatory and prohibitory orders are directed at the future conduct of officials so as to

⁶³² *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 595 (Brennan J).

⁶³³ *Ibid* 580 (Mason CJ, Dawson, Toohey and Gaudron JJ).

⁶³⁴ *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 159.

Chapter 6: Aligning the Hypothetical System with the Benchmark

confine it within legal bounds. These are orders of a regulatory nature, aligning with the control rationale.

Though not in the same way, the writ of certiorari and remedy of declaration can also be seen as falling within the regulatory category of remedial responses. Each of these remedies operates so as to define the legal limits within which power can be exercised, and thereby provides a measure of control over the conduct of officials. The writ of certiorari does this by nullifying decisions and instruments that step outside the legal boundaries within which power can be exercised, and depriving them of future effect. Similarly, though a declaration is non-coercive, it is issued by the courts in the anticipation that government officials will act in conformity with its content. For example, in *M61/2010E v Commonwealth*,⁶³⁵ the High Court would have issued declaratory relief in respect of the validity of advice from immigration detention staff employed by a private company (who had no jurisdiction at all, let alone scope to commit jurisdictional error), on the basis that the Minister would need to observe the declaration of invalidity if he elected to exercise his discretion to consider that advice.⁶³⁶ If we view the function of these remedies as a means to police the boundaries within which power can legally be exercised, this takes on the character of a control-oriented remedial response.

However, we can also see these policing remedies as performing a deterrent function, particularly in the case of declaratory relief. Rather than taking legal effect to compel a particular outcome, a declaration of invalidity leaves the respondent to take such steps as they might choose to see the matter dealt with. While a declaration is made by the court in the expectation that it will be complied with,⁶³⁷ its non-coercive nature affords the respondent greater opportunity to elect how to respond to it, thereby facilitating improvements going forward. As put by Varuhas, the public law declaration

serves to mark and perhaps disapprove of unlawful conduct, as well as serving an 'educative' function, providing guidance to the administration as to how public powers ought to be exercised into the future and thus facilitating compliance and proper pursuit of public goals.⁶³⁸

⁶³⁵ (2010) 243 CLR 319.

⁶³⁶ Ibid 358–60. See commentary in Aronson, Groves and Weeks, above n 629, 967–68.

⁶³⁷ Aronson, Groves and Weeks, above n 629, 981.

⁶³⁸ Jason N E Varuhas, 'The Development of the Damages Remedy under the *New Zealand Bill of Rights Act*

Accountability Deficits and Overloads: A Missing Framework

When viewed in this light, it is possible to think about the declaration as performing a prospective regulatory function, albeit non-coercive in nature. Though there might be better ways to perform this educative role (eg if the ombudsman formed part of our hypothetical accountability system for the purposes of this analysis, we might look there first), we can see shades of the deterrent rationale in these policing remedies. Given the approach taken in *M61* described above, however, it is unlikely that we can take this point too far. Rather, the best characterisation of the orders available in judicial review proceedings is as a collection of regulatory remedies, well-aligned with the control rationale for accountability.

Beyond control, public law remedies have little role to play in connection with the remaining rationales of restoration and desert. Looking first at restoration, it is important to note that, while judicial review remedies may occasionally produce a restorative result in particular cases, these remedies have very limited capacity to restore the interests of those affected by the breach of public law norms. As put by Cane, public law has a ‘strong bias ... in favour of preventative as opposed to reparative remedies’.⁶³⁹ In this respect, there are four observations that we can make. First, the remedies are not focused in any meaningful way on the interests of the affected individual. As outlined above, each of the remedies is focused on the legality of the respondent’s exercise of powers. With the exception of the tests for standing, the manner in and extent to which the applicant is affected by the conduct of the official is largely irrelevant to the determination of legality, and the applicability of the various remedies.

Secondly, the utility of these remedies from the perspective of an applicant is in many respects a matter of coincidence, rather than a reflection of the merits of their case. For instance, compare the position of an applicant affected by an invalid government decision to refuse an entitlement with that of an applicant affected by an invalid government decision to revoke an entitlement. In both cases the decision may be quashed, but with what result? Unless the decision is remade to different effect, the former applicant will still be left without the entitlement, while the latter will have

1990: From Torts to Administrative Law’ [2016] *New Zealand Law Review* 213, 236.

⁶³⁹ Cane, *Responsibility in Law and Morality*, above n 232, 261.

Chapter 6: Aligning the Hypothetical System with the Benchmark

theirs reinstated. In this way, the extent to which an applicant is restored via remedies in judicial review proceedings is a product of coincidence rather than the character of the remedy. The position was famously put by Brennan J in *Attorney-General (NSW) v Quin* as follows:

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error.⁶⁴⁰

Thirdly, while the available remedies provide the courts with a measure of control over government conduct going forward, this control does not rise to the level of providing the court with the ability to restore an individual's interests. For instance, where an illegal decision is quashed and the court awards a writ of mandamus requiring the official to exercise their power according to law, it is not the role of the court to consider whether this will ultimately prove beneficial to the applicant. In some cases, there may only be one conceivable way in which the power may be exercised, with the effect that the writ is to produce the result the applicant desires. However, this is the exception rather than the rule, and is not the object of the remedy.

The final observation we can make is that, even if the award of remedies in judicial review proceedings achieves a result that restores the applicant for the future, none of remedies enable the courts to restore interests that have been affected in the interim. To take a fairly benign example, the holder of a liquor licence may have their licence revoked pursuant to an invalid decision made by the issuing authority. Though urgent interlocutory relief may theoretically be available, applications for such relief are by no means dealt with lightly by the courts. Unless able to jump through the necessary procedural hurdles, the applicant may wait months for the determination of their claim. It is reasonable to assume that in many cases, the loss and damage sustained by such an individual during this period could be significant. The court may ultimately quash the invalid decision with the effect of restoring the licence going forward, but none of the available remedies provide restoration in respect of the damage suffered by the

⁶⁴⁰ (1990) 170 CLR 1, 35-36.

applicant in the interim.⁶⁴¹ Taken together, these observations demonstrate that while the available remedies in judicial review proceedings will occasionally produce a restorative effect for a plaintiff, this is not the object of those remedies. They are inherently regulatory in nature, and therefore align with the accountability objective of control, rather than restoration.

Judicial review remedies also make no meaningful contribution to the desert rationale. For instance, some might say that there is a punitive element to publicly pointing out an official's mistakes. In other words, by declaring their decisions or conduct to be illegal in a public forum, the courts are exposing an official to condemnation. However, even on a broad view it is difficult to see how this would amount to any style of legal punishment in the manner outlined above.⁶⁴² There is no symbolic condemnation in the judicial pronouncement itself; it is merely an identification of the legal limits of public power. Further, it is difficult to see how a prohibitory or mandatory order requiring an official to exercise their powers legally is any form of punishment. Even if the official does not wish to exercise their powers, the courts are not imposing some new form of 'hard treatment', but are instead requiring the official to perform a pre-existing legal obligation within legal limits. Importantly, the courts cannot tell an official *how* to exercise a discretionary power, but can only require that an official exercise that power within legal limits. It is very difficult to see how redirecting an official back onto the legal path aligns with the rationale of desert.

Taking these observations together, it appears that the purpose and function of the remedies available in judicial review proceedings are aligned with the control rationale for accountability, though in many cases they may also support the deterrence rationale.

2 Who is accountable through judicial review?

If judicial review remedies best suit the control rationale, then to satisfy this aspect of the hypothetical benchmark they would need to be available as against *the individual/entity charged with exercising power*. We can see a broad degree of alignment

⁶⁴¹ There is also no direct entitlement to damages in private law following successful judicial review proceedings: *Rock and Weeks*, above n 144. See also *Jain v Trent Strategic Health Authority* [2009] 1 AC 853, which demonstrates the difficulty of overlaying a common law duty of care in respect of the exercise of public powers.

⁶⁴² See page 105 and following.

Chapter 6: Aligning the Hypothetical System with the Benchmark

with this requirement, with the result that we can say that judicial review measures up with the control aspect of the hypothetical accountability benchmark. As we now know it, judicial review was developed in seventeenth century England, partly in response to the limitations of Crown liability in tort, discussed below.⁶⁴³ A citizen wishing to challenge the legality of government activity was at that time limited to bringing an action in tort personally against the official responsible for the action, with the question of legality underpinning the question of liability.⁶⁴⁴ It was against this background that superior courts began to turn the judicial review remedies traditionally used to control inferior courts towards controlling the exercise of quasi-judicial, and then administrative, power,⁶⁴⁵ allowing citizens a means to directly challenge the legality of government activity. However, this did not necessarily extend to allowing citizens to seek judicial review remedies directly against the Crown. For instance, it has historically been thought that the Crown is immune from the writs of certiorari, prohibition, and mandamus, primarily due to the logical inconsistencies inherent in the idea that remedies are being sought against the Crown, in the name of the Crown.⁶⁴⁶ However, the prevailing academic view is that these immunities are not maintainable in the context of modern Australian government.⁶⁴⁷ The reach of modern judicial review is very extensive, providing a means to challenge the exercise of power by individuals and entities within all three branches of government. In fact, the reach of judicial review is so extensive that one of the more relevant themes in the context of the reach of judicial review (and accountability deficits) is not its application to government defendants, but to private contractors.⁶⁴⁸

While the reach of judicial review is broad, it is bounded by limitations. For instance, constitutional review under s 75(v) of the *Constitution* is available in respect of decisions that are made by an ‘officer of the Commonwealth’. This phrase has been interpreted as limiting the constitutional review jurisdiction to individual office-

⁶⁴³ See page 217 and following.

⁶⁴⁴ Amnon Rubinstein, *Jurisdiction and Illegality: A Study in Public Law* (Clarendon Press, 1965) 2.

⁶⁴⁵ See eg Selway, above n 487; De Smith, above n 487.

⁶⁴⁶ Aronson, Groves and Weeks, above n 629, 877 and 992.

⁶⁴⁷ Ibid 851, 877–81, and Cane, McDonald and Rundle, above n 610, 109.

⁶⁴⁸ The English courts expanded the reach of judicial review in this manner in *R v Panel on Takeovers and Mergers; Ex parte Datafin Plc* [1987] QB 815. As to the applicability of *Datafin* and review of outsourced powers in Australia, see Aronson, Groves and Weeks, above n 629, 149–56.

Accountability Deficits and Overloads: A Missing Framework

holders, and thereby excluding judicial review of decisions made by public corporations,⁶⁴⁹ or officials who (while exercising federal power) hold state offices.⁶⁵⁰ Individuals who are appointed by public entities that operate at arm's length from the government (for example, the Australian Broadcasting Commission⁶⁵¹ and the Aboriginal and Torres Strait Islander Commission)⁶⁵² are similarly excluded.⁶⁵³ One of the most important limits on the reach of judicial review, for present purposes, is in respect of the ability to bring proceedings against private contractors who are charged with the exercise of public power. In the United Kingdom, the courts have expanded the availability of judicial review remedies to certain non-statutory bodies exercising public functions. In *R v Panel on Takeovers and Mergers; Ex parte Datafin Plc*,⁶⁵⁴ the English Court of Appeal held that the Panel on Takeovers and Mergers, which was a self-regulating non-statutory body overseeing the financial market in the United Kingdom, was amenable to judicial review. The critical element giving rise to jurisdiction, it was held, was the existence of a 'public element' or the performance of a 'public duty'.⁶⁵⁵ Later decisions have placed emphasis on the fact that such bodies will be amenable to review if they are supported directly or indirectly by the government, for example through the endorsement or enforcement of their decisions, or where (while non-statutory themselves), they sit within the context of a broader statutory scheme.⁶⁵⁶ In the Australian context, neither the approach set out in *Datafin* (nor any alternative approach attaching liability to the exercise of outsourced public power)⁶⁵⁷ has been adopted.⁶⁵⁸ The case has been made that extending the reach of the phrase

⁶⁴⁹ See eg *Businessworld Computers Pty Ltd v Australian Telecommunications Commission* (1988) 82 ALR 499, 500.

⁶⁵⁰ See eg *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452, 462.

⁶⁵¹ *Waterhouse v Australian Broadcasting Corp* (Unreported, Federal Court, Wilcox J, 21 October 1987), cited in Matthew Groves, 'Outsourcing and s 75(v) of the Constitution' (2011) 22 *Public Law Review* 3, 4.

⁶⁵² *Aboriginal Land Council (NSW) v Aboriginal and Torres Strait Island Commission* (Unreported, Federal Court, Hill J, 30 August 1995), cited in Groves, above n 651, 4.

⁶⁵³ For further examples, see Aronson, Groves and Weeks, above n 629, 49–50.

⁶⁵⁴ [1987] QB 815.

⁶⁵⁵ *Ibid* 847–48, 852.

⁶⁵⁶ *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth; Ex parte Wachmann* [1993] 2 All ER 249; *R v Disciplinary Committee of the Jockey Club; Ex parte Aga Khan* [1993] 2 All ER 853.

⁶⁵⁷ Boughey and Weeks advocate for an alternative approach inspired by the Canadian 'control' tests in Janina Boughey and Greg Weeks, "'Officers of the Commonwealth' in the Private Sector: Can the High Court Review Outsourced Exercises of Power?" (2013) 36 *University of New South Wales Law Journal* 316.

⁶⁵⁸ *Datafin* has been cited with approval in some cases (*Victoria v Master Builders' Association of Victoria* [1995] 2 VR 121; *MBA Land Holdings Pty Ltd v Gungahlin Development Authority* (2000) 206 FLR 120), but

Chapter 6: Aligning the Hypothetical System with the Benchmark

'officer of the Commonwealth' to allow judicial review of the exercise of public power by private bodies 'would clearly be in keeping with the accountability view of section 75(v)'s function'.⁶⁵⁹ To put the position in the converse, the failure of judicial review to attach to the exercise of public functions may represent a potential accountability deficit.

Putting to one side these particular difficulties of review under s 75(v), we can see that judicial review is well-aligned with the task of targeting the *repository* of public power (as required by the benchmark). So, rather than focusing only on an individual, or hierarchical, or corporate accountability model, we see that judicial review instead adopts whichever model is appropriate so as to target the person upon whom power has been conferred in the instant case. We see that in cases where a power has been conferred on, and is exercised by, an individual, the appropriate respondent in judicial review claims will be that individual. So, for instance, if the Minister for Immigration and Border Protection makes a decision pursuant to a statutory power conferred on the Minister, the appropriate respondent in proceedings for judicial review of that decision is that individual Minister. Similarly, prevailing authority suggests that when a claim for judicial review of a Federal Court judge's decision is sought under s 75(v), the individual judge, rather than the Court, may be named as respondent.⁶⁶⁰ This is reinforced by High Court procedural rules, which require that where an applicant seeks a writ of mandamus or prohibition is against an officer of the Commonwealth, 'the officer shall be described in the title of the proceeding by the office held',⁶⁶¹ and that in all other cases, a defendant may either be named personally or by reference to their office.⁶⁶²

has been questioned in others (*Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393). It was arguably open to the High Court to address the issue in *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, in which it was considered whether ADJR Act remedies or prerogative writs were available against the Australian Wheat Board. It was held that these remedies were not available, though the majority did not consider that this finding addressed the broader question of whether private bodies could be amenable to public law remedies.

⁶⁵⁹ Boughey and Weeks, "'Officers of the Commonwealth" in the Private Sector: Can the High Court Review Outsourced Exercises of Power?', above n 657, 323.

⁶⁶⁰ Aronson et al cite *Re Jarman; Ex parte Cook* (1997) 188 CLR 595, 602 and 607 in favour of this proposition, though they argue that the more coherent approach would be to treat the Federal Court itself (rather than individual judges) as an 'officer of the Commonwealth', in line with the approach taken to judicial review of tribunal decisions, as discussed below: Aronson, Groves and Weeks, above n 629, 50–51.

⁶⁶¹ *High Court Rules 2004* (Cth) r 25.02.2.

⁶⁶² *Ibid* r 25.02.3.

Accountability Deficits and Overloads: A Missing Framework

In comparison, we see that in cases where power has been conferred on one party, but has been exercised by another, judicial review adopts the hierarchical model of accountability. For instance, in many cases an executive decision-maker will rely on reports or summaries prepared by their subordinates (eg in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, the Minister relied on a summary of relevant facts prepared by departmental officers).⁶⁶³ Deficiencies in that summary (in that case, failure to set out a material fact), ultimately were laid at the feet of the Minister rather than with the officers who prepared the summary.⁶⁶⁴ The hierarchical accountability model is also reflected in the *Carltona*,⁶⁶⁵ or 'alter ego', principle. This principle reflects the proposition that 'administrative necessity' may lead to the conclusion that a senior official is entitled to act through their subordinate officers in respect of the exercise of certain functions.⁶⁶⁶ In such cases, again, accountability ultimately rests with the senior official rather than with the individual officer who made the relevant error. All of these circumstances display the hierarchical model of accountability, with a senior official being held accountable for the errors of their subordinates.

Finally, we see that where power has been conferred on a government entity, and is exercised by individuals on behalf of that entity, judicial review adopts the corporate accountability model. The corporate approach is evident in the line of authority which considers the amenability of corporate decisions to review under s 75(v) of the *Constitution*, under which jurisdiction is limited to decisions made by an 'officer of the Commonwealth'. As noted above, this phrase has been interpreted to exclude public corporations, meaning that an individual office-holder must be identified. In testing the outer limits of this restriction, there have been cases in which applicants have sought to name individual officers comprising a public body that made the decision sought to be reviewed. For instance, in *Vietnam Veterans' Affairs Association of Australia New South Wales Branch Inc v Cohen*,⁶⁶⁷ members of the Specialist Medical Review Council were named as respondents in a case where decisions of the Council and Repatriation Medical Authority were under challenge. In reaching the conclusion that naming these

⁶⁶³ (1986) 162 CLR 24 30–31.

⁶⁶⁴ *Ibid* 31.

⁶⁶⁵ So named for the case *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560.

⁶⁶⁶ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 38.

⁶⁶⁷ (1996) 70 FCR 419.

Chapter 6: Aligning the Hypothetical System with the Benchmark

individual members in the proceedings was ‘colourable’,⁶⁶⁸ Tamberlin J indicated that decisions made by these bodies were ‘the collegiate acts of the Authority acting as separate legal entities’ rather than ‘the actions, conduct or decisions of the individual members’.⁶⁶⁹ In those circumstances, the Council was the appropriate respondent with the result that the claim could not be maintained under s 39B of the *Judiciary Act 1903* (Cth) (being the Federal Court’s equivalent jurisdiction to s 75(v)).⁶⁷⁰ Another example of this approach is seen in the treatment of tribunals under s 75(v) of the *Constitution*. While corporate bodies are excluded from the definition ‘officer of the Commonwealth’, tribunals have been treated somewhat differently. In *Aala*, Gaudron and Gummow JJ described the power to award certiorari against a decision of the Refugee Review Tribunal as an exercise of the court’s power ‘against the officer of the Commonwealth constituting the Tribunal’.⁶⁷¹ Similarly, in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*, McHugh J considered whether proceedings involving a decision made by the Refugee Review Tribunal were validly constituted if the Tribunal were not named as party.⁶⁷² His Honour concluded that:

The Tribunal is the relevant ‘officer of the Commonwealth’ for the purposes of this appeal. Accordingly, it is necessary that the Tribunal be joined as a party to this appeal.⁶⁷³

Beyond the realms of s 75(v), a similar approach is taken with respect to the judicial review of inferior court decisions at common law. The appropriate respondent in a case involving the review of a decision of a judge of the New South Wales Supreme Court is the Supreme Court of New South Wales, rather than the individual judge.⁶⁷⁴ There are a number of factors that recommend this approach. First, it reflects the reality that the orders that are sought to be reviewed are those of the inferior court, rather than those of individual judges who constitute the court on a given occasion. Secondly (and related to the first), this approach is consistent with the fact that a court may be constituted by

⁶⁶⁸ Ibid 432–33.

⁶⁶⁹ Ibid 432.

⁶⁷⁰ But see *Broadbent v Medical Board of Queensland* (2011) 195 FCR 438, 464 [103]. See also Aronson, Groves and Weeks, above n 629, 50, where the authors suggest that this approach ought not to be maintained in light of the approach taken to Tribunals, discussed in the following paragraph.

⁶⁷¹ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 90–91 [14].

⁶⁷² (2005) 228 CLR 294.

⁶⁷³ Ibid 310 [43].

⁶⁷⁴ *Sinkovich v Attorney General (NSW)* (2013) 85 NSWLR 783, 787–88 [13].

more than one judge. If the appropriate accountability model was one of individual accountability, how would this apply in cases of dissenting judgments? For these reasons, the most coherent approach is to adopt a corporate accountability model, in which the institution is the appropriate defendant.

Taking these observations together, we see that as a cause of action, judicial review is well-aligned with the requirement that the party *who* is held accountable is the party charged with the exercise of power. Accordingly, judicial review moves between the individual, hierarchical and corporate accountability models with the goal of attaching liability to the party on whom public power has been conferred (rather than who exercises that power in the instant case).

3 To whom is the government accountable through judicial review?

The hypothetical benchmark of accountability anticipates that, for the purposes of the control rationale, the government will be answerable to ‘all members of the public’. The restoration rationale, in contrast, limits access to those who have been harmed as a result of unlawful government activity. We see evidence of the tension between these points in the standing rules that govern access to judicial review. An individual wishing to challenge an exercise of government power must establish standing in order to be entitled to bring the matter before the courts and obtain relief. The applicable tests differ depending on the remedy sought. In 1998, McHugh J expressed the view that ‘[t]here can be little doubt that the present law of standing is far from coherent’.⁶⁷⁵ Despite the continued development of the law over the intervening years, the position is little clearer today. Some cases suggest a movement towards adopting a single test of standing; in others, the courts continue to adhere to the position that standing differs depending on the form of relief sought. This leaves a proliferation of similar, but distinct, tests that apply depending on the remedy and procedure adopted by an applicant. Loosely in order of the strictness of each test, the formulations are as follows.

⁶⁷⁵ *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 279–80.

Chapter 6: Aligning the Hypothetical System with the Benchmark

First, a person who is the subject of the decision in question, or a party to the relevant proceedings, will have standing to seek prohibition. Inevitably, such a person will also satisfy the more general tests of standing. Secondly, a person with a 'legal specific right' that has been affected may seek an order of mandamus.⁶⁷⁶ The meaning of this phrase was considered in *R v Whiteway; Ex parte Stephenson*,⁶⁷⁷ in which Deane J considered that while 'by no means clear', it amounted to 'something less than a definite legal right enforceable by the courts', and possibly even a right 'of a vague nature'. His Honour stated that it must be 'some special right possessed by the [applicant] over and above rights enjoyed by the public'.⁶⁷⁸ Thirdly, a person who is 'aggrieved' may seek certiorari of a decision, which the courts have taken to mean having suffered damage more significant than that incurred by the public at large.⁶⁷⁹ Fourthly, an applicant with a 'special interest in the subject matter of the action' may seek a declaration or injunction.⁶⁸⁰ This special interest is to be contrasted with a 'mere intellectual belief or concern'.⁶⁸¹ In practice, the test is applied flexibly so as to take into account the nature of the applicant's interest in each case. Finally, 'strangers' (ie persons with 'without a relevant legal interest')⁶⁸² have standing to apply for prohibition, certiorari, and quo warranto at the discretion of the Court. Despite academic warnings that the 'stranger' label has been divorced somewhat from its historical context,⁶⁸³ the notion has been employed in the nature of an essentially public interest suit for these remedies by the High Court.⁶⁸⁴ The boundaries of the 'stranger' standing entitlement have not been firmly set, though it appears that the Court will more readily find standing in cases in which an applicant has an interest falling within the scope of those above.⁶⁸⁵ While each of these tests purport to apply different standards, they appear to follow the same trajectory. Each focuses on the nature of the applicant's interest in the

⁶⁷⁶ *R v Commissioners of Customs and Excise; Ex parte Cook* [1970] 1 WLR 460.

⁶⁷⁷ [1961] VR 168, 170.

⁶⁷⁸ *Ibid.*

⁶⁷⁹ *R v Justices of Surrey* (1870) LR 5 QB 466

⁶⁸⁰ *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 527.

⁶⁸¹ *Ibid* 530.

⁶⁸² *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 104-05 [48]-[49].

⁶⁸³ Aronson, Groves and Weeks, above n 629, 818.

⁶⁸⁴ *Ibid* and cases cited in notes 319 to 321.

⁶⁸⁵ *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 263.

Accountability Deficits and Overloads: A Missing Framework

decision, asking whether they are a ‘mere intermeddler or busybody’,⁶⁸⁶ as opposed to someone with a genuine grievance.

In the constitutional context, these standing limitations are also reflected in the High Court’s jurisdiction to adjudicate ‘matters’. In light of the strict separation of judicial power, this has been interpreted to limit the High Court’s jurisdiction to the determination of present judicial controversies, in which there is ‘some immediate right, duty or liability’ to be determined, or ‘some right or privilege or protection given by law, or the prevention, redress or punishment of some act inhibited by law’.⁶⁸⁷ There is a degree of alignment between these requirements and the standing rules discussed above. As put by Gummow J in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Management Ltd*:

The notion of ‘standing’ is an implicit or explicit element in the term ‘matter’ throughout Ch III, identifying the sufficiency of the connection between the moving party and the subject matter of the litigation.⁶⁸⁸

There is more likely to be a ‘matter’ in circumstances where a party seeks to determine a dispute about their legal rights and interests. Conversely, it is less likely that there will be a ‘matter’ in circumstances where a party is merely interested in querying the legality of government activity, without having some vested interest in the outcome.

Aside from the occasional expansion of standing tests to accommodate ‘strangers’, we can view all of these various tests as broadly aligned with the restoration rationale for accountability. Certainly, the tests reveal a preference for a person who, if not having suffered direct harm, has a personal bone to pick in relation to a government decision. This is a far cry from the expectation of our hypothetical accountability benchmark, that control be pursued by ‘all members of the public’. Calls for the abandonment of judicial review standing tests with a move towards greater reliance on a more general discretion of the court to stifle unworthy claims are certainly nothing new,⁶⁸⁹ and allowing open standing would go some way towards bringing judicial review into alignment with the

⁶⁸⁶ *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, 527.

⁶⁸⁷ *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265–67.

⁶⁸⁸ (2000) 200 CLR 591, 637 [122].

⁶⁸⁹ See eg Louis Jaffe, ‘Standing to Secure Judicial Review: Public Actions’ (1961) 74 *Harvard Law Review* 1265; Mark Leeming, ‘Standing to Seek Injunctions Against Officers of the Commonwealth’ (2006) 1 *Journal of Equity* 3.

Chapter 6: Aligning the Hypothetical System with the Benchmark

control rationale of accountability. 'Public interest' motivated claims may raise the spectre of very different types of issues as compared with claims motivated by private interests, and may be no less deserving of adjudication.⁶⁹⁰ Indeed, there might be cases in which there is no party with the requisite degree of private interest (or inclination to bring proceedings) can be found, leaving illegal government action to go unchallenged. Of course, there are potential difficulties we might confront in opening up standing in such a manner. There are the usual 'floodgate' arguments to consider.⁶⁹¹ Harlow raises a slightly different concern, arguing that relaxing standing rules to facilitate claims by 'campaigning groups' could be viewed as allowing 'politics to invade the legal process'.⁶⁹² She warns that, in doing so, 'we may end by undermining the very qualities of certainty, finality, and especially independence for which the legal process is esteemed, thereby undercutting its legitimacy'.⁶⁹³

In the context of discussing government accountability, a related point is that allowing open standing would move judicial review away from those people who stand to be most affected by a decision,⁶⁹⁴ with the effect, for example, that a person who has been granted a liquor licence might see it revoked following proceedings by a community group advocating greater regulation of alcohol. The choice of litigation would be taken out of the hands of a person who might be uniquely affected, and drawn into the public arena.⁶⁹⁵ Such concerns might be of critical importance for the purposes of the restoration rationale of accountability, which is concerned with leaving the choice of prosecution within the hands of the individual who has been harmed. However, the control rationale is driven by different considerations, namely to ensure that public power is exercised legally. If this is our core concern, open standing would appear to be an attractive option.

Some might argue that any concerns about the limitations inherent in current standing tests may be ameliorated by the mechanism of the Attorney-General's fiat. This

⁶⁹⁰ Peter Cane, 'Standing Up for the Public' [1995] *Public Law* 276, 277.

⁶⁹¹ Fisher and Kirk describe such arguments as 'completely discredited': Elizabeth Fisher and Jeremy Kirk, 'Still Standing: An Argument for Open Standing in Australia and England' (1997) 71 *Australian Law Journal* 370, 373.

⁶⁹² Carol Harlow, 'Public Law and Popular Justice' (2002) 65 *Modern Law Review* 1, 2.

⁶⁹³ *Ibid.*

⁶⁹⁴ Fisher and Kirk, above n 691, 373-74.

⁶⁹⁵ *Ibid.* 374.

Accountability Deficits and Overloads: A Missing Framework

mechanism allows a party to commence proceedings in the name of the Attorney-General provided that they comply with the terms of the fiat, usually including the obligation to bear the costs of prosecuting the claim and being liable for an adverse costs order.⁶⁹⁶ Returning to our accountability benchmark, we can view the fiat of the Attorney-General as performing two roles. First, this assigns a defined prosecutor the role of managing public interest litigation, consistently with the demands of the deterrent rationale. Secondly, the ability of a public interest litigant to approach the Attorney-General may operate as a residual safety net in supporting the control rationale, ensuring that even if not 'all members of the public' can bring proceedings directly, there is at least a mechanism available to ask another to bring the proceedings in their stead. There are reasons, however, why we might have some concerns about the utility of the Attorney-General's fiat as a form of residual 'safety net' for the purposes of the control rationale. First, the decision as to whether or not to allow the fiat is a matter entirely within the discretion of the Attorney-General, with a decision to refuse being non-justiciable.⁶⁹⁷ Secondly, there is a risk (however small) that, as a member of the government, the Attorney-General may conceivably be influenced to issue or decline to issue a fiat on the basis of political motivations. This possibility was hinted at by Gaudron, Gummow and McHugh JJ in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* in noting that

it may be 'somewhat visionary' for citizens in this country to suppose that they may rely upon the grant of the Attorney-General's fiat for protection against ultra vires action of statutory bodies for the administration of which a ministerial colleague is responsible.⁶⁹⁸

There are difficulties inherent in assessing whether this risk plays out in practice. What we can note in an observable sense is that the instances of proceedings commenced pursuant to the fiat of the Attorney-General are a narrow exception rather than the rule; the court in *Re McBain; Ex parte Australian Catholic Bishops Conference* noted that the issue of the fiat in that case had been the first occasion in a decade.⁶⁹⁹

⁶⁹⁶ Roger Douglas, 'Standing' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 158, 159.

⁶⁹⁷ *Ibid.*

⁶⁹⁸ (1998) 194 CLR 247, 262–63 [38], cited in Aronson, Groves and Weeks, above n 629, 771, note 8.

⁶⁹⁹ (2002) 209 CLR 372, 434 [156].

Chapter 6: Aligning the Hypothetical System with the Benchmark

In summary, we might conclude that the party *to whom* the government is accountable via judicial review proceedings reveals tensions within our hypothetical benchmark of accountability. In their orthodox form, standing rules tend to be more closely aligned with the restoration rationale, notwithstanding the conclusion reached above that restoration via judicial review remedies is largely a matter of co-incidence rather than design. The relaxation of these rules to facilitate public interest litigation (which would be a better reflection of the control rationale) has been recommended, but not taken up in the development of the law. Further, we see that while the availability of the Attorney-General's fiat might go some way towards ameliorating the limitations of standing rules, this has its limitations in cases where the fiat is denied, whether or not with the design of avoiding scrutiny of government activities. On the whole, we would say that this analysis reveals a degree of divergence from the *to whom* aspect of the hypothetical accountability benchmark.

4 For what is the government held accountable through judicial review?

The hypothetical benchmark anticipates that the control rationale will be relevant in all cases of *unlawful exercise of public power*. The deliberately loose label 'unlawful' has been selected to force us to think about the legal limits within which power may be exercised. As noted in discussing the scope of the misfeasance tort below,⁷⁰⁰ 'unlawful' can take on different meanings in different contexts. In its narrowest form, it may refer to acts that are specifically prohibited or forbidden by law. More expansively, it may target acts that an agent lacks power to engage in. More broadly still, it may mean any breach of established legal standards. As will be seen in the following discussion, review under s 75(v) of the *Constitution* sits most conformably with the second of these two understandings of 'unlawful', as the constitutional writs have come to be understood as closely tied to the concept of jurisdictional error.

The concept of jurisdictional error has come to play an extremely important role in the context of judicial review in Australia. For present purposes, jurisdictional error is relevant for two reasons. First, it plays a defining role with respect to the powers of each

⁷⁰⁰ See page 230.

Accountability Deficits and Overloads: A Missing Framework

of the branches of government, as it provides a hard limit on the legislature's ability to remove the court's powers of judicial review. This reinforces the permanent role that judicial review plays within both our hypothetical accountability system, and more broadly. The second reason jurisdictional error is so important for present purposes is that it plays a key role in delimiting the types of relief that may be available in relation to a decision affected by a particular error. The relief available pursuant to s 75(v) is closely tied to the concept of jurisdictional error. Establishing such an error is a prerequisite for entitlement to the constitutional writs of prohibition and mandamus.⁷⁰¹ Likewise, the writ of certiorari is restricted to jurisdictional errors,⁷⁰² notwithstanding that, outside the jurisdiction conferred by s75(v), certiorari may extend to non-jurisdictional errors of law appearing on the face of the record.⁷⁰³ In contrast, there remains doubt as to whether injunctive and declaratory relief in the High Court's s 75(v) jurisdiction extends beyond jurisdictional error.

In *Abebe v Commonwealth*, Gaudron J wondered:

Given the potential for administrative decisions to impact on existing rights and interests, and, also, on important and valuable statutory rights to which the individual might otherwise be entitled, it may well be that an injunction will lie to prevent an officer of the Commonwealth from giving effect to an administrative decision based on error, even if that error is not jurisdictional error.⁷⁰⁴

In slightly more emphatic terms, McHugh J in *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* thought that '[n]o doubt the power to grant injunctions under s 75(v) is not confined to jurisdictional error'.⁷⁰⁵ However, His Honour cautioned that such relief would then require attention to the character of the legal effect of the decision and its impact on legal rights.⁷⁰⁶ The possibility was again raised in *S157*, where the majority hinted that:

Given that prohibition and mandamus are available only for jurisdictional error, it may be that injunctive relief is available on grounds that are wider than those that result in

⁷⁰¹ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 508 [82].

⁷⁰² *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 393–94, cited in Cane, McDonald and Rundle, above n 610, 114.

⁷⁰³ *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 58 ALD 609, 617 [29]. This derives from the fact that the power to award a writ of certiorari is a matter of ancillary jurisdiction for the purposes of s 75(v) of the Constitution.

⁷⁰⁴ (1999) 197 CLR 510, 551–52 [105].

⁷⁰⁵ (2000) 58 ALD 609, 617 [31]. His Honour's comment was made in the context of considering the potential reach of certiorari beyond jurisdictional error when ancillary to injunctive relief under s 75(v).

⁷⁰⁶ *Ibid* 617 [31].

Chapter 6: Aligning the Hypothetical System with the Benchmark

relief by way of prohibition and mandamus.⁷⁰⁷

However, the examples provided of this broader foundation for relief ('fraud, bribery, dishonesty or other improper purpose')⁷⁰⁸ would presumably take a decision-maker beyond jurisdiction in any event.⁷⁰⁹ More recently in *Futuris*, the High Court said little to clarify things, noting simply that the

principles of jurisdictional error control the constitutional writs but do not attend the remedy of injunction including that provided in s 75(v) ... The same is true of the other equitable remedy, the declaratory order.⁷¹⁰

Again, however, this was qualified with the statement that the equitable remedies 'operate to declare invalidity and to restrain the implementation of invalid exercises of power',⁷¹¹ mirroring the consequences of a finding of jurisdictional error.⁷¹² What we can say is that, though the matter is not without doubt, there is a possibility that injunctive and declaratory relief extend beyond the reach of jurisdictional error (though other requirements may then restrict access to relief beyond those limits).⁷¹³

Accepting that jurisdictional error is the foundation for relief for most, if not all, remedies under s 75(v) of the *Constitution*, it is necessary to consider what type of *unlawful conduct* this concept captures. Though the concept had featured in a minor way in earlier legal history,⁷¹⁴ the crystallisation of jurisdictional error as it is currently understood came in *Craig v South Australia*,⁷¹⁵ which involved an application for certiorari to quash a decision of an inferior court judge. The High Court was ultimately called on to determine whether the inferior court judge had made an error that justified an order for certiorari, which required the Court to consider whether to follow the path taken by the House of Lords in *Anisminic Ltd v Foreign Compensation Commission*.⁷¹⁶ In that case, the House of Lords had held that all errors of law were effectively

⁷⁰⁷ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 508 [82].

⁷⁰⁸ *Ibid.*

⁷⁰⁹ Cane, McDonald and Rundle, above n 610, 114, note 149.

⁷¹⁰ *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 162 [47].

⁷¹¹ *Ibid.*

⁷¹² Cane, McDonald and Rundle, above n 610, 114.

⁷¹³ Eg in *SZRWS v Minister for Immigration and Border Protection* [2017] FCCA 3101, [32], Driver J noted that if available outside the confines of jurisdictional error, an applicant seeking injunctive relief would otherwise need to establish 'a legal wrong'.

⁷¹⁴ Stephen Gageler, 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 92, 96.

⁷¹⁵ (1995) 184 CLR 163.

⁷¹⁶ [1969] 2 AC 147.

Accountability Deficits and Overloads: A Missing Framework

jurisdictional and therefore attracted certiorari, regardless of whether or not they appeared on the face of the record. The High Court, marking an important point of divergence between Australian and English administrative law, declined to follow this approach. Instead, the High Court maintained the distinction between jurisdictional and non-jurisdictional errors, and began the long journey to setting up jurisdictional error as a touchstone of judicial power to engage in judicial review. It was held that jurisdictional error was to be discovered by employing a different degree of scrutiny in the context of reviewing administrative decisions, as opposed to those of inferior courts.⁷¹⁷ This was because, whereas inferior courts have ‘authority to decide questions of law, as well as questions of fact’,⁷¹⁸ administrative officials⁷¹⁹ cannot ‘authoritatively determine questions of law or ... make an order or decision otherwise than in accordance with the law’.⁷²⁰

According to the High Court in *Craig*, the less intense level of scrutiny applicable to inferior courts would find jurisdictional error in three circumstances.⁷²¹ First, if it ‘mistakenly asserts or denies the existence of jurisdiction’; secondly, if it ‘misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist’; and thirdly, if it ‘purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and powers’.⁷²² For administrative officials a more intense level of review was thought to be appropriate. Presumably in addition to the less intrusive standards that applied to inferior courts, a jurisdictional error would arise on the part of an administrative tribunal if it ‘falls into an error of law’ causing it to ‘identify a wrong

⁷¹⁷ *Craig v South Australia* (1995) 184 CLR 163, 179.

⁷¹⁸ *Ibid.*

⁷¹⁹ In *Craig*, the Court used the label ‘administrative tribunal’, which can be taken to mean administrative decision-makers more generally: Cane, McDonald and Rundle, above n 610, 97.

⁷²⁰ *Craig v South Australia* (1995) 184 CLR 163, 179. Doubt has since been shed on the rigidity of the distinction between inferior courts and administrative bodies, most notably in the application of the distinction to tribunals, which in many cases are constituted by judges and are called on to decide legal questions. See eg Cane, McDonald and Rundle, above n 610, 98; Kristen Walker, ‘Jurisdictional Error Since *Craig*’ (2016) 86 *AIAL Forum* 35, 38. Nothing much turns on this issue for present purposes.

⁷²¹ *Craig v South Australia* (1995) 184 CLR 163, 177, cited in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 573–74.

⁷²² In *Kirk*, the High Court cautioned against reading too much into the word ‘theoretical’ here: *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 574.

Chapter 6: Aligning the Hypothetical System with the Benchmark

issue'; 'ask itself a wrong question'; 'ignore relevant material'; 'rely on irrelevant material'; or 'at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion'.⁷²³

In this sense, *Craig* moved discussions of jurisdictional error away from the narrow conception of distinguishing between the existence and exercise of jurisdiction (where jurisdictional error comprised the former), and into a more complex analysis of whether particular types of errors were of a nature that a decision-maker was entitled, or not entitled, to make *within* jurisdiction.⁷²⁴ The High Court has indicated that the examples of error provided in *Craig* were not to be treated as a 'rigid taxonomy';⁷²⁵ '[i]t is neither necessary, nor possible, to mark the metes and bounds of jurisdictional error'.⁷²⁶ It is unnecessary for present purposes to provide an in-depth analysis of the types of errors that have in various cases been found to be jurisdictional for the purposes of relief under s 75(v). It suffices to say that errors comprising essentially the full gambit of common law judicial review grounds have been thought jurisdictional in one case or another.⁷²⁷ For the most part, the deciding factor in these cases has been the relevant statutory scheme.⁷²⁸

We can say, based on this analysis, that the remedies provided for under s 75(v) control the exercise of public power only if the error in question is jurisdictional.⁷²⁹ If our benchmark of accountability requires that control be achieved through attaching regulatory orders to the *unlawful exercise of public power* more generally, we must move beyond our analysis of the conduct to which the constitutional writs *do* attach (ie jurisdictional error), and instead focus on the conduct to which they do *not*. In this context, our goal would be to define the concept of 'non-jurisdictional' error, which can be understood as comprising the residue of errors that fall beyond classification as jurisdictional. Examples of errors falling into this wider class include the breach of a

⁷²³ *Craig v South Australia* (1995) 184 CLR 163, 179.

⁷²⁴ Cane, McDonald and Rundle, above n 610, 95.

⁷²⁵ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 574.

⁷²⁶ *Ibid* 573.

⁷²⁷ See eg Caron Beaton-Wells, 'Judicial Review of Migration Decisions: Life After *S157*' (2005) 33 *Federal Law Review* 141. For a detailed overview of the grounds of judicial review, see eg Aronson, Groves and Weeks, above n 629, Ch 4–9; Cane, McDonald and Rundle, above n 610, Ch 4.

⁷²⁸ Cane, McDonald and Rundle, above n 610, 100. The statute can obviously offer little guidance in respect of the exercise of non-statutory powers: *ibid* 101.

⁷²⁹ With the possible exception of injunctive and declaratory relief, as discussed above.

statutory requirement to provide reasons in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme*,⁷³⁰ and a contravention of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) in *Bare v Independent Broad-Based Anti-Corruption Commission*.⁷³¹ Again, however, it is not possible to extrapolate a general rule from these findings, as the question of whether an error is jurisdictional (or non-jurisdictional) can only be determined through analysis of the relevant statutory scheme.

Returning to the hypothetical accountability benchmark, the control rationale has been defined such that it will be engaged in response to the *unlawful exercise of public power*. If we adopt a broad view of ‘unlawfulness’, we might not only be concerned to control conduct that is prohibited by law or which goes beyond jurisdictional limits; we might also be inclined to define our benchmark to capture other errors which, though not jurisdictional, nonetheless involve a breach of defined legal boundaries. If we adopt this broad view of unlawfulness, we might doubt whether judicial review pursuant to s 75(v) would satisfy the benchmark. Most, if not all, of the available remedies under s 75(v) are confined by reference to the concept of jurisdictional error. While a wide variety of errors has been found to meet this criterion, there are many errors that may not. And if judicial review pursuant to s 75(v) is the means by which we seek to control the unlawful exercise of public power, then we would reach the view that it underperforms against that benchmark.

5 Procedures in judicial review proceedings

The hypothetical benchmark anticipates that, for the purposes of the control rationale, regulatory orders will be imposed via *coercive procedures that are equally balanced between the parties*. Space available here does not allow for any comprehensive analysis of the ways in which each of the causes of action in our hypothetical system align (or fail to align) with this expectation. Instead, emphasis is placed on two core aspects of procedure: the burden of proof and discretion to refuse relief.

⁷³⁰ (2003) 216 CLR 212, cited in Walker, above n 720, 38.

⁷³¹ (2015) 48 VR 129, 176 [139] (Warren CJ) and 327 [617] (Santamaria JA), cited in Janina Boughey and Lisa Burton Crawford, 'Reconsidering *R (on the application of Cart) v Upper Tribunal* and the Rationale for Jurisdictional Error' [2017] *Public Law* 592, 600.

(a) Discretion to refuse relief

An important procedural point of departure between the causes of action is in connection with the discretion to refuse relief. Whereas relief is available as of right in civil cases, the court retains a discretion to refuse relief in judicial review proceedings, including those remedies set out in s 75(v) of the *Constitution*.⁷³² Accordingly, the courts may decline to intervene in circumstances where the plaintiff has acted in bad faith or delayed in bringing the action, or in circumstances where the order would be impractical or unnecessary, or where other remedies are available.⁷³³ This operates as an important limitation on the operation of judicial review as an accountability mechanism, as even if an applicant can otherwise establish that the government has acted unlawfully, no remedy may issue if the applicant has acted in a disentitling manner, or if relief is otherwise futile or inappropriate. Having said this, the discretion is ‘not to be exercised lightly against the grant of a final remedy’ in circumstances where there is no further avenue of appeal.⁷³⁴ Instead, the exercise of discretion should be guided by the sentiment that ‘the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise’.⁷³⁵

As a procedural mechanism, we can view the court’s discretion to refuse relief in judicial review proceedings as being consistent with the benchmark requirement that procedures be balanced between the parties. By allowing the courts the discretion to refuse relief in appropriate cases (without undermining the rule of law), the courts have leeway to tip the balance back in favour of the government where that approach is warranted.

(b) Burden of proof

Burden of proof does not feature as heavily in judicial review proceedings as it does in civil and criminal proceedings (discussed in Sections C and D respectively). In fact, factual inquiries have a much smaller role to play in the context of judicial review, which

⁷³² *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 172–73 [88].

⁷³³ Aronson, Groves and Weeks, above n 629, Ch 17.

⁷³⁴ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 107 [55] (Gaudron and Gummow JJ).

⁷³⁵ *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 157 [56]. Full extract set out at page 145–46 above.

Accountability Deficits and Overloads: A Missing Framework

is concerned with testing the legality, rather than the merits, of government action.⁷³⁶ As a general proposition, the party seeking to argue lack of jurisdiction bears the onus of establishing that issue.⁷³⁷ One area in which the burden takes particular shape is in connection with establishing the grounds of bad faith and improper purpose; '[a]n improper purpose will not be lightly inferred'.⁷³⁸ Through the presumption of regularity, such a purpose will only be inferred 'if the evidence cannot be reconciled with the proper exercise of the power'.⁷³⁹ Though there are no desert-oriented sanctions available in judicial review proceedings, the burden placed on applicants to establish that a decision-maker has acted in bad faith is significant.⁷⁴⁰ In *Bread Manufacturers of New South Wales v Evans*, Murphy J put the position in the following terms:

No court or other tribunal should make findings against the honour or reputation of a person where no allegation has been made against the person by any party or witness especially where the person is not a party or a witness.⁷⁴¹

To similar effect, the High Court in *Futuris* confirmed that '[a]llegations that statutory powers have been exercised corruptly or with deliberate disregard to the scope of those powers are not lightly to be made or upheld'.⁷⁴² However, the courts have in some cases shown willingness to infer bad faith from the circumstances of a case where the perversity of findings of fact lead to a conclusion that the decision-maker had not acted honestly.⁷⁴³ Generally speaking, however, allegations of bad faith are particularly difficult for an applicant to make out. We can view these varying approaches as attempting to accommodate different aspects of the accountability benchmark. For grounds of a technical or procedural nature, the ordinary onus of proof applies. Where the grounds are of a nature that aligns with concepts of subjective fault,⁷⁴⁴ however, we see that the onus shifts into a more agent-friendly form.

⁷³⁶ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

⁷³⁷ *Municipal Council of Sydney v Campbell* [1925] AC 338, 343.

⁷³⁸ *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649, 672.

⁷³⁹ *Ibid.*

⁷⁴⁰ Aronson, Groves and Weeks, above n 629, 318 [5.500].

⁷⁴¹ (1981) 180 CLR 404, 442, cited in Aronson, Groves and Weeks, above n 629, 318 [5.500].

⁷⁴² *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 165, cited in Aronson, Groves and Weeks, above n 629, 318 [5.500].

⁷⁴³ See cases cited in Aronson, Groves and Weeks, above n 629, 318 [5.500].

⁷⁴⁴ Rock, 'Fault and Accountability in Public Law', above n 346, 185–90.

6 Judicial review: a control-oriented regime?

This analysis demonstrates that judicial review pursuant to s 75(v) predominantly falls within the control aspect of the hypothetical benchmark. The available remedies are essentially regulatory in nature, and while they might potentially also have a deterrent function in some instances (eg declaratory relief), we would have serious doubts about whether these remedies could be said to serve the restoration or desert functions as understood in this thesis. For this reason, the foregoing analysis has focused on the performance of judicial review against the control aspect of the benchmark. For the purposes of the hypothetical analysis, the control rationale has been said to demand that *the individual/entity charged with exercising power* would be accountable to *all members of the public* for *unlawful exercise of public power* through the imposition of *regulatory orders* imposed via *coercive procedures that are equally balanced between the parties*.

In measuring the performance of judicial review against this benchmark, we see that there are a number of areas in which judicial review performs well; the remedies available in judicial review proceedings involve the imposition of regulatory orders via procedures that are essentially well-balanced between the parties (*how*). However, the benchmark indicates that judicial review does not measure up well in terms of *who* can be held accountable via this cause of action (most notably, the inapplicability of judicial review in the context of outsourcing), and *by whom* they can be held accountable (as many standing tests take on the character of a restoration-oriented, rather than control-oriented, device). The greatest difficulty exposed by this analysis is in connection with identifying *for what* the government is held accountable. The hypothetical benchmark has identified the *unlawful exercise of public power* as the relevant criterion. However, we need to do much more to articulate the meaning of ‘unlawful’ in order to proceed towards making claims of accountability deficit and overload. The foregoing analysis has highlighted one such difficulty in connection with judicial review under s 75(v); namely the confinement of remedies to errors that are jurisdictional. If we define ‘unlawful’ errors more broadly than ‘jurisdictional’ errors, we would reach the view that this cause of action falls short of our hypothetical benchmark. However, much more

work needs to be done in identifying and justifying the possible breadth of the notion of ‘unlawful exercise of power’ before we would reach that point.

C MISFEASANCE IN PUBLIC OFFICE: RESTORING HARM OCCASIONED BY ABUSE OF POWER

The second mechanism forming our hypothetical accountability system is the tort of misfeasance in public office. As our only ‘truly public tort’,⁷⁴⁵ it is clear why we might be particularly interested in this cause of action for the purposes of facilitating government accountability. As explored in this section, the remedies available for the purposes of the tort of misfeasance in public office lead us to consider it primarily under the rubric of the restoration rationale for accountability, though the availability of punitive damages might also lead us to explore the possibility of the desert and deterrence rationales. On measuring this cause of action against the hypothetical accountability benchmark, we see that this tort does not perform particularly well against expectations. The restoration rationale requires that *the government as an entity* be accountable to *individuals who have suffered loss due to unlawful government activity* through the provision of *reparative remedies via prosecutor-friendly procedures*. The desert rationale requires that *individual public officials* be accountable to *a defined prosecutor (with residual rights for members of the public)* for their *deliberate wrongdoing* through the provision of *punitive sanctions via agent-friendly procedures*. And the deterrence rationale requires that *officials or entities with the capacity to effect change* would be accountable to *a defined prosecutor* for *unlawful exercise of public power* through the imposition of *weak sanctions via flexible procedures that facilitate dialogue*. The tort of misfeasance of public office represents somewhat of a conglomeration of these rationales, preventing it from performing in accordance with the expectations established by the benchmark.

⁷⁴⁵ Mark Aronson, ‘Misfeasance in Public Office: Some Unfinished Business’ (2016) 132 *Law Quarterly Review* 427, 428.

1 Misfeasance in public office: remedies of restoration and desert

The archetypal remedy in tort proceedings is an award of damages.⁷⁴⁶ While damages are, at core, a reparative remedy aligned with the restorative rationale for accountability, they can also be viewed as contributing to a number of the other accountability rationales:

Money is probably the most frequently used means of punishing, deterring, compensating and regulating throughout the legal system.⁷⁴⁷

When awarded in the context of the tort of misfeasance in public office, the available categories of damages awards can be understood to contribute to a range of accountability rationales. The two categories of damages that are relevant for this purpose are compensatory and punitive damages. Compensatory damages provide an individual with a monetary payment to make up for pecuniary and non-pecuniary loss, damage or injury they have sustained.⁷⁴⁸ Pecuniary losses consist of financial deprivations or expenses that can readily be compensated through the replacement of that same amount in damages, while non-pecuniary losses are those that are non-financial in nature, such as physical or mental harm.⁷⁴⁹ These latter losses often cannot be replaced, and so a money award is offered as a best substitute for that loss.⁷⁵⁰ In the civil law context, the aim of an award in damages is to place the plaintiff in the same position as they would have been in but for the defendant's wrong.⁷⁵¹ This rationale is aligned with the restorative function of accountability, in providing individuals who have suffered loss with a monetary payment designed to repair that loss; the tort is

⁷⁴⁶ Barker et al, above n 314, 693.

⁷⁴⁷ Pat O'Malley, *The Currency of Justice: Fines and Damages in Consumer Societies* (Routledge-Cavendish, 2009) 1. There are various ways of describing the types or forms that a damages award can take. Damages may be compensatory (to cover loss suffered as a result of the conduct of another), restorative (to reverse a shift of resources from one person to another), disgorging (to retract a gain made by one person at the expense of another), punitive (to punish a person for their conduct towards another), or nominal (to mark that a wrong has been committed): Cane, 'Damages in Public Law', above n 232, 491. Cane would distinguish nominal damages on the basis these have a declaratory function, as opposed to a goal of enriching the recipient of the award 'at the expense of' the party making the payment. Legislation in a number of Australian states limits the availability of exemplary damages in personal injury claims (see eg *Civil Liability Act 2002* (NSW) s 21).

⁷⁴⁸ Harvey McGregor, *McGregor on Damages* (Sweet and Maxwell, 19th ed, 2014) 13.

⁷⁴⁹ *Ibid.*

⁷⁵⁰ *Ibid.*

⁷⁵¹ *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39, cited in McGregor, above n 748, 14.

Accountability Deficits and Overloads: A Missing Framework

‘designed to provide redress for acts done by public officers in abuse or misuse of powers conferred on them for the purposes of their public duties’.⁷⁵²

The tort of misfeasance in public office also allows for punitive damages awards.⁷⁵³ A punitive (or exemplary)⁷⁵⁴ award of damages aligns with the desert rationale for accountability not only in terms of their purpose, but also in terms of the circumstances in which the award is thought to be appropriate. Punitive damages are thought to be appropriate in cases where a defendant’s ‘conduct is sufficiently outrageous to merit punishment, as where it discloses malice, fraud, cruelty, insolence or the like’,⁷⁵⁵ or in response to ‘conscious wrongdoing in contumelious disregard of another’s rights’.⁷⁵⁶ Though it is not necessary to establish that the defendant’s conduct was malicious in order to obtain a punitive damages award, it does appear necessary to establish a minimum level of conscious engagement on the part of the defendant, in the form of intentional or reckless behaviour.⁷⁵⁷ The Australian courts have not followed the restrictive approach of the English courts represented by the decision of *Rookes v Barnard*,⁷⁵⁸ in which the House of Lords fixed the availability of punitive damages to already-recognised categories of case.⁷⁵⁹ Even within the restrictive approach, however, punitive damages have continued to be available for egregious conduct by government officials. In *Rookes v Barnard* Lord Devlin was concerned to maintain the availability of punitive damages in response to ‘arbitrary and outrageous use of executive power’,⁷⁶⁰ as in cases of ‘oppressive, arbitrary or unconstitutional action by the servants of the government’.⁷⁶¹

⁷⁵² *Obeid v Lockley* [2018] NSWCA 71, [100].

⁷⁵³ The interaction between punitive and compensatory damages awards is dealt with in Chapter 7 below.

⁷⁵⁴ There remains dispute as to whether aggravated damages fall into this same category: Cane, *An Anatomy of Tort Law*, above n 250, 114; Allan Beever, ‘The Structure of Aggravated and Exemplary Damages’ (2003) 23 *Oxford Journal of Legal Studies* 87. If we conceive of aggravated damages as plaintiff-focused (ie appeasing a perceived indignity) as opposed to defendant-focused (ie punishing and deterring) it is convenient to hive off aggravated damages in the context of the present discussion. Otherwise, little turns on this dispute.

⁷⁵⁵ McGregor, above n 748, 454.

⁷⁵⁶ *Gray v Motor Accident Commission* (1998) 196 CLR 1, 7.

⁷⁵⁷ *Lamb v Cotogno* (1987) 164 CLR 1, 7–8; *Gray v Motor Accident Commission* (1998) 196 CLR 1, 9–10; *Trevorrow v South Australia [No 5]* (2007) 98 SASR 136, 389–90. See also Harlow, ‘A Punitive Role for Tort Law?’, above n 506, 252.

⁷⁵⁸ [1964] AC 1129.

⁷⁵⁹ See *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 138–39.

⁷⁶⁰ [1964] AC 1129, 1223.

⁷⁶¹ *Ibid* 1226.

Chapter 6: Aligning the Hypothetical System with the Benchmark

The condemnatory feature of punitive damages is particularly apt in the context of the tort of misfeasance in public office.⁷⁶² As outlined in more detail below,⁷⁶³ this tort involves a serious degree of subjective fault on the part of the official concerned, which may invite temptation to conclude that punitive damages will be available in every case where a claim is made out. However, the courts appear to require something more than the elements of subjective fault comprised in the misfeasance tort before awarding punitive damages. In *Kuddus*, Lord Hutton accepted that punitive damages may be available in respect of oppressive, arbitrary or unconstitutional acts by government officials, however expressed the view that ‘not every abuse of power which constitutes the tort of misfeasance will come within [that] category’.⁷⁶⁴ In order for punitive damages to be relevant, therefore, the plaintiff must show something more than the degree of subjective fault that comprises the tort itself.

Like the desert rationale for accountability, punitive damages are focused primarily on the individual wrongdoer rather than on the victim.⁷⁶⁵ This is because the purpose of a punitive damages award is to punish and mark public disapproval of the wrongdoer’s conduct.⁷⁶⁶ As put by Chamberlain, making punitive damages available in misfeasance cases ‘is necessary to express a sense of public outrage at the misuse of the powers that were granted to the official to exercise in the public interest’.⁷⁶⁷ The availability of punitive damages further serves the important constitutional function to ‘uphold and vindicate the rule of law’,⁷⁶⁸ or in Harlow’s words, constitutes ‘a constitutional principle of symbolic importance’.⁷⁶⁹ Not only is the purpose of a punitive damages award closely aligned to the accountability rationale of desert, it can also be viewed as contributing to the higher theoretical goal of supporting the legitimacy of government.

⁷⁶² Note that while there is a degree of alignment between rationales, in practice the award of punitive damages for the misfeasance tort have been rare. For an exception, see *Fernando v Commonwealth* [No 4] (2010) 119 ALD 371.

⁷⁶³ See discussion commencing at page 229 below.

⁷⁶⁴ *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122, 153 [91].

⁷⁶⁵ *Gray v Motor Accident Commission* (1998) 196 CLR 1, 7.

⁷⁶⁶ *Wilkes v Wood* (1763) Lofft 1, 18–19.

⁷⁶⁷ Erika Chamberlain, *Misfeasance in a Public Office* (Carswell, 2016) 67.

⁷⁶⁸ See *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122, 149, cited with approval in *New South Wales v Ibbett* (2006) 229 CLR 638, 649–50. See also Chamberlain, above n 767, 43: ‘the misfeasance tort supports the rule of law by holding public officers accountable through punitive damages’.

⁷⁶⁹ Harlow, ‘A Punitive Role for Tort Law?’, above n 506, 251.

Accountability Deficits and Overloads: A Missing Framework

Beyond restoration and desert, we might wonder whether the remedies available in misfeasance claims have a potential deterrent function. For many, the idea of tort law as a tool of deterrence is ‘innate’,⁷⁷⁰ though as Harlow notes, ‘[d]eterrent theories of tort law are today hard to come by’.⁷⁷¹ More recent academic attention has focused instead on attempting to discern the impact of tort remedies as an empirical matter, with varying degrees of success.⁷⁷² Whatever we think of the potential utility of *compensatory* damages as a tool of deterrence, there are far stronger claims to the deterrent effect of *punitive* damages. Reflections of this rationale were evident even in the genesis misfeasance case⁷⁷³ of *Ashby v White*, with Holt CJ stating that ‘[i]f publick officers will infringe mens rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offences’.⁷⁷⁴ To similar effect, Lord Hutton in *Kuddus* indicated that

[t]he power to award exemplary damages in such cases ... serves to deter such actions in future as such awards will bring home to officers in command of individual units that discipline must be maintained at all times. In my respectful opinion the view is not fanciful ... that such awards have a deterrent effect ...⁷⁷⁵

Lord Scott of Foscote was less convinced, at least in cases where liability was to be borne not by the individual wrongdoer but by their employer.⁷⁷⁶

These concerns echo some of the ideas raised in Chapter 4 above, with respect to identifying the best means to influence the future behaviour of public officials.⁷⁷⁷ It was noted there that while deterrence is often offered as a justification for punishment, there remain doubts as to whether punitive sanctions may be counter-productive, particularly in cases of abuse of power. Instead, in Braithwaite’s view, it was preferable to apply ‘weak sanctions’ in order to reduce the risk of ‘big sticks rebounding’.⁷⁷⁸ The deterrence

⁷⁷⁰ See eg Carol Harlow, ‘Damages and Human Rights’ [2004] *New Zealand Law Review* 429, 432.

⁷⁷¹ Harlow, ‘A Punitive Role for Tort Law?’, above n 506, 249. For discussion of deterrent justifications for the misfeasance tort, see Chamberlain, above n 767, 66–69.

⁷⁷² *Ibid* 250. See also Schuck, above n 229, 16; David Cohen, ‘Regulating Regulators: The Legal Environment of the State’ (1990) 40 *University of Toronto Law Journal* 213, 258.

⁷⁷³ Mark Aronson, ‘Misfeasance in Public Office: A Very Peculiar Tort’ (2011) 35 *Melbourne University Law Review* 1, 6.

⁷⁷⁴ (1703) 2 *Ld Raym* 938, 956.

⁷⁷⁵ *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 *AC* 122, 149 [79].

⁷⁷⁶ *Ibid* 157 [108] and 161 [129]. See also Bruce Feldthusen, ‘Punitive Damages: Hard Choices and High Stakes’ [1998] *New Zealand Law Review* 741, 761.

⁷⁷⁷ See discussion above commencing at page 124.

⁷⁷⁸ Braithwaite, ‘On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers’, above n 11, 360.

rationale of the hypothetical accountability benchmark reflects that approach. Therefore, whatever we think of the capacity for punitive damages awards to influence future conduct more generally, it is unlikely that we would find that they satisfy the deterrence aspect of the hypothetical benchmark. In fact, the courts have acknowledged the risk posed by the imposition of damages awards in this context, noting that the '[i]nappropriate imposition of liability on public officials may deter officials from exercising powers conferred on them when their exercise would be for the public good'.⁷⁷⁹

2 Who is subject to liability in tort?

In looking at the civil liability of government for the tort of misfeasance in public office, there are two distinct issues that fall to be considered. The first is the application of immunities, which have historically acted to shield the government from civil liability. The second is the reach of the tort of misfeasance in public office in particular.

(a) Immunities and privileges for government defendants: an eroding position

The topic of immunities is never far from view in discussions about the role of the courts in holding the government to account. Historically, Crown immunity has played a significant role in limiting the individuals and bodies who could be held liable in tort. The 'Crown' is an elusive and contestable notion, which, as Twomey has noted, may refer in different contexts to different offices and entities.⁷⁸⁰ In the Australian context, it may, amongst other meanings, refer to the office of the Sovereign, the Sovereign's regalia, the Commonwealth or a state body politic, or the executive branch of government.⁷⁸¹ In discussing the 'shield of the Crown', the notion becomes more elastic still, with statutes expanding Crown immunities and privileges beyond the Crown itself to entities and officials representing the Crown.⁷⁸² Given the imprecision associated even with understanding the individuals and bodies that fall under the Crown

⁷⁷⁹ *Sanders v Snell* (1998) 196 CLR 329, 344.

⁷⁸⁰ Anne Twomey, 'Responsible Government and the Divisibility of the Crown' [2008] *Public Law* 742, 748.

⁷⁸¹ *Ibid.*

⁷⁸² Aronson, Groves and Weeks, above n 629, 1102–04. For further discussion, see Darrell Barnett, 'Statutory Corporations and "the Crown"' (2005) 28 *University of New South Wales Law Journal* 186.

'umbrella', it is little wonder that the notion of Crown immunity is one that has caused considerable angst over the years.

A useful starting point is in the English history of the doctrine. There, the immunity was based primarily on the notion that the King was unable to be sued in his own courts.⁷⁸³ In recognition of obligations of justice, the Petition of Right procedure was developed to facilitate waiver of this immunity,⁷⁸⁴ and, ultimately, the benefit of the immunity came to be that of the executive government rather than the monarch personally. However, the expansion in liability did not facilitate Crown liability in tort.⁷⁸⁵ Accordingly, accountability could be pursued only through tortious claims against Crown servants in their personal capacity. In many cases the underlying goal of the plaintiff's claim was in fact to challenge the legality of government conduct, and it was against this background that the prerogative writs first began to be employed in the manner we now think of as judicial review of executive action. Still, Crown immunity in tort persisted in England until the enactment of the *Crown Proceedings Act 1947* (UK). This provided for the Crown to take on vicarious liability for the tortious acts of its officials, but not direct tortious liability: 'the English common law has no knowledge of the state'.⁷⁸⁶

In Australia, the position is somewhat different. The prevailing view in this country is that, prior to its erosion by statute, Crown immunity was of a procedural rather than substantive character.⁷⁸⁷ In other words, the King was always capable of doing wrong, but could not be sued for it prior to the revocation of Crown immunity. The revocation of this procedural bar was achieved through the enactment of Crown Proceedings Acts in various jurisdictions across Australia over the course of the 19th and 20th centuries. In this respect, s 64 of the *Judiciary Act 1903* (Cth) is typical, providing that:

In any suit to which the Commonwealth or a State is a party, the rights of parties shall

⁷⁸³ Peter Cane, 'Tort Law and Government Liability in the Administrative State: Revolution and Evolution' in Kit Barker et al (eds), *Private Law and Power* (Hart Publishing, 2017) 83, 85.

⁷⁸⁴ *Ibid.*

⁷⁸⁵ See discussion in *Commonwealth v Mewett* (1997) 191 CLR 471, 543. For discussion of a possible explanation for this anomaly, see Cane, 'Tort Law and Government Liability in the Administrative State: Revolution and Evolution', above n 783, 86.

⁷⁸⁶ *Chagos Islanders v Attorney General* [2004] EWCA Civ 997, [20], cited in Aronson, Groves and Weeks, above n 629, 1092.

⁷⁸⁷ *Commonwealth v Mewett* (1997) 191 CLR 471. For discussion, see Aronson, Groves and Weeks, above n 629, 1104 and 1113.

Chapter 6: Aligning the Hypothetical System with the Benchmark

as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.⁷⁸⁸

Accordingly, Crown immunity in tort in Australia can be regarded now as a factor of historical interest rather than a restriction on *who* can be held accountable pursuant to an action in tort.

An area in which government immunities remain particularly relevant is in relation to the liability of judges. Judicial officers enjoy a much narrower scope of liability than that applying to other officials. The scope of the immunity depends on whether the judge is a member of a superior or inferior court, and whether or not they have acted in excess of jurisdiction. The traditional rule was threefold: (a) a superior court judge was immune from liability irrespective of whether they exceeded their jurisdiction, even if acting maliciously,⁷⁸⁹ in bad faith or on the basis of bias⁷⁹⁰; (b) an inferior court judge acting within jurisdiction was immune, except when actuated by malice;⁷⁹¹ and (c) an inferior court judge acting outside jurisdiction enjoyed no immunity.⁷⁹² The United Kingdom made moves towards modifying the traditional rule in *Sirros v Moore*, in which the English Court of Appeal would have crafted a single regime of immunity pursuant to which all judges would enjoy complete immunity for acts within jurisdiction (including malicious acts), and would be liable for acts outside jurisdiction only if they knew they were so acting.⁷⁹³ This would have represented an expansion of the immunity for inferior court judges, and a contraction of the immunity enjoyed by superior court judges (who would no longer be able to act maliciously in excess of their powers).⁷⁹⁴ However, the United Kingdom later stepped back from this approach with a return to

⁷⁸⁸ For equivalent state and territory legislation, see *Crown Proceedings Act 1988* (NSW) s 5(2); *Crown Proceedings Act 1980* (Qld) s 9(2)(a); *Crown Proceedings Act 1958* (Vic) s 23(1)(b); *Crown Proceedings Act 1992* (SA) s 5(1)(b); *Crown Proceedings Act 1993* (Tas) s 5(1)(b); *Crown Proceedings Act* (NT) s 5(1)(b); *Court Procedures Act 2004* (ACT) s 21(1)(b); *Crown Suits Act 1947* (WA) s 5, cited in Aronson, Groves and Weeks, above n 629, 1114.

⁷⁸⁹ Paul Craig, *Administrative Law* (Sweet and Maxwell, 7th ed, 2012) 953.

⁷⁹⁰ Mark Aronson, 'Jurisdictional Error Without the Tears' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 330, 332–33.

⁷⁹¹ Lee and Campbell, above n 600, 216

⁷⁹² Hogg, Monahan and Wright, above n 267, 286–87.

⁷⁹³ [1975] QB 118, 132 and 136 (Denning MR), and 149 (Ormrod LJ).

⁷⁹⁴ Lee and Campbell, above n 600, 217, Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort', above n 773, 11.

Accountability Deficits and Overloads: A Missing Framework

wider liability for inferior court judges in *Re McC (A Minor)*.⁷⁹⁵ The tentative steps taken in the United Kingdom were later adopted in New Zealand, where the current position is that the immunity is available to any inferior or superior judge who acts in good faith and in absence of gross negligence.⁷⁹⁶ In Australia, there remains some doubt as to whether *Sirros v Moore* is good law and, in particular, whether there remains a distinction between the immunities of inferior and superior court judges. Though the case has been cited with apparent approval,⁷⁹⁷ the better view is that the Australian courts are yet to express a concluded view on the issue.⁷⁹⁸ For the most part, these common law questions have been overtaken by a proliferation of legislative provisions conferring immunities of one sort or another on judges around Australia. Without descending into the detail of these, it can be accepted that there will be very limited circumstances in which judges form part of the wider collection of government officials who can be held liable in tort.

(b) *A tort committed by ‘public officers’*

The only ‘truly public tort’⁷⁹⁹ of misfeasance in public office is limited in its application to ‘public officers’. The courts have indicated that ‘[i]t is not sufficient merely to be employed by a public authority for public purposes’.⁸⁰⁰ Instead, the position held by a government official must entail a ‘relevant power’ and ‘one in which [public] duties attach in the discharge of which the public has an interest’.⁸⁰¹ In the most recent Australian misfeasance case, Bathurst CJ noted that ‘the degree of “attachment” required between the office and power was ‘not entirely clear’,⁸⁰² though accepted that the link need not be express.⁸⁰³ For His Honour, the definition of public officer would ‘at least include persons who, by virtue of the particular positions they hold, are entitled to exercise executive powers in the public interest’.⁸⁰⁴ On this basis, Bathurst CJ was

⁷⁹⁵ [1985] AC 528, cited in Hogg, Monahan and Wright, above n 267, 287.

⁷⁹⁶ *Harvey v Derrick* [1995] 1 NZLR 314, cited in Hogg, Monahan and Wright, above n 267, 288.

⁷⁹⁷ See eg *O’Shane v Harbour Radio Pty Ltd* (2013) 85 NSWLR 698, 720.

⁷⁹⁸ Lee and Campbell, above n 600, 218.

⁷⁹⁹ Aronson, ‘Misfeasance in Public Office: A Very Peculiar Tort’, above n 773, 2.

⁸⁰⁰ *Leerdam v Noori* (2009) 255 ALR 553, [16] (Spigelman CJ).

⁸⁰¹ *Cannon v Tahche* (2002) 5 VR 317, 336–37 [49].

⁸⁰² *Obeid v Lockley* [2018] NSWCA 71, [97].

⁸⁰³ *Ibid* [103].

⁸⁰⁴ *Ibid* [114]. See also Beazley P at [206] and Leeming JA at [212].

Chapter 6: Aligning the Hypothetical System with the Benchmark

willing to accept that ‘senior investigators’ of the NSW ICAC were ‘public officers’.⁸⁰⁵ Though the investigators did not hold formal offices, His Honour had no doubt that they were ‘exercising the functions of a public officer, namely, the performance of their role as “senior investigators” which ... they were obliged to carry out in the public interest’.⁸⁰⁶ As it stands, the tort has also been pleaded against officials ranging from government Ministers⁸⁰⁷ to police officers⁸⁰⁸ to planning officers within a local council.⁸⁰⁹ However, the tort does not extend to offices in respect of which there is no duty owed to the public, with the result that the tort does not extend to a prosecutor,⁸¹⁰ or to a solicitor representing a Minister in tribunal proceedings,⁸¹¹ or to public servants more generally. Aronson argues for a wider application of the tort than that envisaged by these cases, suggesting that there is no reason to limit the tort to those who in a strict sense ‘hold’ a ‘public office’, and that it should extend to all public servants.⁸¹² He responds to concerns about the extension of liability to low-level officials by noting that the tort would remain confined by reference to the burdensome fault elements that require intentional and consciously reckless wrongdoing.⁸¹³ Low-level officials, Aronson suggests, are unlikely to consciously consider the legality of their conduct, let alone proceed in the face of suspected illegality.⁸¹⁴ There also remains a question as to whether judicial officers can be held liable for the tort, in part due to the unresolved questions about the scope of judicial immunity in Australia, discussed above. While it appears that at least inferior court judges will be liable for deliberately exceeding jurisdiction,⁸¹⁵ it is less clear whether any judge may be liable for malicious exercise of power within jurisdiction.⁸¹⁶

⁸⁰⁵ Ibid [118].

⁸⁰⁶ Ibid.

⁸⁰⁷ *Cornwall v Rowan* (2004) 90 SASR 269, [257], cited in Jim Davis, ‘Misfeasance in Public Office, Exemplary Damages and Vicarious Liability’ (2010) 64 *AIAL Forum* 59, 60.

⁸⁰⁸ *Farrington v Thomson* [1959] VR 286, cited in Davis, above n 807, 60.

⁸⁰⁹ *MM Constructions (Aust) Pty Ltd v Port Stephens Council [No 6]* (2011) 185 LGERA 276, 337–38 [270]–[273].

⁸¹⁰ *Cannon v Tahche* (2002) 5 VR 317.

⁸¹¹ *Leerdam v Noori* (2009) 255 ALR 553.

⁸¹² Aronson, ‘Misfeasance in Public Office: A Very Peculiar Tort’, above n 773, 49–50.

⁸¹³ Ibid 50.

⁸¹⁴ Ibid.

⁸¹⁵ *Rawlinson v Rice* [1998] 1 NZLR 454; *Cannon v Tahche* (2002) 5 VR 317, 336 [48].

⁸¹⁶ *Cannon v Tahche* (2002) 5 VR 317, 334 [44]; *Fleet v Royal Society for the Prevention of Cruelty to Animals NSW* [2005] NSWSC 926, [37].

Accountability Deficits and Overloads: A Missing Framework

A further interesting question arises as to the extended application of the tort of misfeasance in public office in the context of outsourced powers. As the law presently stands, a private contractor exercising outsourced powers is unlikely to fall within the meaning of ‘public officer’ for the purposes of the tort of misfeasance in public office. In *New South Wales v Roberson*, Basten JA was not required to determine whether a doctor exercising statutory powers would be captured by the tort, noting in obiter that ‘in an age when many statutory functions (including basic custodial services) are “contracted out”, the scope of the tort (as with the scope of judicial review) remains uncertain’.⁸¹⁷ Aronson has forcefully argued that the tort should indeed extend to private contractors.⁸¹⁸ In his view:

The essence of misfeasance is surely that it is a deliberate abuse of public power, and it should be no excuse that a particular defendant is not subject to the internal disciplinary processes of the public service. If anything, that should be seen as an argument for liability, because there are fewer alternative remedies against the contractor.⁸¹⁹

While the extension of judicial review to private contractors is an issue that has received some attention,⁸²⁰ the scope of the ‘public officer’ element of the tort of misfeasance in public office appears to date to have been defined more in institutional, rather than functional, terms.⁸²¹ There has been little shift in approach that would see private contractors held liable for the tort of misfeasance in public office simply on the basis that they are performing public functions.⁸²²

Returning to our hypothetical accountability benchmark, it is immediately apparent that the scope of this tort is not particularly well-aligned with the restoration rationale. The hypothetical benchmark anticipates that the party *who* will be accountable to provide restoration will be the government as an entity, rather than individual wrongdoers. Leading from the discussion in Chapter 4, this choice of benchmark might be justified on the basis that the government will in almost all cases be better placed than an individual to facilitate restoration. Further, there would be a

⁸¹⁷ (2016) 338 ALR 166, 183 [75].

⁸¹⁸ Aronson, ‘Misfeasance in Public Office: A Very Peculiar Tort’, above n 773, 49.

⁸¹⁹ *Ibid.*

⁸²⁰ See text accompanying note 654 above.

⁸²¹ This may be viewed in contrast to the position adopted in the United Kingdom: see eg Aronson, ‘Misfeasance in Public Office: Some Unfinished Business’, above n 745, 436–37.

⁸²² In *Obeid v Lockley* [2018] NSWCA 71, Bathurst CJ noted that the Australian approach ‘is not as broad’ as the English approach in this respect (at [113]).

Chapter 6: Aligning the Hypothetical System with the Benchmark

preference for direct liability over vicarious liability, as the corporate accountability model is better able to accommodate cases of systemic wrongdoing, or where it is difficult to identify the particular chain of events leading to the loss complained of.

There are serious doubts as to whether the tort of misfeasance in public office is capable of accommodating notions of corporate liability. There are cases in which an entity (such as a local council) has been considered capable of committing the tort. So, for instance, in *Dunlop v Woollahra Municipal Council*, Lord Diplock approved of the approach taken by the New South Wales Supreme Court in accepting that the Council was a public officer for the purposes of the tort.⁸²³ Similarly, in *Nyoni v Shire of Kellerberrin*, North and Rares JJ found that the malicious conduct of the CEO of the Shire of Kellerberrin ‘should be imputed’ to his employer.⁸²⁴ For their Honours, the CEO ‘was the mind of the Shire ... and, because he was “the hands and brains” of the Shire, the Shire became directly (and not vicariously) liable for any misfeasance in public office’.⁸²⁵ On a broader scale, Gray J in *Trevorrow v State of South Australia [No 5]* found that the State and the Aborigines Protection Board was directly liable for misfeasance in public office for harm occasioned by an Aboriginal child as a result of his illegal removal from his family.⁸²⁶ Critical to that finding was the fact that removal was effected pursuant to government policy, that various Crown Ministers and employees held positions on the Board, that the Board acted ‘as an emanation and agent of the State’, and that the State in effect ‘authorised the conduct’.⁸²⁷ On appeal, the Court altered the character of the State’s liability to that of vicarious, as opposed to direct (see discussion below).⁸²⁸ However, the Court was prepared to accept that the Board met the description of a public officer, notwithstanding its corporate nature.⁸²⁹

In contrast with these cases, there are statements to the effect that corporate entities cannot engage in misfeasance in public office. In *Emanuele v Hedley*, one of the

⁸²³ [1982] AC 158, 172.

⁸²⁴ (2017) 248 FCR 311, 329 [85]. Special leave refused: *Shire of Kellerberrin v Nyoni* [2018] HCATrans 27.

⁸²⁵ *Nyoni v Shire of Kellerberrin* (2017) 248 FCR 311 329 [85]. See also *Hart-Roach v Public Trustee* WASC 34.

⁸²⁶ (2007) 98 SASR 136, 230 [978]–[980].

⁸²⁷ *Ibid* 230 [980].

⁸²⁸ *South Australia v Lampard-Trevorrow* (2010) 106 SASR 331, 390 [275].

⁸²⁹ *Ibid* 388 [265]–[266].

Accountability Deficits and Overloads: A Missing Framework

claims made was that the Commonwealth was directly liable for misfeasance.⁸³⁰ The Court indicated that

it is a legal nonsense to suggest there can be conduct of the Commonwealth itself that constitutes a misfeasance in public office. The Commonwealth of Australia is a legal entity created by the *Commonwealth of Australia Constitution Act 1900* (Imp). It is a juristic person but, of course, is incapable of acting except through agents. It is incapable itself of committing misfeasance in public office; it does not hold public office.⁸³¹

Similarly, in *Bailey v Director General, Department of Natural Resources*, Fullerton J was critical of the nomination of the Water Administration Ministerial Corporation as a defendant in a misfeasance in public office claim, stating that '[a] ministerial corporation cannot be a public officer on any view'.⁸³² Aronson queries this approach.⁸³³ He notes that it is at odds with the approach adopted in the United Kingdom, pursuant to which various corporate-style entities have been held liable for the tort.⁸³⁴ While institutions cannot themselves maintain a mental state that would satisfy the intentional requirements of the tort, Aronson suggests that there is no difficulty in imputing an institution with the mental states of its agents for this purpose,⁸³⁵ (which was the approach taken in the cases cited in the foregoing paragraph). This might lead to the result that the bad faith actions of an individual member of a corporation are taken to be the bad faith actions of the corporation itself.

However, it is important to bear in mind that, even on this extended model of corporate accountability, the corporation's intention cannot become more than the sum of its parts. Aronson puts this in terms that '[t]he good faith mistakes and incompetence of a range of individuals within an organisation cannot be amalgamated to create the basis for inferring or imputing a "composite" bad faith to a fictional and "composite" officer'.⁸³⁶ An example of such an approach can be seen in *Chapel Road Pty Ltd v*

⁸³⁰ The Court wondered why the claims had been framed as misfeasance; the nature of the allegations fell more squarely within the torts of abuse of process or malicious prosecution: (1998) 179 FCR 290, 300 [36].

⁸³¹ *Ibid.*

⁸³² [2014] NSWSC 1012, [531], cited in Aronson, 'Misfeasance in Public Office: Some Unfinished Business', above n 745, 437.

⁸³³ Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort', above n 773, 44; Aronson, 'Misfeasance in Public Office: Some Unfinished Business', above n 745, 437.

⁸³⁴ Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort', above n 773, 44; Aronson, 'Misfeasance in Public Office: Some Unfinished Business', above n 745, 438.

⁸³⁵ Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort', above n 773, 44; Aronson, 'Misfeasance in Public Office: Some Unfinished Business', above n 745, 437.

⁸³⁶ Aronson, 'Misfeasance in Public Office: Some Unfinished Business', above n 745, 438.

Chapter 6: Aligning the Hypothetical System with the Benchmark

Australian Securities Investments Commission [No 10], in which Schmidt J indicated that bad faith on the part of the Australian Securities and Investments Commission ‘cannot be established simply by aggregating the acts of various public officers, or establishing a course of conduct, which it is claimed was improper or tainted in some way’.⁸³⁷

The foregoing discussion leaves some doubt as to whether government entities (whether the state itself or statutory bodies) will in all cases be capable of characterisation as a ‘public officer’. If the corporate accountability model is not adopted, the next best option, for the purposes of the restoration rationale, is to adopt a hierarchical accountability model. This would require the government to foot the bill for the liability of its servants, thereby increasing the likelihood that a victim will obtain a remedy. However, there also remain doubts as to the reach of the government’s vicarious liability for the purposes of the misfeasance tort. In *Mengel*, the High Court indicated that the usual position is that ‘although the tort is the tort of a public officer, he or she is liable personally and, unless there is de facto authority, there will ordinarily only be personal liability’.⁸³⁸ This passage points to the availability of vicarious liability where there is de facto authority.⁸³⁹ While there are Australian authorities that have cautioned against reading the passage in *Mengel* as an unqualified denial of the possibility of vicarious liability outside cases of de facto authority,⁸⁴⁰ doubt remains as to how far this might extend. The difficulty stems from the intentional nature of the tort, as vicarious liability is framed by reference to acts of employees committed in the ‘course or scope of employment’.⁸⁴¹ As Vines puts it, ‘[t]he wrong in misfeasance in public office has been described as something which is an ‘abuse of office’, and surely an abuse of an office could not be regarded as within the course of employment for that office’.⁸⁴²

⁸³⁷ (2014) 307 ALR 428, 444 [77].

⁸³⁸ *Northern Territory v Mengel* (1995) 185 CLR 307, 347.

⁸³⁹ In *South Australia v Lampard-Trevorrow* (2010) 106 SASR 331, the Court found that the State was vicariously liable on the basis that the Secretary acted with the de facto authority of an agent of the Crown, and that the APB had acted with the de facto authority of the relevant Minister: 390 [273].

⁸⁴⁰ See eg *Okwume v Commonwealth* [2016] FCA 1252, [207]–[212]; *Neilson v City of Swan* (2006) 147 LGERA 136, 170 [154].

⁸⁴¹ *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, 148 [40].

⁸⁴² Prue Vines, ‘Misfeasance in Public Office: Old Tort, New Tricks’ in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Thomson Reuters, 2011) 221, 228, citations omitted.

Accountability Deficits and Overloads: A Missing Framework

One of the cases cited in *Mengel* was the English case of *Racz v Home Office*.⁸⁴³ In refusing to strike out a pleading of vicarious liability for misfeasance in public office, Lord Jauncey accepted the plaintiff's submission that the relevant question was whether

the prison officers were engaged in a misguided and unauthorised method of performing their authorised duties or were engaged in what was tantamount to an unlawful frolic of their own.⁸⁴⁴

In *South Australia v Lampard-Trevorrow*, the South Australian Supreme Court applied this reasoning, finding the State vicariously liable for the misfeasance of its officers on the basis that the officers 'acted in apparent performance of their [statutory] duties' and in the belief that their actions were 'for the benefit of the public and the State' rather than for personal gain.⁸⁴⁵

It is also useful to bear in mind that misfeasance in public office is not the only cause of action where vicarious liability and intentional wrongdoing might collide. In *Prince Alfred College Inc v ADC* the High Court considered the College's vicarious liability in circumstances where its employee had sexually abused a student.⁸⁴⁶ The High Court identified a number of factors that might assist in deciding whether such conduct fell within the scope of employment, including: (a) 'any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim';⁸⁴⁷ (b) 'whether the apparent performance of such a role may be said to give the "occasion" for the wrongful act ... [including taking] into account ... authority, power, trust, control and the ability to achieve intimacy with the victim';⁸⁴⁸ and (c) whether 'the employee used or took advantage of the position in which the employment placed the employee vis-à-vis the victim'.⁸⁴⁹ These factors are particularly relevant in the context of the misfeasance tort, which can only be made out in respect of abuse of *public* powers, reflected in the requirement that the officer's act be done 'in the purported discharge of his or her public duties'.⁸⁵⁰ As Aronson puts it, the types of

⁸⁴³ [1994] 2 AC 45.

⁸⁴⁴ *Ibid* 53. See also *Three Rivers District Council v Bank of England [No 3]* [2003] 2 AC 1, 191.

⁸⁴⁵ (2010) 106 SASR 331, 390 [275].

⁸⁴⁶ (2016) 258 CLR 134.

⁸⁴⁷ *Ibid* 159–60 [81].

⁸⁴⁸ *Ibid* 160 [81].

⁸⁴⁹ *Ibid* 159 [80].

⁸⁵⁰ *Northern Territory v Mengel* (1995) 185 CLR 307, 370 (Deane J).

wrongdoing captured by the misfeasance tort are of a kind that in most cases ‘can only be committed “on the job”’.⁸⁵¹

To summarise, in looking at *who* can be held accountable pursuant to the tort of misfeasance in public office, only a subset of government officials will fall within the scope of the ‘public office’ requirement. Further, as distinct from the restoration rationale, the Australian courts have not convincingly extended the reach of the tort into the realm of direct corporate accountability, though vicarious liability remains possible. All of this tells us that there is a real question as to whether this cause of action is well-adapted to serve the restoration rationale. Instead, the focus on sheeting home individual accountability to certain types of government officials is far more closely aligned with the desert rationale.

3 Who can sue for misfeasance in public office?

The hypothetical benchmark envisages that a person who is harmed as a result of illegal government activity ought to be able to seek restoration, while the desert aspect of the benchmark would limit access to a prescribed prosecutor (with residual rights for the public). In looking at ‘standing’ to bring an action for misfeasance in public office, we see that the tort is most squarely aligned with the restoration rationale. In tort law, issues of standing are wrapped up in the nature of the cause of action, rather than being determined through standalone tests of eligibility to make a claim: ‘In private law there is, in general, no separation of standing from the elements in a cause of action’.⁸⁵² In order to determine *to whom* a government defendant is held accountable in tort, we must look at the content of the relevant cause of action. For the purposes of the misfeasance tort, two elements of the cause of action operate as delimiting devices to mark out the range of individuals who are entitled to commence proceedings.

The first delimiting device is the mental element(s) of the misfeasance tort. Each of the two types of misfeasance claim (that is, targeted malice and reckless exercise of powers) place the defendant in the driving seat in marking out the category of individuals to whom they might be liable. In cases of targeted malice, a direct line is

⁸⁵¹ Aronson, ‘Misfeasance in Public Office: A Very Peculiar Tort’, above n 773, 45.

⁸⁵² *Bateman’s Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 264 [43].

Accountability Deficits and Overloads: A Missing Framework

created between the plaintiff and defendant. The defendant in such a case has consciously considered the interests of the plaintiff and has acted either with the intention of causing harm, or not caring that this would be the result of their actions. The second limb of the tort, reckless exercise of powers, also places the plaintiff in the contemplation of the defendant. This is because the tort cannot be made out merely in cases of 'foreseeable' harm, but instead requires the defendant to have 'foreseen' the harm likely to be occasioned.⁸⁵³ The defendant therefore must have adverted to the plaintiff's interests at some level and decided to proceed irrespective of the harm that was likely to result.⁸⁵⁴ We can say, therefore, that for both limbs of the tort, the individuals *to whom* a government defendant may be accountable are marked out by some degree of subjective contemplation by the defendant (whether conscious or recklessly indifferent) and, in this sense, the defendant plays a large role in choosing *to whom* they are liable.

A second delimiting device employed by the misfeasance tort is the requirement of loss or damage. For the purposes of the misfeasance tort, the recognised forms of material loss and damage are relatively broad, extending beyond personal injury and property damage, to pure economic loss, psychological harm and loss of reputation.⁸⁵⁵ However, the tort has its limits. In *Watkins v Secretary of State for the Home Department*,⁸⁵⁶ the House of Lords rejected the plaintiff's claim of damages for misfeasance in circumstances where prison officials opened his legal correspondence in breach of prison rules. Though the plaintiff's rights had been interfered with, the House of Lords maintained that proof of material damage was essential to mount a claim; misfeasance is not a tort actionable *per se*.⁸⁵⁷ On this basis, the tort would not extend

⁸⁵³ We might adopt a different approach here if the requirement were reduced to the objective test of 'foreseeable' harm rather than the subjective test of 'foreseen' harm: Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort', above n 773, 21; Alison Doecke, 'Misfeasance in Public Office: Foreseen or Foreseeable Harm' (2014) 22 *Torts Law Journal* 20. The New South Wales Court of Appeal has recently indicated that the mental element is not to be watered down in that manner: *Obeid v Lockley* [2018] NSWCA 71, [153]–[172] (Bathurst CJ), [242] (Leeming JA).

⁸⁵⁴ This requirement of subjectively *foreseen* as opposed to *foreseeable* loss might go some way towards ameliorating Chamberlain's concerns about the erosion of the historically strict 'standing' rules for the purpose of the misfeasance tort: Erika Chamberlain, 'The Need for a "Standing" Rule in Misfeasance in a Public Office' (2007) 7 *Oxford University Commonwealth Law Journal* 215, 225.

⁸⁵⁵ See cases cited at notes 226 to 229 in Rosalie Balkin and Jim Davis, *Law of Torts* (LexisNexis Butterworths, 5th ed, 2013) 726.

⁸⁵⁶ [2006] 2 AC 395.

⁸⁵⁷ *Ibid* 408–09 [26] (Lord Bingham).

to cover ‘distress, injured feelings, indignation or annoyance’.⁸⁵⁸ Recently in *Nyoni v Shire of Kellerberrin*, the Full Federal Court was willing to infer material damage where one government agent represented to another that Mr Nyoni was unfit to continue to conduct his pharmacy business: ‘the making of such an allegation ... should be presumed (as it would in cases of slander) to cause sufficient material or actual damage to support the action of misfeasance in public office’.⁸⁵⁹ While it remains necessary, therefore, for a plaintiff to point to a recognised form of harm, the court may be more willing to infer harm in cases involving malicious conduct aimed at affecting the plaintiff’s reputation (or, at least, business reputation). Ultimately, however, the category of individuals *to whom* a government official might be liable pursuant to this tort is confined to those who suffer a recognised category of material loss or damage by reason of the defendant’s conduct. Returning to the accountability benchmark, we see therefore that this tort is most squarely aligned with the restoration rationale when looking at *to whom* the government is accountable.

4 For what does the misfeasance tort hold an agent accountable?

If the tort of misfeasance in public office is to be assessed against the restoration and desert aspects of the hypothetical accountability benchmark, it would respectively need to be engaged: (1) when *individuals have suffered harm due to unlawful government activity* and, (2) when an agent has engaged in *deliberate wrongdoing*. If restorative remedies and punitive sanctions are not available in these circumstances, we might identify a potential area of accountability deficit. If restorative remedies and punitive sanctions are made available outside these circumstances, we might identify a potential area of accountability overload. We will see from the following discussion that the misfeasance tort falls short of the restoration aspect of this benchmark because it imposes a higher threshold than merely unlawful activity giving rise to loss. Instead, the mental elements comprising the tort sit more conformably with the desert aspect of the benchmark. However, the tort also fails to satisfy the desert aspect of the benchmark, given that proof of harm is a necessary component of the tort. Again, then, we see that

⁸⁵⁸ Ibid 403 [7] (Lord Bingham).

⁸⁵⁹ (2017) 248 FCR 311, 332–33 [101] (North and Rares JJ).

because the misfeasance tort attempts to perform two aspects of the benchmark, this by necessity prevents it performing either one in accordance with its terms.

The tort of misfeasance in public office provides a remedy in damages for:

(i) an invalid or unauthorised act; (ii) done maliciously; (iii) by a public officer; (iv) in the purported discharge of his or her public duties; (v) which causes loss or harm to the plaintiff.⁸⁶⁰

The third of these elements (namely, the definition of ‘public officer’) has been discussed above.⁸⁶¹ It is the remaining elements of the tort that are most relevant for considering *for what* an official is held accountable. Returning to the accountability benchmark, we see that elements one and five (namely, an invalid or unauthorised act which causes loss or harm to the plaintiff) are well-aligned with the restoration aspect of the benchmark. We also see that element two (namely, ‘done maliciously’) appears conformable with the desert aspect of the benchmark. However, when taken together, we see that these elements prevent the tort from being measured as effective against either the restoration or desert aspects of the hypothetical benchmark.

(a) *Restoration: unlawful action causing harm*

The restoration rationale envisages, for the purposes of this hypothetical, that restoration will be available to repair *harm incurred by reason of unlawful government activity*. This broadly framed benchmark remains somewhat question-begging, and requires a little further unpacking before looking specifically at the misfeasance tort. The more straightforward matter to consider is the meaning of ‘unlawful government activity’. In order to assess the misfeasance tort against this benchmark, it is necessary to ascertain the meaning of the word ‘unlawful’; does it mean power exercised in excess of legal limits (including, for instance, breach of procedural fairness obligations), or is it limited to some more definite form of illegality (for instance, conduct amounting to a criminal offence)? Taking the benchmark at its broadest, we would want the meaning of ‘unlawful’ to expand beyond distinct instances of illegality and to capture any conduct in which the government was not permitted to engage. The tort of misfeasance in public office sits well with this extended idea of ‘unlawful’ conduct, attaching to the ‘invalid or

⁸⁶⁰ *Northern Territory v Mengel* (1995) 185 CLR 307, 370 (Deane J).

⁸⁶¹ See discussion from page 220 above.

Chapter 6: Aligning the Hypothetical System with the Benchmark

unauthorised' exercise of power. The tort captures illegal conduct as understood in the traditional sense (for example fabrication of evidence, forgery, and cover-ups by police officers).⁸⁶² However, the tort is also capable of capturing more technical instances of illegality as understood in judicial review proceedings. As noted by Brennan J in *Mengel*:

[T]he purported exercise of power must be invalid, either because there is no power to be exercised or because a purported exercise of the power has miscarried by reason of some matter which warrants judicial review and a setting aside of the administrative action.⁸⁶³

We can contrast this position with the now-defunct⁸⁶⁴ 'Beaudesert' tort, which purported to make a remedy in damages available for the 'unlawful, intentional and positive acts of another'.⁸⁶⁵ In contrast to the misfeasance tort, 'unlawful' in the context of the *Beaudesert* tort was interpreted to mean 'an act forbidden by law', as opposed to 'an act that is ultra vires and void'.⁸⁶⁶ If the accountability benchmark demanded restoration of harm caused by conduct in excess of power, this first element of the misfeasance tort would conform with that expectation. It is further important to bear in mind that 'unlawfulness' in this context is limited to the abuse of *public* power, touched on in the discussion of 'public office' above.⁸⁶⁷ For this reason, an official who happens to be in uniform while committing a crime entirely unrelated to their public functions will not commit the tort of misfeasance.⁸⁶⁸

The final element of the misfeasance tort as framed by Deane J in *Mengel* is the requirement that the impugned act have 'cause[d] loss or harm to the plaintiff'.⁸⁶⁹ The scope of 'harm' in this context is outlined above.⁸⁷⁰ Relevant for present purposes is the meaning of 'cause', which requires the plaintiff to demonstrate that there exists the requisite link between the conduct complained of and the harm occasioned. The hypothetical benchmark required restoration of harm 'incurred by reason of' unlawful government activity. Again, this broadly worded phrase highlights the difficulty of

⁸⁶² See cases cited in Aronson, Groves and Weeks, above n 629, 1160.

⁸⁶³ *Northern Territory v Mengel* (1995) 185 CLR 307, 356.

⁸⁶⁴ *Ibid* 344-45.

⁸⁶⁵ *Beaudesert Shire Council v Smith* (1966) 120 CLR 145, 156.

⁸⁶⁶ *Northern Territory v Mengel* (1995) 185 CLR 307, 336.

⁸⁶⁷ See above page 220. See also Aronson, 'Misfeasance in Public Office: Some Unfinished Business', above n 745, 440-41.

⁸⁶⁸ *Ibid* 441.

⁸⁶⁹ *Ibid* 370 (Deane J).

⁸⁷⁰ See discussion commencing at page 228.

Accountability Deficits and Overloads: A Missing Framework

specifying the types of loss and harm that our benchmark would be concerned to address. Torts employ concepts of causation to mark out the boundaries of outcomes that are attributable to impugned conduct, most commonly by asking whether the harm would have been occasioned 'but for' that conduct (factual causation),⁸⁷¹ and whether the outcome ought to be treated as a cause in law (attributive causation).⁸⁷² In many cases, determining whether an official's excess of power has caused the plaintiff's loss may be straightforward. This may be the case, for instance, where the government official had no jurisdiction to act in the first place (ie simple ultra vires). However, the situation becomes more complicated where the nature of the error is such that the same act could potentially have been performed within power (for example, where the same decision could be made having afforded a fair hearing or ignoring the irrelevant consideration). The same problem is evident in respect of powers that are discretionary in nature. As noted in *Lock v Australian Securities and Investments Commission*:

The causation question requires consideration of what the relevant public officer would have done if there had been no such deliberate omission. In the case of an unlawful decision not to exercise a discretionary power, there may have been a range of alternative lawful decisions, one of which might include a lawful decision not to exercise the power.⁸⁷³

Though the matter did not need to be determined in that case, the implication is that causation may be difficult to establish in cases where there is more than one legal way in which power might be exercised. This particular causation issue is one that must be confronted by advocates of a public law remedy in damages (ie damages for illegality per se).⁸⁷⁴ The crux of the difficulty is that in determining whether harm would have occurred 'but for' the illegality complained of, the court is being asked implicitly to determine how the discretionary power *should* have been exercised, potentially moving the court into forbidden merits-review territory. As Aronson notes, the cases have not yet gone far enough to tell us how these difficult causation questions are to be resolved.⁸⁷⁵

⁸⁷¹ Barker et al, above n 314, 533.

⁸⁷² Ibid 544.

⁸⁷³ (2016) 248 FCR 547, 579 [138] (Gleeson J). See further Aronson, Groves and Weeks, above n 629, 1158 [19.750].

⁸⁷⁴ See eg Craig, 'Compensation in Public Law', above n 319, 438–39; Panetta, above n 145, 171–72; C S Phegan, 'Damages for Improper Exercise of Statutory Powers' (1980) 9 *Sydney Law Review* 93, 115–17.

⁸⁷⁵ Aronson, 'Misfeasance in Public Office: Some Unfinished Business', above n 745, 444.

Chapter 6: Aligning the Hypothetical System with the Benchmark

This analysis shows us that the misfeasance tort comprises a number of legal tests that are capable of giving shape to the restoration aspect of the hypothetical accountability benchmark. It gives meaning to the idea of ‘unlawful’ government activity, it specifies the types of ‘harm’ that are remediable, and provides a mechanism to determine which harms are incurred ‘by reason of’ that activity, at least in most cases. However, the tort contains a further element that prevents us from reaching the conclusion that it is consistent with the restoration aspect of the hypothetical accountability benchmark. The benchmark envisages that an obligation of repair will be enlivened in cases of harm caused by unlawful conduct per se. The misfeasance tort fails to satisfy this benchmark, as it is limited in its application to unlawful conduct that is attended by a particular mental element, as discussed in the following section. In the words of Brennan J in *Mengel*, ‘something further is required to render wrongful an act done in purported exercise of power when the act is ultra vires’.⁸⁷⁶ It is this additional requirement that prevents the misfeasance tort from satisfying the restoration aspect of the hypothetical benchmark.

(b) Desert: deliberate wrongdoing

The desert aspect of the accountability benchmark anticipates that punitive sanctions will be made available in cases of *deliberate wrongdoing*. As noted above, one of the elements of the misfeasance tort is that the official’s act be ‘done maliciously’.⁸⁷⁷ This mental element of the tort has been described as comprising two alternative limbs.⁸⁷⁸ The first is that of ‘targeted malice’, which captures ‘actual intention to cause injury’,⁸⁷⁹ or conduct either ‘specifically intended to injure a person’⁸⁸⁰ or engaged in ‘with the predominant intent of damaging a person’.⁸⁸¹ The second limb, which addresses a knowing or recklessly unlawful act that causes damage, captures both deliberate wrongdoing and recklessness in the sense of ‘deliberate blindness’.⁸⁸² In other words, the tort requires a degree of ‘conscious maladministration’,⁸⁸³ either in the form of

⁸⁷⁶ *Northern Territory v Mengel* (1995) 185 CLR 307, 356.

⁸⁷⁷ *Ibid* 370 (Deane J).

⁸⁷⁸ *Three Rivers District Council v Bank of England [No 3]* [2003] 2 AC 1, 137 (Auld LJ).

⁸⁷⁹ *Northern Territory v Mengel* (1995) 185 CLR 307, 370 (Deane J).

⁸⁸⁰ *Three Rivers District Council v Bank of England [No 3]* [2003] 2 AC 1, 191 (Lord Steyn).

⁸⁸¹ *Ibid*.

⁸⁸² *Northern Territory v Mengel* (1995) 185 CLR 307, 371 (Deane J).

⁸⁸³ *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 375 [124] (Gummow J). See also *Federal Commissioner*

Accountability Deficits and Overloads: A Missing Framework

intention to cause harm (or recklessness as to harm arising), or intention to exceed powers (or recklessness as to legality). It is further worth making the point that liability for ‘malicious’ conduct cannot be avoided on the basis that the act was otherwise within power. While it has been suggested that ‘spite or an intention to harm are not sufficient [to make out the tort] if the action is in fact lawful’,⁸⁸⁴ the better view is that spiteful or malicious conduct is unlikely to ever be considered ‘otherwise lawful’; such conduct would likely contravene the judicial review grounds of improper purpose and bad faith.⁸⁸⁵ This leads to the conclusion that a plaintiff does not need to identify a separate ground of illegality (such as a failure to accord procedural fairness) in cases of targeted malice, but can rely on that conduct as inferring excess of power. We can conclude, therefore, that the misfeasance tort is well-aligned with the notion of deliberate wrongdoing comprising the desert aspect of the hypothetical benchmark.

Beyond this mental element, however, the desert rationale begins to fall away. As already discussed, the tort may only be made out in circumstances where a plaintiff has suffered recognised loss. In *Watkins v Secretary of State for the Home Department*, Lord Bingham confirmed that the punitive scope of the tort ought not to be expanded beyond this reach, noting

the primary role of the law of tort is to provide monetary compensation for those who have suffered material damage rather than to vindicate the rights of those who have not. If public officers behave with outrageous disregard for their legal duties, but without causing material damage, there are other and more appropriate ways of bringing them to book.⁸⁸⁶

His Lordship therefore concluded ‘I would not for my part develop the law of tort to make it an instrument of punishment in cases where there is no material damage for which to compensate’.⁸⁸⁷ This requirement of damage takes the tort beyond a focus only on the deliberately wrongful conduct of the defendant, and refocuses the inquiry on the

of Taxation v Futuris Corporation Ltd (2008) 237 CLR 146, 153–54 [11]–[15].

⁸⁸⁴ Aronson, ‘Misfeasance in Public Office: Some Unfinished Business’, above n 745, 441. Aronson gives the example of a parking inspector taking enjoyment in issuing a parking fine to their enemy.

⁸⁸⁵ *Nyoni v Shire of Kellerberrin* (2017) 248 FCR 311, 330 [88]. The only circumstances in which this would not be the case would be in relation to a power specifically conferred to enable an official to act maliciously, and it is inconceivable that the legislature would enact such a law.

⁸⁸⁶ [2006] 2 AC 395, 403 [9].

⁸⁸⁷ *Ibid* 409–10 [26].

Chapter 6: Aligning the Hypothetical System with the Benchmark

effect of that conduct on the plaintiff. In other words, as expressed in Chapter 4, the tort is concerned not just with fault, but with outcomes.

To increase the hurdle further still, it is not only necessary to show that the deliberate wrongdoing caused loss, but also that the defendant was aware of (or reckless as to) the risk of harm to the plaintiff.⁸⁸⁸ In most cases of targeted malice, this additional requirement is of no real import as malicious conduct necessarily implies awareness of the consequences of that conduct for the plaintiff. However, in cases where malicious or deliberately unlawful conduct impacts a third party, the requirement to show that the defendant was aware of (or reckless as to) that risk imposes an additional burden on the plaintiff which is unanticipated by the hypothetical benchmark. In *Obeid v Lockley*, Bathurst CJ was of the opinion that this additional fault element in relation to harm reflects the balance between a number of accountability rationales as framed in this thesis, noting:

An approach which requires a plaintiff to establish that they were likely to suffer harm and that the defendant was either aware of or recklessly indifferent to that risk strikes a correct balance between, on the one hand, the inappropriate imposition of liability on public officers which may deter them from exercising powers conferred on them in the public interest, and on the other hand, the protection of persons affected by the misuse of public power.⁸⁸⁹

(c) Summary

Taking these matters together, we can say that the misfeasance tort represents somewhat of a compromise between the various accountability rationales, attempting to balance competing goals. As put by the High Court in *Sanders v Snell*:

Misfeasance in public office is concerned with misuse of public power. Inappropriate imposition of liability on public officials may deter officials from exercising powers conferred on them when their exercise would be for the public good. But too narrow a definition of the ambit of liability may leave persons affected by an abuse of power

⁸⁸⁸ There has been some doubt expressed as to whether the High Court in *Mengel* would have allowed the tort to operate in cases where loss was reasonably foreseeable, as opposed to cases where the defendant was reckless as to its being incurred (see eg *South Australia v Lampard-Trevorrow* (2010) 106 SASR 331, 387–88 [263], Aronson, Groves and Weeks, above n 629, 1151–52 and Doecke, above n 853). In *Obeid v Lockley* [2018] NSWCA 71, Bathurst CJ was firmly of the view that this was a misreading of *Mengel*, and that to make out the tort it was necessary for the plaintiff to establish that the defendant was aware that their conduct would cause harm, or was recklessly indifferent to such a risk (at [153]–[172]). See also Leeming JA at [242]. For discussion of the difference between these forms of mental state, see Mads Andenas and Duncan Fairgrieve, 'Misfeasance in Public Office, Governmental Liability, and European Influences' (2002) 51 *International and Comparative Law Quarterly* 757, 762–64.

⁸⁸⁹ [2018] NSWCA 71, [157].

uncompensated. The tort of misfeasance in public office must seek to balance these competing considerations. Not surprisingly the intention with which the public official acts has a prominent place in striking that balance.⁸⁹⁰

In adopting the defendant's intention as the defining factor in striking this balance, we see that the tort sits uncomfortably somewhere between the two poles of restoration and desert within our hypothetical accountability benchmark. It falls short of the restoration pole because of the additional mental elements that take the tort beyond liability for unlawful conduct *per se*, and it falls short of the desert pole because of the requirement to prove loss and damage. Accordingly, we must accept that, taken alone, the misfeasance tort cannot satisfy the lofty accountability expectations set by the hypothetical benchmark.

5 Misfeasance proceedings: a prosecutor or agent-friendly regime?

Because the tort of misfeasance in public office provides remedies that are both restoration and desert-oriented, there is a tension between the procedures anticipated by the hypothetical accountability benchmark; the restoration rationale anticipates the employment of *prosecutor-friendly* procedures for the application of restorative remedies, while the desert rationale anticipates the employment of *agent-friendly* procedures for the application of punitive sanctions. We see evidence of some of these tensions in the aspects of procedure considered in this chapter: discretion and the burden of proof.

(a) Discretion

Discretion plays a much less important role in the context of tort proceedings than in judicial review proceedings. Whereas the writs available pursuant to s 75(v) are discretionary in nature, damages in tort proceedings are available as of right:

In an action of tort a plaintiff is entitled to have his damages assessed according to law, and to have judgment for the damages assessed *ex debito justitiae*.⁸⁹¹

This approach is well-aligned with the prosecutor-friendly procedures expected for the purposes of the restoration rationale, as a plaintiff will be *prima facie* entitled to a

⁸⁹⁰ (1998) 196 CLR 329, 344 [37].

⁸⁹¹ *Blundell v Musgrave* (1956) 96 CLR 73, 94 (Fullagar J).

Chapter 6: Aligning the Hypothetical System with the Benchmark

remedy having made out their claim. However, not all categories of damages meet this description. In *Gray v Motor Accident Commission*, the High Court approved of the primary judge's characterisation of punitive damages as 'discretionary', being available only where compensatory damages were insufficient to achieve the punitive purpose (ie condemnation and deterrence).⁸⁹² Justice Kirby observed that while '[d]amages are ordinarily the plaintiff's right, being the remedy devised by the common law to effect its purposes',⁸⁹³ punitive damages could be understood as an exception to this rule.⁸⁹⁴ Here, then, we see that the remedies available for the tort of misfeasance in public office move away from the prosecutor-friendly approach. Justice Kirby acknowledged this shift, noting that the treatment of punitive damages awards as discretionary

is inherent in the interaction of criminal punishment and civil damages ... If one of the reasons for awarding exemplary damages is the punishment of the wrongdoer in an emphatic and public way, it is obviously relevant to take into account the fact that this may already have been done or is likely to follow.⁸⁹⁵

This highlights the tension between the rationales of restoration and desert, as the nature of the remedy attaching to the desert rationale (punitive damages) is subject to more defendant-friendly procedures than the remedy attaching to the restoration rationale (compensatory damages).

(b) *Burden of proof*

It was noted in connection with judicial review proceedings that the ordinary burden of proof outside the criminal law requires a plaintiff to make out their case 'on the balance of probabilities'. This is undoubtedly a more prosecutor-friendly approach than that evident in the criminal context, which requires proof 'beyond reasonable doubt'. Short of building in evidentiary presumptions that place the onus on the defendant to disprove facts going to liability, we might reach the view that the burden of proof for tort of misfeasance in public office broadly aligns with the hypothetical benchmark. While the tort is a civil claim enjoying this standard civil burden of proof, the nature of the allegations comprising its mental elements move the tort into more difficult terrain. Unless an official has made an admission revealing their motives in a given situation,

⁸⁹² (1998) 196 CLR 1, 14 [40] (Gleeson CJ, McHugh, Gummow and Hayne JJ), 33 [96] (Kirby J).

⁸⁹³ *Ibid.*

⁸⁹⁴ *Ibid.*

⁸⁹⁵ *Ibid* 33-34 [96]-[97].

proof of state of mind is notoriously difficult,⁸⁹⁶ often becoming a matter of inference.⁸⁹⁷ The courts have reiterated that requisite state of mind to establish the misfeasance tort 'is a very serious allegation ... [that] cannot be made in a broad brush way'.⁸⁹⁸ Though the standard of proof technically remains constant (being on the balance of probabilities), the *Briginshaw* principle⁸⁹⁹ governs proof of malicious intent.⁹⁰⁰ The result is that the court will not lightly find that a public officer has acted with malice, and will prefer to adopt an inference that is favourable to the public officer against whom a serious accusation of wrongdoing has been made where more than one inference is open.⁹⁰¹ Further, costs implications may arise following a baseless allegation of bad faith or malice, particularly in the context of the exercise of public powers.⁹⁰² Here we see some departure from the benchmark, as predominantly restoration-oriented causes of action adopt procedures more akin to a desert-oriented mechanism.

6 The misfeasance tort: caught between accountability rationales

The foregoing analysis has demonstrated that the tort of misfeasance in public office can be understood as playing a role in contributing to each of the restoration and desert rationales for accountability,⁹⁰³ due to the availability of both compensatory and punitive damages awards (*with what consequences*). However, because many of the remaining aspects of the benchmark (*who, to whom, for what, and via what procedures?*) are in tension between the restoration and desert rationales, we see that the tort maintains an uncomfortable position between these two poles. So, for instance, the high-grade mental elements of intention and recklessness cater well for the desert rationale's requirement that punitive sanctions be limited to cases of deliberate

⁸⁹⁶ Cane, 'Mens Rea in Tort Law', above n 276, 542.

⁸⁹⁷ *A v New South Wales* (2007) 230 CLR 500, 521 [61].

⁸⁹⁸ *Leinenga v Logan City Council* [2006] QSC 294, [64] (Mullins J). See further *Uniform Civil Procedure Rules 2005* (NSW) r 15.4.

⁸⁹⁹ The case of *Briginshaw v Briginshaw* (1938) 60 CLR 336 is taken as having established the principle that a judge will not find that serious allegations have been made out on the balance of probabilities unless they 'feel ... an actual persuasion' (at 361) or reach a 'comfortable satisfaction' as to that allegation (at 350).

⁹⁰⁰ *Deputy Commissioner of Taxation v Frangieh [No 3]* (2017) 321 FLR 1, 25–26 [124]–[126].

⁹⁰¹ *Ibid* 26 [125].

⁹⁰² See eg *Obeid v Andrew Ipp* [2017] NSWSC 271.

⁹⁰³ This tort is also conceived of as having a deterrent rationale (see discussion at page 216 above). However, because the hypothetical benchmark anticipates the application of *weak sanctions*, discussion has instead centred on the restoration and desert rationales.

wrongdoing. However, this high mental threshold prevents the tort from meeting the demands of the restoration rationale, which would ideally require the provision of compensatory remedies for loss caused by invalidity *per se*. To similar ends, because damage is the gist of the action, the tort caters well to the restoration rationale's demand that compensatory remedies be confined to cases in which unlawful conduct has caused loss. However, this requirement of proof of damage prevents the tort from meeting the desert rationale's demand for punishment in cases of deliberate wrongdoing irrespective of outcomes. We see similar shortfalls where the tort accommodates conflicting demands as to *who* can be held accountable, *to whom*, and *via what procedures*? Because of these shortfalls, we might reach the view that the misfeasance tort does not fully meet the expectations of the restoration and desert aspects of the hypothetical accountability benchmark. Were the misfeasance tort the only accountability mechanism in our system capable of serving these rationales, we might then treat those shortfalls as potential areas of accountability deficit.

D MISCONDUCT IN PUBLIC OFFICE: PUNISHING ABUSE OF POWER

The final mechanism in our hypothetical system is the common law criminal offence of misconduct in public office. The following analysis demonstrates that the sanctions applicable in the context of this tort fall squarely within the desert rationale. According to the hypothetical benchmark, the desert rationale anticipates that *individual public officials and government entities* would be accountable to a *defined prosecutor (with residual rights for members of the public)* for their *deliberate wrongdoing (for an entity, deliberate wrongdoing performed in its name)* through the imposition of *punitive sanctions via agent-friendly procedures*. As outlined in the following discussion, this offence measures up relatively well against this benchmark.

1 Misconduct in public office: desert-oriented sanctions

As was foreshadowed in Chapter 4, the literature on punishment broadly represents a battleground between retributivist and restorative justice theorists, arguing as to

Accountability Deficits and Overloads: A Missing Framework

whether the function of punishment is one of condemning reprehensible conduct, imposing sanctions on those who deserve them, deterring future wrongdoing, reforming wrongdoers and a host of other possible explanations. In the context of this thesis, we can understand the retributivist approach to be aligned with the desert rationale of accountability. On this view, a primary function of punishment is to condemn intentional wrongdoing and mark public disapproval of conduct that would threaten the legitimacy of government if left unpunished. This accountability rationale is reflected in New South Wales sentencing legislation, which cites as two purposes of sentencing ‘to make the offender accountable for his or her actions’, and ‘to denounce the conduct of the offender’.⁹⁰⁴

As a common law offence, the penalties that may be handed down following a conviction for misconduct in public office are ‘at large and in the discretion of the court’.⁹⁰⁵ Commonly imposed penalties in the criminal context include fines and terms of imprisonment, each of which is capable of contributing to the desert rationale. Imprisonment is the classic conception of criminal punishment: ‘a clear case of punishment in the emphatic sense’.⁹⁰⁶ It carries with it the ‘symbolism of public reprobation’⁹⁰⁷ that is key to the retributivist conception of legal punishment that underlies the desert rationale of accountability explored in this thesis. It is useful in this respect to consider the comments made by Beech-Jones J in sentencing former New South Wales Minister Eddie Obeid following his conviction for the offence of wilful misconduct in public office⁹⁰⁸ (conviction upheld on appeal,⁹⁰⁹ with special leave to appeal to the High Court refused).⁹¹⁰ The conduct giving rise to the offence related to Mr Obeid’s use of his position to influence the renewal of leases in relation to premises in which his family business held a financial interest. Imposing a five-year term of imprisonment, Beech-Jones J placed weight on the public nature of the offence, describing it as a ‘breach of trust in the form of a deliberate or reckless breach of a duty

⁹⁰⁴ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.

⁹⁰⁵ See *Blackstock v The Queen* [2013] NSWCCA 172, [8]. In Victoria, a ceiling of 10 years imprisonment applies: *Crimes Act 1958* (Vic) s 320.

⁹⁰⁶ Feinberg, ‘The Expressive Function of Punishment’, above n 390, 398.

⁹⁰⁷ *Ibid* 415.

⁹⁰⁸ *R v Obeid [No 12]* [2016] NSWSC 1815.

⁹⁰⁹ *Obeid v The Queen* (2017) 350 ALR 103.

⁹¹⁰ *Obeid v The Queen* [2018] HCATrans 54.

Chapter 6: Aligning the Hypothetical System with the Benchmark

owed by a public official to the public'.⁹¹¹ The 'real damage', for Beech-Jones J, was not reflected simply in the nature the benefit obtained by Mr Obeid through his conduct, but instead was damage 'to the institutions of government and public confidence in them'.⁹¹² It is useful to set out some of His Honour's concluding sentencing comments in full:

The overwhelming majority of parliamentarians are not motivated by an intention to enrich themselves or their families. Instead, they act in what they believe to be the best interests of the electorate, cognisant that the most likely reward for their service is persistent criticism and ultimately electoral rejection. The continuity and relative strength of our parliamentary democracy is a product of their efforts and the maintenance of public confidence in their honesty. All the work of parliamentarians can be destroyed by the wilful misconduct of only some of their members. Corruption by elected representatives consumes democracies. It destroys public confidence in democratic institutions. It opens up consideration of alternative modes of government, especially those that offer an illusion of security and order.⁹¹³

We see here echoes of the overarching legitimacy objective of accountability, as His Honour links the breach of trust underpinnings of the misconduct offence with erosion of public confidence in the democratic system of government. It was on the basis of this issue of public confidence that Beech-Jones J determined that the 'dominant considerations' in sentencing in these circumstances included 'denunciation and recognition of the harm done to the community'.⁹¹⁴ In light of these factors, His Honour reached the view that no penalty other than imprisonment was appropriate.⁹¹⁵

By comparison to a term of imprisonment, a fine can be considered a less severe form of punishment. This is reflected in New South Wales sentencing legislation, which provides that a sentence of imprisonment must not be imposed unless (as was found to be the case in *R v Obeid [No 12]*)⁹¹⁶ 'no penalty other than imprisonment is appropriate'.⁹¹⁷ As a form of penalty, a fine can be considered less intrusive than imprisonment from the perspective of an offender. While it may cause hardship in the immediate term, unlike a term of imprisonment it allows an offender to continue to engage in their social and professional life. Beyond this, there is a range of reasons why

⁹¹¹ *R v Obeid [No 12]* [2016] NSWSC 1815, [79].

⁹¹² *Ibid* [84].

⁹¹³ *Ibid* [137].

⁹¹⁴ *Ibid* [138].

⁹¹⁵ *Ibid*.

⁹¹⁶ *Ibid*.

⁹¹⁷ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1).

Accountability Deficits and Overloads: A Missing Framework

a fine might be considered a useful form of penalty: it can be tailored according to the severity of the offence and the means of the defendant; it can be reversed if a conviction is later discovered to be unsound; once exacted, there are no ongoing administration costs; and, perhaps most compellingly, the amount of the fine is reinvested into the public coffers.⁹¹⁸ This last point is particularly interesting in the context of the restorative rationale for accountability. If we conceive of damage to public trust as a broadly conceived type of harm, we might think of the requirement to pay a fine into the central revenue as contributing to repair of that harm, increasing the funds available to improve public services going forward.

If terms of imprisonment and fines are sufficiently condemnatory to satisfy the desert rationale of accountability, we might doubt whether they would fit with the deterrence rationale as it is framed in the present hypothetical.⁹¹⁹ The deterrence aspect of the hypothetical benchmark of accountability looks to the imposition of *weak sanctions*, and if prison sentences and fines are of a condemnatory nature, it is difficult to see how they can also be characterised as ‘weak sanctions’. This is reflected in Feinberg’s distinction between punishments and ‘mere penalties’ described in Chapter 4 above.⁹²⁰ For Feinberg, to qualify as punishment a sanction must stand as a symbolic representation of society’s condemnation of wrongdoing. If the weight of the sanction is not sufficiently severe to carry condemnation, then it will instead be of the character of a ‘mere penalty’. For example, it is difficult to view a parking fine as punishment for the offence of disobeying parking regulations. Unlike more serious sanctions, a parking fine is imposed *ex parte*, with the offender being informed of the offence and penalty via an administrative procedure. Additionally, the quantum of the fine is relatively small, in some cases perhaps even less than the cost of having paid for parking. There is a real risk in Bentham’s terms that such a fine may come to represent a licence paid in arrears,⁹²¹ rather than being a symbolically condemnatory sanction in its own right.

⁹¹⁸ Pat O’Malley, ‘Theorizing Fines’ (2009) 11 *Punishment and Society* 67, 67–68.

⁹¹⁹ As noted below, this is not to say that there is no place for deterrence as a rationale for criminal law and criminal sanctions more generally. The point here is confined to the application of the hypothetical accountability benchmark.

⁹²⁰ Feinberg, ‘The Expressive Function of Punishment’, above n 390, 398.

⁹²¹ See O’Malley, *The Currency of Justice: Fines and Damages in Consumer Societies*, above n 747, 22.

Chapter 6: Aligning the Hypothetical System with the Benchmark

Based on this analysis, we might reach the view that the penalties applicable for commission of the misconduct offence fall within the desert, rather than deterrence, category. This is certainly not to suggest that this thesis takes the position that criminal penalties have no legitimate deterrent role in a more general sense. Rather, it demonstrates that if we construct a benchmark that seeks to achieve deterrence through the imposition of ‘weak sanctions’, we cannot then assign a serious penalty a deterrent function. Again, we see that this is one of the inherent difficulties in defining a benchmark of accountability.

2 Who can be charged with the offence?

For the offence of misconduct in public office to fit within the rubric of the desert rationale for accountability, the benchmark anticipates that punitive sanctions will be imposed on *individual public officials and government entities* who have engaged in deliberate wrongdoing. The common law offence of misconduct in public office is one that can only be committed by ‘public officials’.⁹²² This is understood to include

an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public.⁹²³

In marking out the reach of this offence, the courts have demonstrated a preference to maintain a degree of elasticity in the definition. This degree of elasticity allowed the New South Wales Court of Criminal Appeal to extend the reach of the offence to members of Parliament in *Obeid v The Queen*.⁹²⁴ The Court cited with approval Zelic’s description of a member of Parliament as being ‘a “public character”’, ‘paid from public funds’, and performing duties ‘exclusively of a public nature’.⁹²⁵ The common law offence has also been applied to a broad range of officials including Ministers, judges, police officers, prison officers, prosecutors, and employees of local government authorities, educational institutions and health care providers.⁹²⁶ Accordingly, the

⁹²² *R v Quach* (2010) 27 VR 310, 323 [46], cited with approval by the New South Wales Court of Criminal Appeal in *Obeid v The Queen* (2015) 91 NSWLR 226, 252–54 [133] and [139].

⁹²³ *R v Whitaker* [1914] 3 KB 1283, 1296.

⁹²⁴ (2015) 91 NSWLR 226, 250–51 [121]–[125].

⁹²⁵ G Zelic, ‘Bribery of Members of Parliament and the Criminal Law’ [1979] *Public Law* 31, 38, cited in *Obeid v The Queen* (2015) 91 NSWLR 226, 250 [123].

⁹²⁶ See David Lusty, ‘Revival of the Common Law Offence of Misconduct in Public Office’ (2014) 38 *Criminal Law Journal* 337, 344–45.

offence is well-positioned to capture a wide variety of individual officials who have engaged in wrongdoing.

The question of whether such an offence might be committed by government *entities* is a much more difficult one. In defining the hypothetical benchmark, it was noted that there might be important functional reasons to allow criminal prosecution of the government as an entity, rather than just the individual officials who act in its name. If we adopt this position, however, we must then confront the practical difficulties in punishing entities. One of the most difficult questions to consider is how the elements of the offence (in particular, *mens rea*) might be attributed to a government entity. The offence of misconduct in public office is one that is committed ‘wilfully’.⁹²⁷ Can the knowledge and intention of officials within senior roles of a statutory body or government department be imputed to those bodies for the purposes of this offence? Can the knowledge and intention of a Commonwealth Minister be imputed to the Commonwealth? One way of approaching the issue would be to adopt an approach similar to that adopted in relation to the criminal liability of companies. In *DPP v Kent and Sussex Contractors Ltd*,⁹²⁸ it was held that a company could be held liable for the offences of knowingly making false statements and using false documents with the intent to deceive, by imputing to the company the knowledge and intention of its officers.⁹²⁹ Under this approach, the officers of a company are taken to be its ‘directing mind and will’, and the company is to be held criminally liable accordingly.⁹³⁰ Hogg and co-authors suggest that there is no reason why similar reasoning cannot be extended to government bodies.⁹³¹ By analogy to the civil case of *The Truculent*, the authors argue that if a Minister or official can be regarded as the directing mind and will of the responsible government department, the knowledge and intention of that official may be imputed to the department.⁹³²

⁹²⁷ *Obeid v The Queen* (2015) 91 NSWLR 226, 252–53 [133].

⁹²⁸ [1944] KB 146, cited in Jeremy Horder, *Ashworth's Principles of Criminal Law* (Oxford University Press, 8th ed, 2016) 168. See also *R v ICR Haulage Ltd* [1944] KB 551.

⁹²⁹ See further *Tesco Supermarkets Ltd v Natrass* [1972] AC 153; *Hamilton v Whitehead* (1988) 166 CLR 121.

⁹³⁰ Horder, *Ashworth's Principles of Criminal Law*, above n 928, 168.

⁹³¹ Hogg, Monahan and Wright, above n 267, 444.

⁹³² *Ibid.*

Chapter 6: Aligning the Hypothetical System with the Benchmark

A second difficulty with attaching direct criminal liability to government entities is identification of a relevant sanction. As with a corporation, government entities have ‘no soul to be damned, and no body to be kicked’.⁹³³ This sentiment appears to underpin Latham CJ’s comments regarding government immunity from criminal liability in *Cain v Doyle*.⁹³⁴ In concluding that the Commonwealth could not be convicted of offences under the relevant legislation, His Honour was significantly influenced by the propositions that ‘the Commonwealth cannot be either fined or imprisoned for a breach of Federal law’.⁹³⁵ While the latter proposition is undoubtedly correct, there is some doubt about the former. In Latham CJ’s view ‘there is no reason that the Commonwealth shall pay a fine to itself’.⁹³⁶ However, as Hogg and co-authors note, the payment of a fine by a government department is not simply the creation and cancellation of a fictitious debt. Rather, the structure of government means that the imposition of a fine against a government department involves a physical reduction of resources as one department accounts to another for the fine.⁹³⁷ Accordingly, it is possible to view the imposition of a fine for a criminal offence committed by a government entity as a punitive sanction in the traditional sense. But perhaps more importantly, far from there being ‘no reason’⁹³⁸ for the Commonwealth to pay a fine to itself, Cane argues that there is a ‘powerful functional case’ to impose direct criminal liability on the government, namely, to discourage the government from off-loading responsibility to agents who have engaged in wrongdoing ‘in the name of the government or public’.⁹³⁹ Whether or not the government suffers ‘hard treatment’ as a result of the imposition of a fine, there are important symbolic benefits in seeing the government held accountable for criminal conduct that is engaged in on its behalf. As Hogg and co-authors would have it, ‘there might be reason in the public condemnation associated with the imposition of a fine’.⁹⁴⁰ In the context of discussions about government accountability, these sentiments take on greater significance, particularly where the actions of the individual might be said to

⁹³³ See John C Jr Coffee, ‘“No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment’ (1981) 79(3) *Michigan Law Review* 386.

⁹³⁴ (1946) 72 CLR 409.

⁹³⁵ *Ibid* 419.

⁹³⁶ *Ibid* 418.

⁹³⁷ Hogg, Monahan and Wright, above n 267, 441.

⁹³⁸ *Cain v Doyle* (1946) 72 CLR 409, 418.

⁹³⁹ Cane, *Responsibility in Law and Morality*, above n 232, 267.

⁹⁴⁰ Hogg, Monahan and Wright, above n 267, 441.

have been 'shaped' by the dynamics of the corporate context in which they are situated.⁹⁴¹ Whatever we think of these views, the definition of 'public officer' for the purposes of the misconduct offence has not as yet been extended so far as to capture government entities.

3 Who can prosecute government misconduct?

Pursuant to the hypothetical benchmark, the desert rationale for accountability anticipates that punitive sanctions will be sought by a 'defined prosecutor' with residual prosecutorial rights to be available to members of the public. These residual rights were thought to be important in the context of the desert rationale in order to avoid the possibility or impression that a government prosecutor would act partially in pursuing sanctions against fellow government officials. Current prosecutorial practices in Australia align well with this expectation.

As a general rule, modern criminal prosecutions are primarily the province of the state.⁹⁴² In *R v Carroll*, the High Court described the criminal trial as 'an accusatorial process in which the power of the State is deployed against an individual accused of crime'.⁹⁴³ In the majority of cases, the relevant procedure is that a police officer will file an information with the relevant court. If the offence is an indictable one (as in the case for the offence of misconduct in public office), a committal hearing will be held, following which the Director of Public Prosecutions will take carriage of the prosecution of the trial proceedings. While private citizens may play important roles in providing evidence, in the vast majority of cases the decision to prosecute and the conduct of the proceedings will be driven by the state. Such prosecutorial decisions are unsusceptible to judicial review,⁹⁴⁴ thereby reducing the capacity of private individuals to compel prosecution of criminal offences.

However, the state's monopoly on prosecution is by no means absolute. Indeed, the historical position was that crimes were frequently prosecuted privately. Kirchengast, in tracing through the history of criminal prosecution, notes that prosecution of wrongs

⁹⁴¹ See eg Horder, *Ashworth's Principles of Criminal Law*, above n 928, 170.

⁹⁴² Cane, *Responsibility in Law and Morality*, above n 232, 268.

⁹⁴³ (2002) 213 CLR 635, 643 [21] (Gleeson CJ and Hayne J).

⁹⁴⁴ *Maxwell v The Queen* (1996) 184 CLR 501, 534.

Chapter 6: Aligning the Hypothetical System with the Benchmark

was exclusively private in nature in its original form.⁹⁴⁵ Following the emergence of the criminal jurisdiction up to the nineteenth century, private prosecution remained the primary means by which misdemeanours and felonies were punished.⁹⁴⁶ However, changes in social conditions and increasing incidences of petty crime in England in the eighteenth to nineteenth centuries revealed limitations in the private prosecution model, ultimately leading to the establishment of the office of public prosecution.⁹⁴⁷ This, then, marked a key turning point in the move away from private to public prosecution of criminal offences. Though public prosecution is now the dominant means by which criminal offences are prosecuted in Australia, it remains possible in most jurisdictions for an individual to mount a private prosecution. In 1896, Kay LJ referred to the lineage of this common law rule, remarking in *R v Stewart*:

Prima facie there is no doubt that anybody may take proceedings to recover a penalty. That is an old rule and is well established ... In order to prevent the application of the general rule, it must be shewn that the Act in plain terms prevents anyone, except certain specified persons, from prosecuting for offences under the Act.⁹⁴⁸

Thus, the common law position is that unless Parliament has legislated so as to confine the ability to prosecute to a nominated individual or entity, any person can commence proceedings to prosecute a criminal offence.⁹⁴⁹

In some jurisdictions, statute mirrors the common law position in relation to private prosecutions.⁹⁵⁰ For example, in New South Wales, s 14 of the *Criminal Procedure Act 1986* (NSW) provides that ‘any person’ is entitled to commence proceedings in relation to any statutory offence, ‘unless the right to institute the prosecution or proceeding is expressly conferred by that Act on a specified person or class of persons’. However, a registrar must first consider whether there are grounds for the proceedings,⁹⁵¹ and once commenced, the Director of Public Prosecutions has a right to

⁹⁴⁵ Tyrone Kirchengast, *The Victim in Criminal Law and Justice* (Palgrave Macmillan, 2006) 39.

⁹⁴⁶ *Ibid* 60.

⁹⁴⁷ *Ibid*.

⁹⁴⁸ [1896] 1 QB 300, 303.

⁹⁴⁹ *R v Thompson* (1991) 58 A Crim R 81, 84.

⁹⁵⁰ See eg at the Commonwealth level, s 13 of the *Crimes Act 1914* (Cth), which provides that ‘any person’ is entitled to commence proceedings in relation to any statutory offence, ‘unless the contrary intention appears’ (though indictable offences are to be prosecuted in the name of the Commonwealth Attorney-General or a person appointed on their behalf: *Judiciary Act 1903* (Cth) s 69.

⁹⁵¹ *Criminal Procedure Act 1986* (NSW) s 49(2).

take over the proceedings.⁹⁵² In other jurisdictions, the consent of a superior court is required to maintain a private prosecution.⁹⁵³ In yet others, the common law right of private prosecution has been abrogated by statute. For example, in Western Australia, s 20(5) of the *Criminal Procedure Act 2004* (WA) provides that '[a] person acting in his or her private capacity cannot commence a prosecution, unless another written law expressly provides otherwise'. Instead, prosecutions are to be commenced by 'an authorised person', a police officer or other prescribed individuals.⁹⁵⁴

Assuming that private prosecution is possible (with or without additional procedural requirements as described above), there then remains a question as to whether the specific offence is one that can be prosecuted privately. Both at common law and pursuant to the relevant provisions outlined in the foregoing paragraph, private prosecution is only available if statute has not otherwise given exclusive rights of prosecution to a defined prosecutor. For instance, if a statute provides that an offence can only be prosecuted by a defined individual (for example, the Director of Public Prosecutions), private prosecution will not be relevant for that offence. An example of such an offence is s 338 of the *Crimes Act 1900* (NSW), which provides that perjury can be prosecuted only by the Director of Public Prosecutions, at the direction of the New South Wales Attorney-General, or by a person who has leave of the Court in respect of which the perjury was committed. The offence of misconduct in public office, being a common law offence in New South Wales where no additional limitations apply, remains able to be prosecuted privately.

Irrespective of the long lineage of the rules that provide for private prosecutions, the modern position has seen a distinct reduction in the usage of this mechanism. This was observed by Emmett J in *Wilson v Official Trustee in Bankruptcy* as follows:

The machinery of the law with respect to prosecutions for criminal offences has changed markedly over the last 100 years or so. Prosecutions for criminal proceedings are now

⁹⁵² *Director of Public Prosecutions Act 1986* (NSW) ss 9 and 17. There is a distinction drawn between indictable offences (which the Director may take over in any case) and summary offences (which the Director may only take over with the consent of the original prosecutor, unless the summary offence is 'prescribed'). Regulation 4 of the *Director of Public Prosecutions Regulation 2015* (NSW) indicates that all summary offences are so prescribed, other than those in relation to which a Minister's consent to prosecution is required. Therefore, the distinction is of no major import for present purposes.

⁹⁵³ For example, in Queensland, s 686 of the *Criminal Code 1899* (Qld) provides that any person may present an information against any other person for an indictable offence 'by leave of the Supreme Court'.

⁹⁵⁴ *Criminal Procedure Act 2004* (WA) s 20(3).

Chapter 6: Aligning the Hypothetical System with the Benchmark

invariably brought by statutory authorities or government agencies established for that purpose. Private prosecutions for criminal offences are rare.⁹⁵⁵

One explanation for the relative disuse of the private prosecution mechanism is the high burden placed on a prosecutor in terms of time and cost.⁹⁵⁶ Legal proceedings are expensive to commence and maintain, and so only those parties particularly invested in seeing the prosecution through are likely to be interested in accessing this mechanism. Commencing proceedings is also not without risk, as a private prosecutor who commences criminal proceedings without reasonable and probable cause may find themselves responding to a claim of malicious prosecution. For all of these reasons, there are strong disincentives to pursuing private prosecution.

One possible inducement to a private prosecutor weighing against these disincentives would be the *qui tam* action (the full Latin phrase translating to ‘who as well for the king as for himself sues in this matter’). The ordinary position is that any penalty created by statute is payable to the Crown, and not to a private prosecutor (or common informer):

The Crown, and the Crown alone, is charged generally with the execution and enforcement of penal laws enacted by public statutes for the public good, and is interested, *jure publico*, in all penalties imposed by such statute; and therefore may sue for them in due course of law, where no provision is made to the contrary.⁹⁵⁷

The position is otherwise if a *qui tam* action is available, in which case the private prosecutor may take a percentage of the penalty payable by the convicted defendant. As Braithwaite notes, *qui tam* actions featured heavily in England during fourteenth and fifteenth centuries, and presently play an important role in the United States in connection with tax regulation, providing financial incentives to whistle-blowing ‘bounty hunters’.⁹⁵⁸ The *qui tam* action was part of received law in the Australian colonies,⁹⁵⁹ and accordingly it is possible that a statute may provide a private prosecutor with the right to receive some or all of a penalty applicable for a relevant offence. The

⁹⁵⁵ [2000] FCA 1251, [14].

⁹⁵⁶ Stephen, above n 269, 495–96.

⁹⁵⁷ *Bradlaugh v Clarke* (1883) 8 App Cas 354, 358.

⁹⁵⁸ John Braithwaite, ‘Responsive Regulation and Developing Economies’ (2006) 34 *World Development* 884, 895.

⁹⁵⁹ *Hawkesbury City Council v Foster* (1997) 97 LGERA 12, 15.

statute may provide for a right of recovery expressly or by necessary implication, and the private prosecutor bears the burden of establishing the right.⁹⁶⁰

The rationale for *qui tam* actions has been described as follows:

In order to provide that laws should not become a dead letter by reason of the circumstances that no prosecutor, official or private, comes forward, Parliament has in these cases enlisted the motive of private greed to ensure that the offender shall be made to smart for his offence, by enabling any person to come forward and claim certain sums of money which, in many cases, as in this, may be large.⁹⁶¹

In other words, the *qui tam* action provides an incentive to private individuals to enforce the law in circumstances where the law might not otherwise be enforced by a public prosecutor. This is reflective of Braithwaite's view that *qui tam* actions may have an important role to play in circumstances where state capacity to prosecute is at its weakest.⁹⁶² While capacity (in terms of resources and information) are of course critical factors that may limit the state's prosecutorial function, another issue to consider is the state's motivation to commence prosecutions. In discussions about government accountability, we might think that there is benefit in encouraging private prosecution not only to make up for any shortfall in the state's *capacity* to prosecute, but also any shortfall in its *interest* to prosecute, which may be particularly relevant in the context of public corruption offences. Leaving these observations aside, we can say that, generally speaking, the provisions made for prosecution of the offence of misconduct in public office in New South Wales are well-aligned with the desert aspect of our hypothetical benchmark; the primary position is that prosecution is left to a defined prosecutor, with residual public rights of prosecution.

4 For what does the misconduct offence hold an agent accountable?

The desert rationale for accountability simply requires that the government be subject to punitive sanctions in cases of *deliberate wrongdoing*. Going back to the discussion of 'subjective fault' set out in Chapter 4, we might interpret this benchmark as capturing, in the first instance, cases of intentional wrongdoing. The common law offence of

⁹⁶⁰ *Bradlaugh v Clarke* (1883) 8 App Cas 354, 358.

⁹⁶¹ *Orpen v Haymarket Capital Ltd* (1931) 145 LT 614, 615-16.

⁹⁶² Braithwaite, 'Responsive Regulation and Developing Economies', above n 958, 895.

Chapter 6: Aligning the Hypothetical System with the Benchmark

misconduct in public office arises in circumstances where an official ‘wilfully misconduct[s] himself’.⁹⁶³ There are a number of types of conduct that are thought to fall within the ambit of the offence.⁹⁶⁴ Only one of these specifically relates to excess of public power, which Finn describes as ‘malfeasance’.⁹⁶⁵ However, mere excess of power does not of itself amount to malfeasance, as it is necessary to show that the official had no honest belief that they had the power to act as they did, or alternately, that the conduct independently satisfies the elements of a separately identifiable crime, such as assault.⁹⁶⁶ Further types of conduct that may give rise to liability for the crime of misconduct in public office include fraudulent conduct and malicious exercise of power,⁹⁶⁷ being the ‘doing of an otherwise lawful act in a fashion which is wrongful’.⁹⁶⁸ It appears that the subjective element inherent in all of these descriptions of the misconduct offence aligns with the notion of deliberate wrongdoing as envisaged by the hypothetical benchmark.

It was noted in discussing ‘subjective fault’ in Chapter 4 that this may extend beyond intentional wrongdoing, and into the realm of reckless conduct. The misconduct offence is capable of encompassing subjectively reckless behaviour. In *R v Obeid [No 11]*, Beech-Jones J accepted that the offence may be made out ‘where the accused is reckless as to whether their act or omission was in breach of the duties and obligations attaching to their office’.⁹⁶⁹ As noted in Chapter 4, recklessness is a subjective state of mind, involving an advertence to the possibility of an event, but deciding to proceed regardless.

In *R v Macdonald*, Adamson J further expanded on the mental elements making up the offence, noting that ‘[i]t is the motivation, not the intention or belief, which determines whether the [conduct] amounts to misconduct’.⁹⁷⁰ On this basis, Her Honour placed emphasis on Mr Macdonald’s *motivation* in granting an exploration

⁹⁶³ *R v Quach* (2010) 27 VR 310, 323.

⁹⁶⁴ For recent discussion of the scope of the offence in the United Kingdom and proposals for reform, see Horder, *Criminal Misconduct in Office: Law and Politics*, above n 497.

⁹⁶⁵ PD Finn, ‘Official Misconduct’ (1978) 2 *Criminal Law Journal* 307, 310. See also Lusty, above n 926, 348.

⁹⁶⁶ Finn, above n 965, 320–25.

⁹⁶⁷ *Ibid* 310.

⁹⁶⁸ *Ibid* 318.

⁹⁶⁹ (2016) 260 A Crim R 94, 99 [23]. Approved in *R v Macdonald* [2017] NSWSC 337, [17].

⁹⁷⁰ [2017] NSWSC 337, [24].

licence to an associate (ie to afford a benefit to that associate), as opposed to his apparent belief that the grant of the licence was otherwise in the public interest.⁹⁷¹ If the accused was ‘substantially motivated’ by such an improper purpose, and ‘not motivated to any significant degree’ by a proper purpose, then this element of motivation would be made out.⁹⁷² In so doing, it was not necessary to establish *why* Mr Macdonald was pursuing that improper purpose (eg repayment of a political debt); rather, it was necessary only to establish that the improper purpose was the actuating one.⁹⁷³

Again, we see that all of these enquiries are conformable with the expectation of the desert aspect of the hypothetical benchmark, which anticipates that punitive sanctions attach in cases of deliberate wrongdoing. While the offence extends to cases of reckless conduct, this recklessness is of a subjective nature. The offence enquires directly into the knowledge of the accused and the matters they turned their mind to in engaging in the conduct in question.

5 Misconduct: by what procedures are sanctions imposed?

The offence of misconduct in public office has been classified in this chapter as a desert-oriented offence. In order to satisfy the benchmark of accountability, the punitive sanctions would be imposed via *agent-friendly procedures*. Looking at the employment of discretion and burden of proof, we can see that this is indeed the case.

(a) Discretion

On conviction for the offence of misconduct in public office, the court has a relatively broad discretion to employ in determining the appropriate sentence. As noted above, there is no specified maximum penalty for the common law offence of misconduct in public office. In *R v Obeid [No 12]*, Beech-Jones J thought that this was a ‘significant omission’, as it prevented the court from having reference to the maximum penalty as an indication of the seriousness of the offence.⁹⁷⁴ For a common law offence, the court

⁹⁷¹ Ibid [31].

⁹⁷² Ibid [46].

⁹⁷³ Ibid [49].

⁹⁷⁴ [2016] NSWSC 1815, [62].

Chapter 6: Aligning the Hypothetical System with the Benchmark

instead adopts a corresponding statutory offence as a reference point, in this case the bribery and corruption offences set out in Part 4A of the *Crimes Act 1900* (NSW).⁹⁷⁵ Having identified this statutory analogue, Beech-Jones J nonetheless considered that the common law offence was of a more serious nature, leading to the conclusion that the court ought not be limited by the seven year maximum penalty prescribed by statute.⁹⁷⁶ In ultimately reaching the view that Mr Obeid ought to be subjected to a penalty of five years imprisonment, Beech-Jones J took into account a range of factors. These included the nature of the breach of duty,⁹⁷⁷ the damage occasioned to public confidence,⁹⁷⁸ principles of ‘general deterrence and denunciation’⁹⁷⁹ and the offender’s prior good character (though to a lesser extent than in other cases).⁹⁸⁰ Alongside these factors, the *Crimes (Sentencing Procedure) Act 1999* (NSW) prescribes other matters to be taken into account in connection with sentencing common law offences,⁹⁸¹ including a range of aggravating and mitigating factors,⁹⁸² and specifies the purposes of sentencing.⁹⁸³

The approach adopted in *R v Obeid [No 12]* demonstrates the degree of discretion afforded to the court in determining the penalty applicable for the offence of misconduct in public office. While some offences prescribe more particular penalties or set maximum limits, the penalty for this common law offence is effectively at large, and is determined by the court taking into account a whole range of factors specific to the instant case. This highly discretionary process allows the court to take into account not only the nature of the offence, but also various mitigating factors that might weigh in the defendant’s favour. In Mr Obeid’s case, accepted mitigating factors included that Mr Obeid had no record of previous convictions, that he was a person of good character, that he was unlikely to reoffend, he had good prospects of rehabilitation, and that he had co-operated in the conduct of the trial.⁹⁸⁴ In taking into account these matters in

⁹⁷⁵ Ibid [66].

⁹⁷⁶ Ibid [70].

⁹⁷⁷ Ibid [82]–[83].

⁹⁷⁸ Ibid [84].

⁹⁷⁹ Ibid [85].

⁹⁸⁰ Ibid [86] and [94].

⁹⁸¹ Ibid [61].

⁹⁸² *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A(2)–(3).

⁹⁸³ Ibid s 3A.

⁹⁸⁴ *R v Obeid [No 12]* [2016] NSWSC 1815, [129] and [132].

sentencing, the court is able to adopt a flexible approach that tailors the sentence to the nature of the deliberate wrongdoing in which the offender has engaged, consistently with the desert aspect of the hypothetical accountability benchmark.

(b) *Burden of proof*

In criminal law, the prosecuting party bears a significant onus both in terms of a legal and evidential burden. It is necessary to establish, 'beyond reasonable doubt', the legal elements making up the offence as well as evidentiary proof in support of those elements: 'The burden of proving guilt beyond reasonable doubt rests on the prosecution from first to last'.⁹⁸⁵ Returning to the hypothetical accountability benchmark, we would say that the criminal burden of proof (through which desert is facilitated) is far more defendant-friendly than the civil burden of proof (though which control and restoration are facilitated). In this respect, the burden of proof in our hypothetical system aligns well with our benchmark. We can justify imposing a higher burden of proof for the criminal offence of misconduct in public office where the cause of action is desert-oriented: 'the justification for the [beyond reasonable doubt] standard ... is to be found in the retributive justification of punishment itself'.⁹⁸⁶ If retribution is concerned with the ideas of punishing those who deserve it (and protecting those who do not) then adopting a higher burden of proof supports this goal.⁹⁸⁷ By adopting this higher burden of proof, we reinforce the condemnatory features of the desert rationale of punishment, as we can assume that those who have met this high standard very likely deserve the punishment they receive. Were we to adopt a lower standard, such as that applicable in civil proceedings, we may risk capturing innocent parties and in turn undermine this condemnatory function over time.

6 Misconduct: a desert-oriented offence

The foregoing discussion demonstrates that the offence of misconduct in public office is well-adapted to serve the desert aspect of our hypothetical accountability benchmark.

⁹⁸⁵ *May v O'Sullivan* (1955) 92 CLR 654, 657.

⁹⁸⁶ Walen, above n 359, 360.

⁹⁸⁷ *Ibid* 426.

Chapter 6: Aligning the Hypothetical System with the Benchmark

From the prescription of who is accountable, to whom, for what, and how, the criminal offence largely aligns with the expectations of the benchmark, in holding *individual public officials and government entities* accountable to a *defined prosecutor (with residual rights for members of the public)* for their *deliberate wrongdoing* through the imposition of *punitive sanctions* via *agent-friendly procedures* (desert rationale). The only significant point of departure is in connection with the punishment of government entities, as opposed to individuals. In comparison to the tort of misfeasance, the crime of misconduct is not one that is commonly thought of as a vehicle to punish institutional wrongdoing. In other respects, however, we would say that this offence is broadly reflective of the benchmark.

E SUMMARY: WHAT DOES THE BENCHMARK REVEAL?

This chapter has demonstrated that, were we able to reach a concluded view on the content of our ‘benchmark’ of accountability, it would potentially be possible to utilise that benchmark to assess the performance of the various mechanisms comprising our accountability system. This has been done in this chapter by using the benchmark to examine each mechanism in isolation. On that approach, the benchmark has allowed us to identify a number of potential areas of accountability deficit. So, for instance, the benchmark has demonstrated that the strict approach to standing in judicial review proceedings falls short of the expectation that *all members of the public* might enforce control. Similarly, the benchmark has demonstrated that the reluctance to extend judicial review and the misfeasance tort to cover the conduct of private contractors falls short of the expectations that *the individual/entity charged with exercising power and the government as an entity* be respectively subject to control and obligations to restore. (As an aside, it is interesting to bear in mind that outsourcing is one of the frequently targeted areas in claims of ‘accountability deficit’.)⁹⁸⁸

This chapter also serves to make an important point about the dangers of looking at mechanisms in isolation. Unless we define our accountability benchmark very

⁹⁸⁸ See note 118 above.

Accountability Deficits and Overloads: A Missing Framework

narrowly (for example, limiting it to the pursuit of transparency), is highly unlikely that a single mechanism will be capable of satisfying the benchmark. If we allow that accountability may be underpinned by competing rationales (eg restoration and desert), it follows that we must allow these competing goals to be pursued through multiple mechanisms. Otherwise we are left with an internally conflicting mechanism that cannot truly perform any of its functions in accordance with the expectations of the mechanism.⁹⁸⁹ Rather than tasking one mechanism with a range of competing accountability-oriented demands, the approach most likely to satisfy the various rationales is to split accountability roles across a number of mechanisms. Having done so, we must then adopt a systemic analysis in order to appreciate the presence of accountability deficits and overloads across those various mechanisms.

⁹⁸⁹ The analysis of the tort of misfeasance in public office reveals some of the tensions inherent between accountability rationales: see page 238 above. This is not to say that the misfeasance tort ought not to pursue these disparate goals. It may be useful to have mechanisms within the system that are capable of contributing to more than one goal (even if in a limited fashion). The point here is that we cannot expect a single mechanism to satisfy all accountability rationales if they are in tension with one another.

Chapter 6: Aligning the Hypothetical System with the Benchmark

CHAPTER 7: ANALYSING THE HYPOTHETICAL SYSTEM

The task undertaken in Chapter 6 of this thesis was to measure each of the mechanisms constituting our hypothetical accountability system against the terms of the hypothetical accountability benchmark. On conducting that individual analysis of each mechanism, it became apparent that each contributed in different ways to one or more of the rationales of accountability. At the highest level, court processes and procedures were said to contribute to the rationale of transparency across each of the causes of action. However, on focusing on the available remedies, it became apparent that each cause of action was directed primarily towards a particular rationale: judicial review was said to contribute to control, the misconduct offence to desert, and the misfeasance tort to restoration (though also to desert). When measured against each of those aspects of the hypothetical benchmark, it was possible to identify a range of areas of potential shortfall (where the mechanism fell short of expectations).

However, as was observed in the concluding remarks to Chapter 6, these observations can only ever stand as a preliminary conclusion on the presence of accountability deficits and overloads. Three examples make this point. First, it was concluded above that the standing limitations for judicial review fall short of our expectations that those in power must answer to *all members of the public*. This, then, represents a potential accountability deficit. But how do we know whether this is truly a deficit if we do not take into account whether another mechanism elsewhere within the system makes up for this shortfall? If another mechanism does provide all members of the public with access to effective control-oriented remedies (eg via an election), then we can no longer say that this represents an accountability gap. Secondly, focusing only on the individual contributions made by each mechanism prevents us from seeing larger gaps in the system. So, for instance, the analysis in Chapter 6 demonstrates that various mechanisms within the system contribute to the rationales of transparency, control, restoration and desert. The analysis did not reveal, however, that none of these mechanisms contribute effectively to deterrence (as framed in this hypothetical). Thirdly, by focusing individually on the contributions of each mechanism, it was noted

Chapter 7: Analysing the Hypothetical System

that each of the misfeasance tort and misconduct offence make provision for punitive sanctions. We can only extrapolate this finding out to a potential accountability overload if we take into account the culmination of both of these mechanisms. To reiterate, if we focus unduly on analysing the contribution of a single mechanism, we are at risk of over-diagnosing potential deficits, and under-diagnosing potential overloads.

Appreciating that accountability is a group, rather than individual, effort is, however, only part of the picture. An accountability system is not simply a collection of independent mechanisms running their own individual races. Rather, as discussed in Chapter 5, the system demonstrates a delicate balance of features, and a complex pattern of relationships, between its constitutive mechanisms. In order to reach a view as to whether a *potential* gap or *potential* overlap represent accountability deficits and overloads, it is necessary to unpack these various synergies and to understand the manner in which the various mechanisms in our system interlock with one another. Chapter 7 undertakes a more in-depth analysis of the inter-relationships that are apparent within the small sub-system of mechanisms that has been selected for the purposes of the hypothetical. The three mechanisms that have been selected for this purpose are (1) common law judicial review, (2) the tort of misfeasance in public office, and (3) the criminal offence of misconduct in public office. Even having simplified the system to this small set of closely related mechanisms, it is possible to see a number of complex inter-relationships reflecting the dynamics explored in Chapter 5.

Section A commences with a discussion of the *independence* of the mechanisms in the system. The remaining sections then consider the range of rules that impact on this degree of independence, with Section B canvassing a number of rules that facilitate a *mutually exclusive* dynamic. This may be the case where the choice to pursue one cause of action precludes the availability of another (eg the doctrine of estoppel by record and the court's power to stay proceedings as an abuse of process), or where the award of a previous remedy is taken into account to preclude or reduce a later remedy (eg exemplary damages are not available where defendant has been adequately punished pursuant to the criminal law). Section C then looks at the rules that facilitate a *staged* dynamic in the accountability system by making one cause of action a precondition of

another, or preventing one action from proceeding until another is concluded. Section D explores the *interdependent* aspects of the judicial accountability system, including through the availability of collateral attack. Finally, Section E looks at the ways in which the system operates *co-operatively*, including, for example, where judgments or evidence obtained in one cause of action can be relied on in another.

Ultimately, this chapter demonstrates the complex array of relationships that may be in play between various mechanisms within an accountability system. While it is tempting to treat each cause of action as an independent source of accountability, they are in fact underpinned by a richly interwoven tapestry of rules and relationship dynamics. Having explored some of the aspects of complexity apparent in this system, it becomes apparent that there is little to be gained in discussing whether, for instance, the unavailability of damages in judicial review cases reveals a potential accountability ‘deficit’ without appreciating the extent to which judicial review claims are interdependent with, or co-operate with, a claim for damages in tort. Similarly, it is overly simplistic to talk of the range of causes of action as producing a potential accountability ‘overload’ without appreciating the extent to which they operate in a staged or mutually exclusive manner. The purpose of this chapter, therefore, is to demonstrate the importance of adopting a ‘system’-based approach to measuring accountability deficits and overloads.

A ACCESS TO INDEPENDENT MECHANISMS

In Chapter 5, it was noted that one of the most straightforward types of relationship evident within an accountability system is that of *independent* mechanisms. Such mechanisms operate in parallel to one another, with the system treading a fine line between, on the one hand, facilitating a ‘failsafe’ approach to patch up potential accountability deficits and, on the other hand, generating potential accountability overloads. Looking at the hypothetical accountability system considered in this Part, if all causes of action were to operate independently, we would say that the same conduct by a public official might simultaneously give rise to a judicial review challenge, a criminal prosecution and tort proceedings. There are potential benefits to adopting such an independent, failsafe approach. For instance, we might say that if the state fails

Chapter 7: Analysing the Hypothetical System

to prosecute a criminal offence, an interested party may be able to bring a claim in tort.⁹⁹⁰ Therefore, the punitive objective of accountability may be achieved via a civil suit, notwithstanding that the most relevant mechanism for that purpose (ie prosecution of a criminal offence) may have fallen short.

However, the arguments here do not all go one way, as allowing mechanisms to operate independently does not always simply thicken the shape of the accountability system pursuant to which wrongdoers can be held accountable. For instance, if tort proceedings are used to challenge criminal conduct, these will be determined by reference to a lower burden of proof (the balance of probabilities, rather than beyond reasonable doubt). While a finding of liability in tort is ostensibly less condemnatory than a criminal conviction for an equivalent offence, there is potentially a risk of miscarriages of justice arising where tort proceedings are used to achieve a condemnatory 'branding' of the defendant.⁹⁹¹ We might also wonder whether frequent use of less exacting causes of action (that is, tort proceedings rather than a criminal prosecution) has the potential to undermine the overall accountability regime. This thesis has argued that the punitive function of accountability is important to condemn abuse of public power. There is a potential risk that this condemnatory purpose may eventually be undermined if alternative mechanisms that lack this essential characteristic are used in place of the traditional criminal prosecution.⁹⁹²

Bearing these concerns in mind, how are notions of independent mechanisms reflected in the hypothetical system under scrutiny here? It is possible to see a significant degree of independence in these three mechanisms. So, for instance, it is possible that if an official makes a decision in bad faith, the official may be subject to judicial review proceedings seeking a writ of certiorari to quash that decision on the ground of bad faith, a claim for the tort of misfeasance, and prosecution for the criminal

⁹⁹⁰ This is an idea explored by Stapleton in the context of the use of tortious proceedings following failed criminal prosecution of murder and rape offences: Jane Stapleton, 'Civil Prosecutions Part 1: Double Jeopardy and Abuse of Process' (1999) 7 *Torts Law Journal* 244; Jane Stapleton, 'Civil Prosecutions Part 2: Civil Claims for Killing or Rape' (2000) 8 *Torts Law Journal* 15. As to the vindicatory function of certain categories of torts, see also Jason N E Varuhas, *Damages and Human Rights* (Hart Publishing, 2016).

⁹⁹¹ See Stapleton, 'Civil Prosecutions Part 1: Double Jeopardy and Abuse of Process', above n 990, 5.

⁹⁹² Stapleton makes a similar point in questioning whether it is satisfactory that rape prosecutions take the character of 'mere' civil wrongs given the enormity of the feminist struggle to have had rape treated seriously by the criminal law: *ibid.*

Accountability Deficits and Overloads: A Missing Framework

offence of misconduct in public office. If each of these proceedings is maintainable and successful, the official will thereby have been subjected to three independent accountability mechanisms within the hypothetical system. Similarly, if a plaintiff has succeeded in obtaining damages in a tort claim, there is nothing to prevent that same conduct being the subject of a criminal prosecution.⁹⁹³

Further evidence of the independence of the mechanisms is apparent in the fact that the remedies are not interchangeable between the causes of action. A good example of this is the unavailability of civil damages for ultra vires conduct. As put by Einfeld J in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs*, 'the mere invalidation of an administrative decision does not provide a cause of action or a basis for an award of damages'.⁹⁹⁴ This is not to say that the fact that conduct is ultra vires may not otherwise be relevant to liability in tort (for instance, the question of whether conduct was in excess of power will be relevant in determining liability for misfeasance in public office). However, the point is that ultra vires conduct per se will not translate into a claim for civil damages. The courts have declined a number of invitations to develop the common law along these lines,⁹⁹⁵ and so we can treat the remedies flowing from tort claims as independent of the cause of action on judicial review.

In similar terms, a plaintiff cannot make a claim for civil damages arising out of an alleged breach of a criminal statute. In *Tang v Minister for Immigration and Multicultural and Indigenous Affairs*,⁹⁹⁶ Spender J struck out a claim pursuant to which the plaintiff sought damages for 'career and health damages'⁹⁹⁷ arising out of an alleged breach of the Commonwealth *Criminal Code* offence of abuse of public office.⁹⁹⁸ On

⁹⁹³ Groves argues that the tortious liability of government can potentially be understood as ameliorating concerns about accountability deficits arising through outsourced public functions: Matthew Groves, 'Outsourcing and Non-Delegable Duties' (2005) 16 *Public Law Review* 265, 268.

⁹⁹⁴ (1991) 31 FCR 29, 41.

⁹⁹⁵ For example, note the failure of the *Beaudesert* tort (which might have afforded damages for damage that was the 'inevitable consequence' of 'unlawful' conduct): *Beaudesert Shire Council v Smith* (1966) 120 CLR 145 overruled in *Northern Territory v Mengel* (1995) 185 CLR 307. Similarly, the courts have maintained a strict hold on the degree of subjective fault (or 'conscious maladministration') needed to make out a claim for misfeasance in public office: *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 375 [124], and have declined to provide a civil remedy in connection with breach of constitutional norms: *James v Commonwealth* (1939) 62 CLR 339.

⁹⁹⁶ [2003] FCA 1494.

⁹⁹⁷ *Ibid* [6].

⁹⁹⁸ *Ibid*.

Chapter 7: Analysing the Hypothetical System

appeal, Connor J agreed, rejecting the proposition that ‘the commission of a criminal offence *simpliciter* creates a right to criminal compensation’.⁹⁹⁹ In order for compensation to be available, the claim would need to be framed as one of breach of statutory duty, requiring the plaintiff to establish that the legislature intended to create a remedy in damages for breach of the criminal statute. Such a proposition could not be maintained in respect of the offence of abuse of office:

[T]he duty, if it is properly characterised as a duty, is one not to engage in the conduct prescribed by the sections. The object of that duty being to protect the Commonwealth of Australia and the public at large from conduct which is inimical to the interests of the proper administration of government. It is not a duty to protect each member of the public from an injury of any kind causative of loss arising in the administration of government. So understood, it cannot be said that the legislature intended to give to any member of the public a right to damages for breach of the duty owed to the Commonwealth and the public at large; there is no duty created for the benefit of each member of the public, or any class of members of the public, which gives rise to a correlative private right to sue for compensation.¹⁰⁰⁰

As these examples make clear, a civil damages remedy cannot be ‘tacked on’ to a claim for judicial review or the prosecution of a criminal offence,¹⁰⁰¹ which supports the view that the causes of action are independent.

However, there are limits to the degree of this independence, as various legal rules and principles operate to move these mechanisms into other types of relationship dynamic. Rather than representing a simple binary system, there are a number of legal rules and doctrines that may confirm or contradict independence. In many cases, the application of these rules will depend on matters that will naturally differ from case to case (eg which set of proceedings has been commenced first in time and the plaintiff’s motives in commencing the claim, amongst other matters). The balance of this chapter explores the various rules that might transform nominally independent causes of action into mutually exclusive, staged, interdependent and co-operative causes of action.

⁹⁹⁹ *Tang v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1042 [10].

¹⁰⁰⁰ *Ibid* [23].

¹⁰⁰¹ Of course, it is relevant to bear in mind that the successful prosecution of a criminal offence may facilitate access to criminal compensation schemes: see eg the Victims Support Scheme established under the *Victims Rights and Support Act 2013* (NSW).

B MUTUALLY EXCLUSIVE CAUSES OF ACTION

There are a number of legal rules and doctrines that operate to prevent the causes of action within the hypothetical accountability system from overlapping with one another. A number of these rules are captured within the broad doctrine of estoppel by record (comprising the principles of *res judicata*, issue estoppel, *Anshun* estoppel and judgments *in rem*), and the court's inherent power to stay proceedings for abuse of process. Another set of rules have been adapted to prevent the remedies arising out of the causes of action from overlapping with one another, most notably the rules governing the availability of exemplary damages alongside criminal sanctions. All of these various legal principles have a significant influence on the shape of the hypothetical accountability system. Returning to the language adopted in Chapter 5, where these principles operate, they have the effect of creating relationships of *mutual exclusivity* between the various causes of action and remedies. The result is that the choice to commence one type of proceeding may preclude the possibility of another, or the award of one type of remedy may preclude the award of another. The dynamics of the relationships created by these rules are discussed below.

1 Avoiding duplication of causes of action

The underlying rationale for estoppel by record centres on two key ideas: *interest rei publicae ut sit finis litium* ('it is for the common good that there should be an end to litigation'), and *nemo debet bis vexari pro eadem causa* ('no one should be harassed twice for the same cause'). There are a number of public policy concerns that underpin the rules that make up the doctrine of estoppel by record. Some of these are concerned with fairness to the defendant. For instance, discussions regarding the rule against double jeopardy frequently point to concerns about the unfairness of requiring a defendant to invest the time, cost and effort of defending themselves against essentially the same charge on multiple occasions.¹⁰⁰² Further, there is concern that a defendant may be put at a disadvantage in later proceedings, as the prosecution will have the benefit of

¹⁰⁰² See eg Gavin Dingwall, 'Prosecutorial Policy, Double Jeopardy and the Public Interest' (2000) 63 *Modern Law Review* 268, 268–69.

Chapter 7: Analysing the Hypothetical System

experience in crafting a stronger case the second time around.¹⁰⁰³ Beyond concerns regarding the individual defendant, there are also broader policy concerns in play. For instance, the estoppel by record rules operate to support the finality of judgments and to prevent the creation of inconsistent findings that may threaten the legitimacy of the court system.¹⁰⁰⁴ In the context of discussions about accountability, we might also point to a further potential rationale for making causes of action mutually exclusive: reducing the potential for accountability overloads. If a government official or department is required to respond to multiple forms of legal attack either simultaneously or consecutively, this may give rise to some of the risks of accountability overload that were cited in Chapter 1 (eg decision paralysis, difficulty in prioritising which standards to comply with, reduction in time and resources and so on). With these rationales in mind, the following discussion outlines a number of the key rules that operate to render causes of action within our hypothetical accountability system *mutually exclusive*.

One of the specific rules that sits under the umbrella of estoppel by record is that of *res judicata*, or ‘cause of action estoppel’,¹⁰⁰⁵ which applies with the effect that:

If one party brings an action against another for a particular cause and judgment is given upon it, there is a strict rule of law that he cannot bring another action against the same party for the same cause.¹⁰⁰⁶

In other words, the doctrine of *res judicata* prevents re-litigation of a cause of action on the basis that the cause of action has been merged and therefore no longer exists.¹⁰⁰⁷ In this context, ‘cause of action’ is a matter of substance rather than form, with the effect that substantially similar claims arising out of the same facts may give rise to estoppel by record.¹⁰⁰⁸ For the rule to apply, the original judgment must have been a final determination of the cause of action by a judicial tribunal (thereby excluding, for example, interlocutory judgments or administrative decisions). In the criminal context, *res judicata* is reflected in the notion of double jeopardy, which allows an accused to raise pleas of *autrefois acquit* or *autrefois convict* as a bar to prosecution of an offence

¹⁰⁰³ Ibid 268.

¹⁰⁰⁴ *R v Carroll* (2002) 213 CLR 635, 672 [128] (McHugh J).

¹⁰⁰⁵ *Neil Pearson & Co Pty Ltd v Comptroller-General of Customs* (1995) 38 NSWLR 443, 450.

¹⁰⁰⁶ *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630, 640, cited in J D Heydon, *Cross on Evidence* (LexisNexis, 10th ed, 2014) 258.

¹⁰⁰⁷ *Blair v Curran* (1939) 62 CLR 464, 532 (Dixon J), cited in Heydon, above n 1006, 258.

¹⁰⁰⁸ *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, 610–13.

Accountability Deficits and Overloads: A Missing Framework

in respect of which the accused has already been acquitted or convicted. Issue estoppel is concerned with similar, though distinct, matters of re-litigation. It prevents a party from raising an issue in subsequent proceedings that has already been determined in earlier proceedings.¹⁰⁰⁹ Not every issue determined in proceedings will give rise to an estoppel. The question of whether a determination is binding will depend on whether the issue can be characterised as having been ‘legally indispensable’ in the earlier proceedings.¹⁰¹⁰ For this reason, a finding in an earlier proceeding will not operate to create an issue estoppel in a later proceeding unless it is ‘fundamental or cardinal’ to that earlier judgment.¹⁰¹¹

To similar effect is the doctrine of *Anshun* estoppel.¹⁰¹² In comparison to *res judicata* (which is based on merger of a cause of action in the earlier proceeding), and issue estoppel (which is based on the determination of issues indispensable to the earlier proceeding), *Anshun* estoppel is based on the obligation of a party to bring forward their entire case to be dealt with in a single set of proceedings.¹⁰¹³ The estoppel may arise where ‘the matter relied upon as a defence in [the] second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it’.¹⁰¹⁴ The *Anshun* doctrine can be thought of as a species of the court’s inherent power to stay proceedings that constitute an abuse of process.¹⁰¹⁵ For present purposes, a relevant aspect of this power is to stay later proceedings that seek to re-litigate a matter that has already been dealt with in earlier proceedings.¹⁰¹⁶ In such a scenario, the court’s inherent power to stay proceedings is wider than estoppel-based principles:

[P]roceedings before a court should be stayed as an abuse of process if, notwithstanding that the circumstances do not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a

¹⁰⁰⁹ *Blair v Curran* (1939) 62 CLR 464, 531 (Dixon J), cited in Heydon, above n 1006, 259.

¹⁰¹⁰ *Blair v Curran* (1939) 62 CLR 464, 532 (Dixon J), cited in Heydon, above n 1006, 260.

¹⁰¹¹ Heydon, above n 1006, 260.

¹⁰¹² Named for the High Court’s decision of *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589. The *Anshun* doctrine is often treated as a subset of estoppel by record, but may more accurately be classed as a feature of the court’s inherent power to stay proceedings for abuse of process: Justice K R Handley, ‘*Anshun Today*’ (1997) 71 *Australian Law Journal* 934, 940.

¹⁰¹³ Heydon, above n 1006, 271.

¹⁰¹⁴ *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, 602.

¹⁰¹⁵ Handley, above n 1012, 940.

¹⁰¹⁶ Another aspect of this discretion is to allow the courts to stay civil proceedings pending resolution of criminal proceedings (discussed in relation to ‘staged’ mechanisms at page 278 below).

Chapter 7: Analysing the Hypothetical System

case which has already been disposed of by earlier proceedings.¹⁰¹⁷

The courts have held that an abuse of process may arise where later proceedings for an alternate offence would contradict an earlier acquittal. For example, in *R v Carroll*, the prosecution brought later proceedings against the accused for perjury, alleging that the accused had lied at his trial when he gave evidence denying that he killed a child.¹⁰¹⁸ The High Court awarded a stay of proceedings on the basis that there was a 'manifest inconsistency between the charge of perjury and the acquittal of murder'.¹⁰¹⁹ This was because the perjury charge was based 'solely upon the respondent's sworn denial of guilt' in the earlier proceedings.¹⁰²⁰

The rule against collateral attack operates to prevent proceedings that invite the court to make an order that is inconsistent with, or might 'tarnish'¹⁰²¹ an earlier judgment.¹⁰²² Pursuant to this rule, the courts do not allow

the initiation of proceedings ... for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.¹⁰²³

Relevantly, this rule operates to prevent a person convicted of a criminal offence from bringing civil proceedings that are premised on their innocence;¹⁰²⁴ for instance, by suing the police for negligence in the conduct of the investigation, or their legal representatives for negligence in the conduct of the trial.¹⁰²⁵ However, this is not to say that a previous criminal conviction can never be contradicted in later civil proceedings. As Stapleton notes, there might be cases in which the court may allow a defendant to bring civil proceedings alleging an error of law by the earlier criminal court, or where

¹⁰¹⁷ *Walton v Gardiner* (1993) 177 CLR 378, cited with approval in *Rogers v The Queen* (1994) 181 CLR 251, 256 (Mason CJ).

¹⁰¹⁸ (2002) 213 CLR 635.

¹⁰¹⁹ *Ibid* 649 [42].

¹⁰²⁰ *Ibid*.

¹⁰²¹ *Giannarelli v Wraith* (1988) 165 CLR 543, 573-74.

¹⁰²² For discussion of circumstances in which collateral challenge is available, see the discussion of 'interdependent' causes of action at page 280 below.

¹⁰²³ *Hunter v Chief Constable of West Midlands Police* [1982] AC 529, 541.

¹⁰²⁴ Stephen Warne, 'Compromise of Litigation and Lawyers' Liability: Forensic Immunity, Litigation Estoppels, the Rule Against Collateral Attack, Confidentiality and the Modified Duty of Care' (2002) 10 *Torts Law Journal* 167, 17.

¹⁰²⁵ See cases cited in Stapleton, 'Civil Prosecutions Part 1: Double Jeopardy and Abuse of Process', above n 990, 12.

Accountability Deficits and Overloads: A Missing Framework

the conviction can be said to have been obtained by perjury, or where fresh evidence admissible in the civil proceedings might justify a contradictory finding.¹⁰²⁶

It is less clear whether the rule against collateral attack has such a critical role to play where later civil proceedings seek to contradict an earlier *acquittal* in criminal proceedings—for instance, where a plaintiff brings a claim in tort (eg battery) following the defendant's acquittal of corresponding criminal charges (eg rape).¹⁰²⁷ One reason such claims might be thought to fall outside the scope of the rule is that the degree of inconsistency between the earlier and later judgments is not as pronounced as in the case of convictions; there is no logical inconsistency in saying that the prosecution failed to prove the criminal offence beyond reasonable doubt, but that the plaintiff in civil proceedings succeeded in proving their civil case on the balance of probabilities.¹⁰²⁸ Thus, the New South Wales Court of Appeal held in *Health Care Complaints Commission v Litchfield* that it was open to the Commission to bring disciplinary proceedings against a doctor following his earlier acquittal of criminal sexual misconduct charges:

Whether particular conduct has been established beyond reasonable doubt is not the same question as whether that conduct has been established on the balance of probabilities. Thus an acquittal does not bar civil proceedings against the accused arising out of the same facts.¹⁰²⁹

In summary, these various legal principles operate to create relationships of *mutual exclusivity* between the causes of action in the judicial accountability system, as the choice to bring the first proceeding (depending on its outcome) may operate to preclude the possibility of bringing later proceedings. In understanding the extent to which these principles in fact create a mutually exclusive accountability dynamic, there are a number of issues to consider.

The first key issue to look at is the range of parties against whom the mutual exclusivity dynamic operates. Does it operate only to prevent the individual parties to the original proceeding from pursuing alternate claims? Or also their privies? Or the

¹⁰²⁶ See cases and discussion in *ibid* 14–15.

¹⁰²⁷ Stapleton's two-part article canvasses the relevant authorities and policy considerations: *ibid*; Stapleton, 'Civil Prosecutions Part 2: Civil Claims for Killing or Rape', above n 990.

¹⁰²⁸ Stapleton, 'Civil Prosecutions Part 2: Civil Claims for Killing or Rape', above n 990, 2.

¹⁰²⁹ (1997) 41 NSWLR 630, 635.

Chapter 7: Analysing the Hypothetical System

public more generally? Each of the various rules operate in slightly different ways. Looking first at *res judicata* and issue estoppel, these rules operate only to bind the parties to the original proceedings¹⁰³⁰ and their privies.¹⁰³¹ For this reason, third parties are not estopped by reference to either the outcome of the original judgment, or by the issues determined in the original judgment.¹⁰³² An exception to this rule arises where the judgment is one *in rem*. Unlike judgments *in personam*, a judgment *in rem* is binding on 'the whole world',¹⁰³³ not only parties to the litigation. A judgment *in rem* (ie one that has the effect of creating, altering or declaring the status of a person or thing)¹⁰³⁴ operates as an estoppel against all members of the public so as to prevent later proceedings that seek to contradict that status. A further exception is where proceedings have been commenced on a representative basis; judgments may operate not only to bind the parties, but also members of the represented class.¹⁰³⁵ In the public law context, this may potentially extend to the commencement of proceedings involving the Attorney-General, who in point of principle acts as a representative of the public. Campbell was of the opinion that, in so doing, it was possible that the judicial determination of such proceedings would thereafter bind the public, at least in relation to determination of public (as opposed to private) rights.¹⁰³⁶ What we can take from this discussion is that the identity of the parties to the proceedings commenced first in time may have a significant impact on the extent to which other parties are estopped from commencing later proceedings traversing the same subject matter, thereby affecting the extent to which causes of action will be treated as mutually exclusive.

A second issue to consider is the extent of the discretion involved in the application of each of these rules. *Res judicata* involves the most strict approach. Where it arises, the court has no discretion to allow the later proceedings.¹⁰³⁷ There is some doubt as to

¹⁰³⁰ *Taylor v Ansett Transport Industries* (1987) 18 FCR 342, 358.

¹⁰³¹ *Effem Foods Pty Ltd v Trawl Industries of Australia Pty Ltd (in liq)* (1993) 43 FCR 510, 526.

¹⁰³² See *Health Care Complaints Commission v Litchfield* (1997) 41 NSWLR 630.

¹⁰³³ *P E Bakers Pty Ltd v Yehuda* (1988) 15 NSWLR 437, 442.

¹⁰³⁴ *Ibid*. Relevant examples of judgments *in rem* include an award of a writ of habeus corpus, or a declaration as to the validity of an election: see examples cited in Enid Campbell, 'Relitigation in Government Cases: A Study of the Use of Estoppel Principles in Public Law Litigation' (1994) 20 *Monash University Law Review* 21, 33.

¹⁰³⁵ See discussion in Campbell, above n 1034, 48.

¹⁰³⁶ *Ibid* 42, citing *Gouriet v Union of Post Office Workers* [1978] AC 435.

¹⁰³⁷ *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502, 511.

Accountability Deficits and Overloads: A Missing Framework

whether issue estoppel operates in the same manner. There is English authority to suggest that the courts may retain discretion to allow later proceedings in ‘special circumstances’, notwithstanding that they traverse the same issues determined in the earlier proceedings.¹⁰³⁸ However, the Australian courts have not expressly approved of this approach.¹⁰³⁹ In comparison, the court’s power to stay proceedings for abuse of process is treated as inherently discretionary. For instance, looking at the *Anshun* doctrine there are two layers of inquiry that limit its application. First, the principle applies only in circumstances where it was ‘unreasonable’ for the party not to have raised the matter in the earlier proceeding.¹⁰⁴⁰ Accordingly, the court will take into account the commercial drivers that influenced a party’s decision to raise (or not raise) issues in that earlier proceeding, including costs and the perceived importance of the issue.¹⁰⁴¹ Secondly, even if the court reaches the view that it was unreasonable not to raise the point in those earlier proceedings, the court nonetheless retains a discretion not to award the stay if there are ‘special circumstances’ that warrant that approach.¹⁰⁴²

A third issue to take into account is whether these principles apply in the same manner in the context of judicial review proceedings as they do in civil and criminal proceedings. The crux of this doubt is summed up in Professor Wade’s suggestion that

in these procedures the court ‘is not finally determining the validity of the tribunal’s order as between the parties themselves’ but ‘is merely deciding whether there has been a plain excess of jurisdiction or not’. They are a special class of remedies designed to maintain due order in the legal system, nominally at the suit of the Crown, and they may well fall outside the ambit of the ordinary doctrine of *res judicata*.¹⁰⁴³

This passage¹⁰⁴⁴ was cited with approval both at first instance and on appeal in the English case of *R v Secretary of State for the Environment; Ex parte Hackney London Borough Council*,¹⁰⁴⁵ with the result that doctrine of *res judicata* was thought not to apply in respect of consecutive judicial review claims. There are a number of reasons we

¹⁰³⁸ *Arnold v National Westminster Bank Plc* [1991] 2 AC 93, 109.

¹⁰³⁹ See eg *Charafeddine v Morgan* (2014) 66 MVR 232, 238 [25]–[26].

¹⁰⁴⁰ *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, 602.

¹⁰⁴¹ *Ibid* 602–03.

¹⁰⁴² See *Macquarie Bank Ltd v National Mutual Life Association of Australia Ltd* (1996) 40 NSWLR 543, 558.

¹⁰⁴³ Sir William Wade and Christopher Forsyth, *Administrative Law* (Oxford University Press, 11th ed, 2014) 206.

¹⁰⁴⁴ Specifically, the equivalent passage from the 1982 edition of that work.

¹⁰⁴⁵ [1983] 1 WLR 524, 538–39 and *R v Secretary of State for the Environment; Ex parte Hackney London Borough Council* [1984] 1 WLR 592, 602.

Chapter 7: Analysing the Hypothetical System

might think it appropriate to distinguish between the application of estoppel principles in respect of administrative law proceedings and litigation between private parties.¹⁰⁴⁶ One concern (as noted by Professor Wade in the above extract) is whether the nature of remedies in judicial review proceedings produces a truly ‘final’ judgment on which the relevant estoppel principles can operate. For instance, we might wonder whether a writ of mandamus compelling a decision-maker to remake a decision in accordance with law is a ‘final’ determination, given that there are further steps to follow in the exercise of the power in question.¹⁰⁴⁷ Further concerns were touched on by the Federal Court in *Wong v Minister for Immigration and Multicultural and Indigenous Affairs*.¹⁰⁴⁸ Their Honours noted that the principles underlying *Anshun* may be ‘of only secondary significance’ where a Minister is involved, as they have ‘no personal interest in the outcome’.¹⁰⁴⁹ Further, their Honours observed:

There may be sound reasons of policy for arguing that *Anshun* estoppel not apply for the benefit of the Executive Government and its representatives, but only to individuals. This is because the Executive is a respondent by force of statute or of the Constitution and is not subject to the same psychological burden that may weigh on individual litigants; they cannot be ‘vexed’ in the same way by instigation of subsequent proceedings. That may be a more appropriate basis, namely that of accepted public policy, to ensure that representatives of the Executive Government cannot rely on the principle of *Anshun* estoppel to frustrate, in effect, the intended legislative mandate.¹⁰⁵⁰

In *Kong v Minister for Immigration and Citizenship*, Flick J identified a number of further points of difference, including that pleading styles may make it more difficult to identify ‘issues’ and ‘causes of action’ in public law claims, and that government defendants may have greater resources to prosecute a claim than would a private litigant.¹⁰⁵¹

Notwithstanding these concerns, the balance of Australian authority appears to favour the operation of estoppel by record in judicial review proceedings. One of the earlier decisions on this point was *Taylor v Ansett Transport Industries*, in which Fisher J

¹⁰⁴⁶ See generally Campbell, above n 1034.

¹⁰⁴⁷ A perceived lack of finality was one matter considered by May LJ as excluding the operation of estoppel by record in judicial review cases in *R v Secretary of State for the Environment; Ex parte Hackney London Borough Council* [1983] 1 WLR 524, 537. Campbell is unpersuaded by this argument, noting that even if there are further steps to be taken, the judgment nonetheless reflects a final determination by the court in respect of the legal issues: Campbell, above n 1034, 31.

¹⁰⁴⁸ (2004) 146 FCR 10.

¹⁰⁴⁹ *Ibid* 18 [39].

¹⁰⁵⁰ *Ibid* 20 [53].

¹⁰⁵¹ (2011) 199 FCR 375, 389–90 [38].

distinguished the position taken by the English courts,¹⁰⁵² ultimately concluding that issue estoppel was applicable in cases of consecutive judicial review applications under the ADJR Act.¹⁰⁵³ In *Somanader v Minister for Immigration and Multicultural Affairs*, Merkel J expanded on the decision in *Ansett* in finding that the dismissal of an earlier statutory judicial review claim precluded a later prerogative writ claim based on the same grounds of review.¹⁰⁵⁴ Based on these decisions and subsequent line of authority, the courts in the *Wong* and *Kong* decisions referred to above ultimately accepted that estoppel by record had a role to play in judicial review proceedings.¹⁰⁵⁵ Accordingly, it is not correct to say that estoppel by record necessarily plays a diminished role in the context of public law.

2 Avoiding duplication of remedies

It is also possible to see areas of *mutual exclusivity* in looking at the remedies available for the various causes of action comprising the hypothetical accountability system. As was observed in Chapter 6 above, there is a degree of overlap between the functions of the various remedies that are available within each of the three causes of action considered in this hypothetical. In particular, it was observed that while judicial review remedies are essentially regulatory in nature and criminal sanctions are essentially punitive in nature, damages in tort are capable of performing a wider range of functions: restoration (ie compensatory damages) and punishment (ie punitive or exemplary damages).¹⁰⁵⁶ Given the degree of overlap between the various categories of remedies, there is the potential that if all causes of action were to operate *independently*, at some point the same set of circumstances may lead to the award of overlapping categories of remedies. For example, if a public official received a fine for the offence of misconduct in public office, and was subsequently required to pay punitive damages to a plaintiff

¹⁰⁵² Including differences between England and Australia as to the source of jurisdiction and the requirement of to obtain leave of the court before seeking judicial review, amongst other grounds: (1987) 18 FCR 342, 355–56.

¹⁰⁵³ *Ibid* 356. See also Ryan J at 365.

¹⁰⁵⁴ (2000) 63 ALD 670, 680 [43] and 683 [54].

¹⁰⁵⁵ *Wong v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 146 FCR 10, 20 [53]; *Kong v Minister for Immigration and Citizenship* (2011) 199 FCR 375, 390 [39].

¹⁰⁵⁶ Tort damages may also be ascribed a deterrent function, however as noted above, this style of remedy does not align with the notion of ‘weak sanctions’ adopted for the purpose of the hypothetical benchmark: see above page 216.

Chapter 7: Analysing the Hypothetical System

for the tort of misfeasance in public office, the official would be doubly punished in respect of the same conduct. In order to prevent a situation such as this, the law contains a number of rules that operate to make certain remedies *mutually exclusive* of one another.

One such rule is that governing the overlap between exemplary damages and criminal sanctions, which may be at issue in a number of different scenarios. First, a plaintiff may seek punitive damages *after* the defendant has been *convicted* of an offence arising out of the same facts. This situation is governed by the rule set out in *Gray v Motor Accident Commission*, where a plurality of the High Court held that

[w]here ... the criminal law has been brought to bear upon the wrongdoer and substantial punishment inflicted, we consider that exemplary damages may not be awarded.¹⁰⁵⁷

In reaching this view, it was acknowledged that there might be difficulties involved in marking out the bounds of what amounted to ‘substantial punishment’ (though a term of imprisonment would always be so),¹⁰⁵⁸ and whether there was sufficient overlap between the two causes of action so as to engage the principle.¹⁰⁵⁹ However, the plurality indicated that ‘it would be a most unusual case in which it was open to a civil court to conclude that the outcome of those criminal proceedings did not take sufficient account of the need to punish the offender and deter others from like conduct’.¹⁰⁶⁰ In other words, because the objective of criminal punishment overlaps with that of punitive damages awards, to award punitive damages following a criminal conviction amounts either to a second-guess of the criminal court’s assessment or to a duplication of the punishment imposed.¹⁰⁶¹

The second scenario in which the two sets of remedies overlap is where a plaintiff seeks punitive damages *before* the defendant has been convicted of an offence, either because criminal proceedings have not been commenced or have not yet been finalised. The High Court in *Gray v Motor Accident Commission* acknowledged that this scenario may raise difficult questions, though these did not arise for determination in that

¹⁰⁵⁷ (1998) 196 CLR 1, 14 [40].

¹⁰⁵⁸ *Ibid* 16 [54].

¹⁰⁵⁹ *Ibid* 14 [45].

¹⁰⁶⁰ *Ibid* 15 [46].

¹⁰⁶¹ *Ibid* 14 [42]–[43]. See also *W v W* [1999] 2 NZLR 1, 7.

Accountability Deficits and Overloads: A Missing Framework

case.¹⁰⁶² In obiter, the plurality noted that it was doubtful whether the mere possibility of criminal proceedings would rule out exemplary damages, though they thought that the position may be more fraught where criminal proceedings had been commenced but not finalised.¹⁰⁶³ In the Privy Council decision of *W v W*, Lord Hoffman also addressed this concern, noting:

There is an additional problem when a criminal prosecution follows a civil action. Logically, the criminal punishment should take into account the exemplary damages which have been awarded but there is an argument for regarding criminal proceedings in the name of the state as having primacy over a private action.¹⁰⁶⁴

One authority dealing with the related issue of whether exemplary damages could be awarded prior to potential disciplinary proceedings is the New South Wales Court of Appeal decision of *James v Hill*.¹⁰⁶⁵ There, Tobias JA rejected the appellant's argument that the award would raise the spectre of 'double punishment', holding that: 'If disciplinary proceedings are instituted ... and are successful, then no doubt the relevant tribunal will be required to take into account any award of exemplary damages against him. In this way, double punishment will be avoided'.¹⁰⁶⁶

A third potential scenario in which the question arises is where a plaintiff seeks punitive damages *after* the defendant has been *acquitted* of a criminal offence arising out of the same facts. Again, in *Gray v Motor Accident Commission*, the High Court suggested that such a scenario might raise different considerations than those relevant in that case.¹⁰⁶⁷ The New Zealand Court of Appeal had previously grappled with this issue in *Daniels v Thompson*,¹⁰⁶⁸ ultimately reaching the view that where tortious conduct is the subject of a criminal prosecution, exemplary damages ought not to be available irrespective of whether the accused was convicted or acquitted. The finding was underscored by concern for 'the primacy of the criminal law in imposing discretionary Court-based sanctions for criminal offending'.¹⁰⁶⁹ Because the matter did not arise for determination in *Gray*, the High Court left open the possibility of the

¹⁰⁶² (1998) 196 CLR 1, 15 [48].

¹⁰⁶³ *Ibid.*

¹⁰⁶⁴ [1999] 2 NZLR 1, 8.

¹⁰⁶⁵ [2004] NSWCA 301.

¹⁰⁶⁶ *Ibid* [82].

¹⁰⁶⁷ (1998) 196 CLR 1, 15 [47].

¹⁰⁶⁸ [1998] 3 NZLR 22.

¹⁰⁶⁹ *Ibid* 51.

Chapter 7: Analysing the Hypothetical System

Australian courts taking different approach. This invitation was taken up by the New South Wales Court of Appeal in *Niven v SS*, with Tobias JA declining to follow *Daniels*.¹⁰⁷⁰ A critical factor, for His Honour, was that in consequence of the accused's acquittal, there was no prospect of double punishment. Accordingly, there was no fundamental disconnect between an acquittal in criminal proceedings, and the award of exemplary damages in civil proceedings.¹⁰⁷¹ The New South Wales Court of Appeal has followed this approach in subsequent cases, confirming that the acquittal of a defendant in criminal proceedings is not a bar to exemplary damages in civil proceedings traversing the same subject matter.¹⁰⁷²

Taking all these matters together, it is clear that the courts have had to grapple with a number of issues in determining the extent to which sanctions in criminal and civil proceedings are mutually exclusive. The foregoing discussion demonstrates two broad policy concerns. The first is the prospect of double punishment, which would arise where a defendant is subjected to both a criminal sanction and a civil penalty in respect of the same conduct. The maxim *nemo debet bis vexari pro eadem causa* ('no one should be harassed twice for the same cause') has as much relevance in connection with duplication of remedies as it does with duplication of causes of action, discussed above. The second broad policy concern (implicit in the High Court's decision in *Gray* and touched on by the New Zealand Court of Appeal in *Daniels*) is the issue of civil courts essentially second-guessing the determination of the appropriate penalty in criminal proceedings. In other words, if the criminal court has assessed all the circumstances and determined the appropriate outcome (eg substantial punishment, some lesser punishment or no punishment at all), the award of civil penalties amounts to a redetermination of that judgment. It is these broad policy concerns that are thought to justify relationships of mutual exclusivity between these categories of remedies.

¹⁰⁷⁰ [2006] NSWCA 338, [63].

¹⁰⁷¹ *Ibid*.

¹⁰⁷² See eg *Whitbread v Rail Corporation New South Wales* [2011] NSWCA 130, although Whealy JA accepted the trial judge's assessment that exemplary damages were not otherwise appropriate (at [251]). See also *Cheng v Farjudi* (2016) 93 NSWLR 95, which considered the availability of exemplary damages where the defendant was found guilty but no conviction was recorded.

3 Preference for alternative mechanisms

A further reflection of the *mutually exclusive* dynamic can be seen in the court's refusal to intervene in circumstances where an alternative avenue is available. In some circumstances, this may be reflected in the preference for certain causes of action over others. For example, the court may not be willing to afford relief via judicial review proceedings in circumstances where a right of appeal could have been exercised, or where an appeal remains to be determined.¹⁰⁷³ In other circumstances, this approach is evident in the preference for certain types of remedies over others. So, for instance, the writ of mandamus is sometimes described as a 'remedy of last resort'.¹⁰⁷⁴ While not applied in a literal sense by the courts,¹⁰⁷⁵ this may see preference afforded to a civil action for damages over an application for mandamus to compel a duty for the expenditure of public funds.¹⁰⁷⁶ Where the courts utilise their discretion to refuse relief in this way, this has the effect of privileging certain causes of action or remedies over others, supporting a *mutually exclusive* approach that prevents remedies from overlapping with one another.

C STAGED MECHANISMS

A *staged* accountability relationship is one in which mechanisms are precluded from operating simultaneously, with the effect that one stands as a precondition to another. There are a number of features of the hypothetical accountability system that reflect this type of dynamic. The two considered here are the now-defunct 'felonious tort rule' and the court's power to stay one set of proceedings pending resolution of another.¹⁰⁷⁷

¹⁰⁷³ *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 153 [10]. See further Aronson, Groves and Weeks, above n 629, 1023–26.

¹⁰⁷⁴ Aronson, Groves and Weeks, above n 629, 1026.

¹⁰⁷⁵ *Ibid* 1026–27.

¹⁰⁷⁶ Enid Campbell, 'Private Claims on Public Funds' (1969) 3 *University of Tasmania Law Review* 138, 148; Enid Campbell, 'Enforcement of Public Duties Which Are Impossible to Perform' (2003) 10 *Australian Journal of Administrative Law* 201, 205–06; Aronson, Groves and Weeks, above n 629, 1026–27.

¹⁰⁷⁷ For an excellent analysis of the development of these principles in the English context, see Matthew Dyson, 'The Timing of Tortious and Criminal Actions for the Same Wrong' (2012) 71 *Cambridge Law Journal* 86.

1 The 'felonious tort rule'

One legal rule that previously had the effect of creating a 'staged' relationship between causes of action was the so-called 'felonious tort rule'. As stated in *Smith v Selwyn*, the rule provided that

a plaintiff against whom a felony has been committed by the defendant cannot make the felony the foundation of a cause of action unless the defendant has been prosecuted or a reasonable excuse has been shewn for his not having been prosecuted.¹⁰⁷⁸

Its effect, therefore, was that criminal proceedings would take priority as the first 'stage' in a staged accountability relationship between criminal and civil proceedings, preventing the latter from going ahead unless a criminal prosecution had been finalised or its failure otherwise explained.¹⁰⁷⁹ The rule applied to restrict the ability of a tortfeasor to bring proceedings against a party who had committed a felony against them.¹⁰⁸⁰

The rationale for the felonious tort rule is said to originally lie in the historical English practice of forfeiture, which saw all property of convicted felons forfeited to the Crown.¹⁰⁸¹ To allow civil claims to precede criminal prosecution, therefore, would have resulted in a plaintiff taking financial priority over the Crown in respect of that property. If that was the only explanation for the rule, it ought to have been abolished along with forfeiture in 1870. The continuation of the felonious tort rule after that date is said to be justified by the public policy rationale that plaintiffs ought to be encouraged to prosecute crimes in the public interest in priority over their own interests.¹⁰⁸² As put in *Wickham v Gatril*:

The reason of the rule is that persons who have been defrauded by felonious acts should do their duty to the public by prosecuting for the felony before they seek redress for the private injury done to themselves.¹⁰⁸³

In this respect, the felonious tort rule may be viewed as bolstering the role of private prosecution discussed in Chapter 6. If private prosecution serves as an important

¹⁰⁷⁸ [1914] 3 KB 98, 106.

¹⁰⁷⁹ Pannam cites as examples of reasonable excuse a police refusal to prosecute after a full investigation, or an unreasonable delay in prosecution by police: Clifford Pannam, 'Felonious Tort Rule' (1965) 39 *Australian Law Journal* 164, 166.

¹⁰⁸⁰ The rule therefore had no application to misdemeanours, or in circumstances where civil proceedings were commenced against the felon's employer or principal: *ibid* 165–66.

¹⁰⁸¹ *Ibid* 166; Dyson, above n 1077, 106.

¹⁰⁸² Pannam, above n 1079, 168; Dyson, above n 1077, 106.

¹⁰⁸³ (1854) 65 ER 433, 435, cited in Pannam, above n 1079, 168.

‘constitutional safeguard’,¹⁰⁸⁴ allowing individual members of the public to enforce breaches of public power, a requirement that those members of the public prioritise criminal proceedings over their own redress may then be viewed as underpinning that safeguard.

Whatever the origins or rationale of the felonious tort rule, it no longer holds sway in Australia. In *Caesar v Sommer*, Needham J reached the view that ‘it would be wrong to regard the rule ... as a rule of law applying in New South Wales today’, with the foundation on which it rested having ‘completely disappeared’.¹⁰⁸⁵ In *McMahon v Gould*, Wootten J expressed sympathy for this view, as well as a desire that ‘the rule will stay buried, so that its ghost does not again rise to rattle medieval chains (albeit refurbished in Victorian times) in modern litigation’.¹⁰⁸⁶ Accordingly, this rule no longer operates to create a rigidly staged relationship between criminal and civil proceedings traversing the same offence. However, a more modern and flexible iteration of the rule is evident in the court’s power to stay proceedings.

2 The court’s inherent power to stay proceedings

Another way in which causes of action can operate in a *staged* manner is through the stay of one set of proceedings until resolution of another.¹⁰⁸⁷ As noted above,¹⁰⁸⁸ the court’s power to prevent abuse of process can operate to create a *mutually exclusive* dynamic, by preventing a later set of proceedings from traversing the same ground as earlier proceedings (for example, precluding prosecution of a perjury charge that would contradict an acquittal at the original trial). However, the court’s power to stay proceedings is also capable of creating a *staged* relationship between two causes of action.¹⁰⁸⁹ For instance, where both criminal and civil proceedings have been commenced (or where criminal proceedings are ‘on the cards’),¹⁰⁹⁰ the defendant may apply for a stay of the civil proceedings pending resolution of the criminal proceedings.

¹⁰⁸⁴ *Gouriet v Union of Post Office Workers* [1978] AC 435, 97.

¹⁰⁸⁵ [1980] 2 NSWLR 929, 931.

¹⁰⁸⁶ (1982) 7 ACLR 202, 205 (Wootten J).

¹⁰⁸⁷ See eg Dyson, above n 1077.

¹⁰⁸⁸ See page 266 above.

¹⁰⁸⁹ In some circumstances, statutory provisions have the effect of creating an automatic stay: see eg *Corporations Act 2001* (Cth) s 1317N.

¹⁰⁹⁰ *Citation Resources Ltd v Landau* (2016) 116 ACSR 410, 423 [49].

Chapter 7: Analysing the Hypothetical System

If awarded, this has the effect of making the completion of the criminal proceedings a precondition of the subsequent proceedings, thereby staging the causes of action.

Unlike the felonious tort rule, the court's power to stay proceedings is inherently discretionary, rather than operating as a blanket rule. Further, while the felonious tort rule operated to the benefit of the defendant, the exercise of the discretion to award a stay is tipped somewhat in favour of the plaintiff. In *McMahon v Gould*, Wootten J identified a range of matters relevant to the exercise of the discretion.¹⁰⁹¹ Relevantly, these include that the defendant has no prima facie entitlement to a stay of civil proceedings simply by reason of pending or possible criminal proceedings. Instead, the position is that the plaintiff is entitled to have their case heard in the ordinary course, with the defendant bearing the burden of justifying the 'grave' interference with that entitlement. Matters that might justify such an interference could include that the concurrent hearing of civil and criminal proceedings might undermine the defendant's 'right of silence',¹⁰⁹² or impose too great a burden to allow the defendant to adequately defend both proceedings.¹⁰⁹³ Therefore, if there are good reasons to do so, the court may exercise its discretion to put in place a *staged* dynamic between two causes of action, allowing one to be resolved before the other can be entertained. However, the burden is on the party seeking the stay to establish that such a course is necessary in the circumstances of the case, and there is no prima facie reason why civil proceedings cannot be determined before criminal proceedings traversing the same subject matter.¹⁰⁹⁴

D INTERDEPENDENT CAUSES OF ACTION

The fourth type of accountability relationship dynamic explored in this thesis is that of *interdependence*. This type of relationship might be evidenced, for example, where the mechanisms comprising the system are intertwined with one another, enjoying an almost symbiotic relationship. It is possible to see this style of dynamic in a number of

¹⁰⁹¹ (1982) 7 ACLR 202, 206–07.

¹⁰⁹² Note that later authorities raise concerns about the weight Wootten J affords the privilege against self-incrimination (see eg *Websyte Corporation Pty Ltd v Alexander [No 2]* [2012] FCA 562, [109]–[116]).

¹⁰⁹³ *McMahon v Gould* (1982) 7 ACLR 202, 206 (Wootten J).

¹⁰⁹⁴ See eg *Niven v SS* [2006] NSWCA 338.

aspects of the hypothetical accountability system. For instance, in circumstances where collateral challenge is available, a plaintiff can use one cause of action for the purposes of pursuing what might have been achieved in another. It is also possible to see this dynamic in certain categories of remedies that are available only in tandem with others.

1 Collateral challenge

One important rule that confines the interdependence of causes of action within the hypothetical accountability system is that of collateral challenge. As explained in *Ousley v The Queen*:

A collateral attack on an act or decision occurs when an act or decision is challenged in proceedings whose primary object is not the setting aside or modification of the decision ... [I]t occurs in proceedings where the validity of the administrative act is merely an incident in determining other issues.¹⁰⁹⁵

There are numerous examples of circumstances in which collateral challenge may be relevant.¹⁰⁹⁶ For instance, a successful defence to a criminal prosecution might depend on a challenge to the validity of the instrument that creates the offence, or a successful tort claim might depend on establishing the invalidity of the statutory instrument that might otherwise have authorised the tortious conduct. The validity point might have been raised directly by way of judicial review proceedings, but might also be attacked collaterally in the relevant criminal or tort proceedings. The reason we can consider this an example of an *interdependent* relationship is that one cause of action is being used to achieve indirectly a result that could have been achieved directly through use of another. There are, therefore, symbiotic features to the relationship between the two causes of action, with a finding in one by its nature resolving a question that might have been raised in the other.

The foundation of collateral challenge to administrative decisions has a long lineage. Indeed, prior to the development of specialised judicial review remedies, actions in tort were the primary (and not merely secondary) vehicle for challenging the legality of government actions.¹⁰⁹⁷ Following the rise of modern administrative law,

¹⁰⁹⁵ (1997) 192 CLR 69, 98–99.

¹⁰⁹⁶ See eg Roger Douglas, 'Collateral Attacks on Administrative Decisions: Anomalous but Efficient' (2006) 51 *AIAL Forum* 71, 71–72.

¹⁰⁹⁷ *A v New South Wales* (2007) 230 CLR 500, 532 [94]. See also Rubinstein, above n 644, 2.

Chapter 7: Analysing the Hypothetical System

however, there has been a concomitant rise in discomfort with the notion of public law issues being challenged and resolved as a subset of other causes of action. A number of the policy concerns that weigh against allowing a collateral challenge are implicit in the list of criteria that Besanko J identified in *Jacobs v OneSteel Manufacturing Pty Ltd*:

1. Are the grounds of challenge likely to involve the adducing of substantial evidence?
2. If a collateral challenge is permitted, will all proper parties be heard before the court or tribunal in which the collateral challenge is to be heard?
3. In the particular case, does the allowing of a collateral challenge by-pass the protective mechanisms associated with judicial review proceedings such as the rules as to standing, delay and other discretionary considerations?
4. Is there a statutory provision that bears in one way or another on the question of whether a collateral challenge should be permitted?
5. Is the issue raised by the collateral challenge clearly answered by authority?
6. Are there other cases pending which raise the same issue?
7. (Possibly) Is there a more appropriate forum in terms of expertise and perhaps court procedures such that a collateral challenge should not be permitted?¹⁰⁹⁸

These criteria reflect concerns that civil or criminal proceedings might not be the most appropriate vehicle to challenge the validity of a decision or instrument given the capacity of the tribunal to determine the challenge, potential discrepancies between the identity of the parties to the challenge and knock-on effects for other cases. Against these concerns can be weighed the attraction of dealing with all relevant matters in one set of proceedings rather than creating a fragmented collection of claims with potentially contradictory outcomes.¹⁰⁹⁹

Returning to the present analysis, the availability of collateral challenge would be a critical factor influencing the extent to which we can describe the causes of action comprising the hypothetical accountability system as *interdependent*. An example that illustrates this degree of interdependency and potential implications is the case of *Soh v Commonwealth*.¹¹⁰⁰ In this case, the plaintiff was an unlawful non-citizen being detained at an immigration detention centre, who was transferred to a New South Wales prison for a period of almost nine months following his involvement in incidents at the detention centre. The claim rested on the alleged unlawfulness of the decision to

¹⁰⁹⁸ (2006) 93 SASR 568, 594 [93].

¹⁰⁹⁹ The nature of these concerns is considered in *Director of Housing v Sudi* (2011) 33 VR 559, 601–02.

¹¹⁰⁰ (2008) 220 FCR 127.

Accountability Deficits and Overloads: A Missing Framework

transfer Mr Soh to prison, including (relevantly) on the ground that he had been denied procedural fairness. In this sense, the plaintiff sought, in one set of proceedings, a determination of the legality of the decision to transfer him to prison (a judicial review determination) as well as damages in tort. In deciding the case, Madgwick J accepted that there had been a denial of procedural fairness.¹¹⁰¹ However, this finding did not automatically translate into a finding of illegality for the purposes of the tort of false imprisonment:

It seems to me that, in the present case, where illegality of the decision is sought to be made a sword in an action for damages, a denial of natural justice will not of itself invalidate the applicant's detention ... unless I make a formal declaration to that effect.¹¹⁰²

Liability for false imprisonment was therefore conditioned on Madgwick J's discretion to make a declaration of invalidity, which His Honour declined to exercise given Mr Soh's lengthy delay in seeking relief.¹¹⁰³ On this basis, Mr Soh was unable to make good his claim that his imprisonment was 'unlawful' for the purposes of his false imprisonment claim.¹¹⁰⁴ This case demonstrates the role that collateral attack may play in facilitating a relationship of *interdependence* between the causes of action in the accountability system, as a single case encompassed determination of issues relevant to separate causes of action. It is possible to observe a similar interplay between judicial review and the tort of misfeasance in public office, which requires that an act be 'invalid or unauthorised',¹¹⁰⁵ understood to include circumstances where 'the purported exercise of the power has miscarried by reason of some matter which warrants judicial review and a setting aside of the administrative action'.¹¹⁰⁶

2 Interdependent remedies

It is also possible to see a degree of interdependence between the remedies available in the various causes of action in the hypothetical accountability system. It was noted above that, in some instances, remedies may be *mutually exclusive*.¹¹⁰⁷ So, for instance,

¹¹⁰¹ Ibid 147 [97]–[98].

¹¹⁰² Ibid 148 [101].

¹¹⁰³ Ibid 148 [102].

¹¹⁰⁴ Ibid 149 [103].

¹¹⁰⁵ *Northern Territory v Mengel* (1995) 185 CLR 307, 370 (Deane J).

¹¹⁰⁶ Ibid 356.

¹¹⁰⁷ See page 272 above.

Chapter 7: Analysing the Hypothetical System

it is not possible to obtain exemplary damages in circumstances where a defendant has already been the subject of substantial punishment via an alternative accountability mechanism.¹¹⁰⁸ However, there are also ways in which the remedies within the system are *interdependent* upon one another. One of the best examples of this is the relationship between punitive and compensatory damages. In causes of action in which proof of loss and damage is an essential element of the claim, exemplary damages are viewed as an extension of (and therefore dependent on the availability of) compensatory damages. In *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd*, Brennan J put the position as follows:

Exemplary damages are parasitic on compensatory damages ... A single cause of action provides the foundation of a judgment awarding, in an appropriate case, exemplary damages as well as compensatory damages. When a plaintiff's claim for compensatory damages has been satisfied in full, however, he no longer has a cause of action that can support an award of compensatory damages to which an award of exemplary damages can attach.¹¹⁰⁹

Two principles flow from this view. First, because exemplary damages are viewed as an extension of compensatory damages, the size of the award will be determined by reference to the relief granted by the compensatory award. In other words, the court considers whether the compensatory award is insufficient to perform the functions of the punitive award before extending the scope of damages awarded.¹¹¹⁰ Secondly, because exemplary damages are unavailable if the claim for compensatory damages fully satisfies the plaintiff's claim, it follows that exemplary damages cannot be available if the claim for compensatory damages was unsuccessful: 'If there is no host, there can not be a parasite'.¹¹¹¹ Therefore, in cases where damage is an essential element of the cause of action (which is the case for the tort of misfeasance in public office),¹¹¹² we can treat the remedies as *interdependent* upon one another.

¹¹⁰⁸ *Gray v Motor Accident Commission* (1998) 196 CLR 1, 14 [40].

¹¹⁰⁹ (1985) 155 CLR 448, 468–69.

¹¹¹⁰ *Rookes v Barnard* [1964] AC 1129, 1227–28; *Amalgamated Television Services Pty Ltd v Marsden [No 2]* (2003) 57 NSWLR 338.

¹¹¹¹ *Fatimi Pty Ltd v Bryant* (2004) 59 NSWLR 678, 690 [73].

¹¹¹² *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395.

E CO-OPERATIVE CAUSES OF ACTION

The final type of relationship dynamic discussed in Chapter 5 was that of *co-operative* mechanisms, being those that share resources and work together in pursuit of their purposes. A good example of this style of dynamic within the hypothetical accountability system can be seen in the rules that govern the admissibility in one proceeding of evidence of findings in another. So, for instance, if a public official is convicted of the offence of misconduct in public office on the basis of evidence that they exercised their powers with malice, can that conviction be used in later civil proceedings so as to prove that the officer acted maliciously for the purposes of establishing the misfeasance tort? If that conviction is admissible in those later tort proceedings, we might say that the two causes of action operate in a *co-operative* manner.

The first issue to grapple with in this context is that of identity of parties. If the parties to both the original and later proceedings are the same (which in the above example may be theoretically possible if the criminal offence was prosecuted privately), there will be issues of estoppel by record to grapple with, as discussed above.¹¹¹³ So, for instance, a defendant in later proceedings may be estopped from denying issues successfully proved by that same plaintiff/prosecutor in earlier proceedings. However, if the parties to the proceedings differ (ie if the criminal offence is prosecuted by the Director of Public Prosecutions), principles of *res judicata* and issue estoppel will have no role to play. In such a case, can the plaintiff in the tort claim rely on the criminal conviction to reduce their evidential burden in proving malice? At common law, the answer is no. While an earlier judgment may be admissible to confirm the outcome of a case, the rule in *Hollington v Hewthorn* prohibits the admission of a judgment as proof of the underlying facts. So, for instance, while a judgment may be admitted to prove the fact that an accused was convicted of the offence of misconduct in public office, the conviction cannot be relied on as proof that the accused acted with malice (even if that finding was an essential ingredient leading to the conviction). As exemplified in *Hollington v Hewthorn* itself, a driver's careless driving conviction was inadmissible in later civil proceedings to establish negligence.¹¹¹⁴ The rule has been the subject of

¹¹¹³ See discussion at page 264 and following.

¹¹¹⁴ *Hollington v F Hewthorn & Co Ltd* [1943] KB 587.

Chapter 7: Analysing the Hypothetical System

significant criticism, including on the grounds that it excludes highly probative evidence, adds time and cost to litigation, and increases the chances of producing judgments that are inconsistent with one another.¹¹¹⁵ Accordingly, the Australian Law Reform Commission recommended altering the rule so as to allow the admission of evidence of a criminal conviction against that person in later civil proceedings.¹¹¹⁶ This recommendation was adopted in the drafting of the Uniform Evidence Law, as reflected in section 92(2) of the *Evidence Act 1995* (Cth) and equivalent state legislation.¹¹¹⁷

But what of the converse position, where a party in criminal proceedings seeks to adduce evidence of an earlier civil judgment? The ALRC thought that these circumstances ought to be treated differently to those described above, as a civil judgment is of ‘considerably less’ probative weight than a criminal conviction.¹¹¹⁸ One reason for this was the lower burden of proof employed in civil proceedings. Another was that the parties in civil proceedings play a far greater role in confining the evidence that is produced to the court. Bearing these matters in mind, the ALRC reached the view that ‘[t]he disadvantages of admitting evidence of a civil judgment (the potential for waste of time and costs in investigating the judgment, and the greater likelihood of challenge to the evidence) outweigh the minimal probative value of the evidence’.¹¹¹⁹ Again, a number of jurisdictions have taken up this recommendation,¹¹²⁰ with the result that civil judgments cannot be adduced in criminal proceedings.

¹¹¹⁵ See Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985) 441. See also Heydon, above n 1006, 283.

¹¹¹⁶ Australian Law Reform Commission, *Evidence*, (1985)442.

¹¹¹⁷ *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic); *Evidence Act 2011* (ACT); *Evidence (National Uniform Legislation) Act 2011* (NT). Note, however, that the production of a certificate recording the conviction provided under s 178 does not operate so as to provide evidence of the facts underlying the conviction: *Chevalley v Industrial Court (NSW)* (2011) 82 NSWLR 634, 650–51 [58]. The position differs in South Australia, Queensland and Western Australia.

¹¹¹⁸ Australian Law Reform Commission, *Evidence*, (1985), 445.

¹¹¹⁹ *Ibid*, cited with approval in *Roberts v Western Australia* (2005) 29 WAR 445, 470 [148].

¹¹²⁰ The standard position is as reflected in s 91 of the *Evidence Act 1995* (Cth) and state and territory equivalents: *Evidence Act 1995* (NSW), *Evidence Act 2001* (Tas), *Evidence Act 2008* (Vic), *Evidence Act 2011* (ACT), *Evidence (National Uniform Legislation) Act 2011* (NT).

F SUMMARY: HOW DOES THE SYSTEM OPERATE?

This chapter has outlined a number of the legal rules and doctrines that affect the nature of the relationship between the various causes of action comprising the hypothetical accountability system. In simple terms, it is possible to think of each of the causes of action as *independent*, in the sense that the same conduct by a public official might give rise to judicial review proceedings, criminal and tortious liability, which might in theory be available simultaneously. However, various legal principles operate to affect the degree of this independence, fostering alternative dynamics in a range of cases. For instance, in circumstances where estoppel by record operates or the court exercises its inherent jurisdiction to permanently stay proceedings for abuse of process, causes of action will become *mutually exclusive*. A *staged* dynamic may come into play where the court exercises its power to stay civil proceedings pending resolution of criminal proceedings. Where a collateral attack is permitted, we can observe a degree of *interdependence* between the causes of action. Finally, where evidence of one proceeding is admissible in another, we can observe a *co-operative* dynamic in play. The complexity of the system may give rise to a wide variety of possible outcomes in a given case, which is only exacerbated by the fact that, in many cases, the operation of these rules is a matter of judicial discretion or may turn on tactical or co-incidental matters, such as which cause of action is brought first in time.

The degree of this complexity is illustrated by the case of *Niven v SS*.¹¹²¹ The respondent, SS, had filed civil proceedings in 2004 relating to historical sexual assaults allegedly committed against him by the appellant. The following year, the appellant was charged with a number of criminal offences relating to that same conduct. The accused sought a stay of the civil proceedings pending resolution of the criminal proceedings, urging that the civil proceedings would allow the plaintiff the opportunity to ‘rehearse’ his evidence before the criminal trial, and that requiring him to give evidence in the civil proceedings would prejudice his ‘right to silence’ in the criminal proceedings.¹¹²²

¹¹²¹ [2006] NSWCA 338.

¹¹²² *Ibid* [10].

Chapter 7: Analysing the Hypothetical System

The trial judge declined to exercise his discretion to award the stay¹¹²³ and the civil proceedings went ahead accordingly. The trial judge found in favour of the plaintiff in those civil proceedings, awarding both compensatory and exemplary damages. The criminal proceedings were heard almost a year later, resulting in the defendant's acquittal on all charges.¹¹²⁴ Thus, the plaintiff successfully obtained compensatory and exemplary damages in the civil claim almost one year prior to the defendant's acquittal of 'relevantly identical'¹¹²⁵ criminal charges.

This case gives us reason to explore overlapping categories of accountability dynamics. First, the court considered whether the civil proceedings ought to have been stayed pending resolution of the criminal proceedings (ie should the proceedings be *staged*)? Secondly, the court considered whether exemplary damages could properly be available in civil proceedings in circumstances where the defendant has been (or might be) acquitted of criminal charges (ie should the remedies be *mutually exclusive*)? If these questions were answered in the negative, the causes of action might then be characterised as *independent*. The judgment of Tobias JA notes in passing a number of the policy considerations that underpin the staged and mutually exclusive dynamics that have been touched on in this chapter. For instance, in considering whether the trial judge erred in refusing to stay the civil proceedings, His Honour referred to the 'primacy ... to be accorded to the administration of the criminal law'.¹¹²⁶ Further, in discussing the availability of exemplary damages, His Honour referred to the prospect of 'double punishment' of the accused.¹¹²⁷ Ultimately, however, His Honour found that there had been no error made by the trial judge either in refusing the stay¹¹²⁸ or in awarding exemplary damages.¹¹²⁹ In so doing, it appears that His Honour had in mind a further policy consideration, being the possibility of the creation of inconsistent judgments in both proceedings. In dismissing this concern, Tobias JA noted:

[T]he High Court in *Grey* [sic] left open the position that might arise if relevant criminal

¹¹²³ See *ibid* [11].

¹¹²⁴ The appellant sought to admit evidence of his acquittal of criminal charges in the appeal against the civil judgment: *ibid* [15].

¹¹²⁵ *Ibid* [6].

¹¹²⁶ *Ibid* [36].

¹¹²⁷ *Ibid* [63].

¹¹²⁸ *Ibid* [36].

¹¹²⁹ *Ibid* [66].

Accountability Deficits and Overloads: A Missing Framework

proceedings ended in the accused's acquittal prior to the hearing and determination of the civil proceedings for the same conduct. In such an event it would be difficult to suggest the whole of the plaintiff's action including a claim for exemplary damages should be struck out given the differences, particularly with respect to the standard of proof, between a criminal and a civil trial. In my opinion, the position is a fortiori where the acquittal occurs after the conclusion of the civil trial.¹¹³⁰

The outcome in this case provides a useful illustration of the complexity of the relationships between the various causes of action constituting the hypothetical accountability system and of the difficult policy choices that influence the exercise of judicial discretion to favour one style of relationship dynamic over another.

In conclusion, the aim of this chapter has been to demonstrate that, in looking for accountability 'deficits' and 'overloads', it is absolutely critical to approach the assessment with an appreciation of the manner in which relevant accountability mechanisms interrelate with one another. To argue, for example, that the lack of restorative remedies in judicial review proceedings represents an accountability gap (ie because there is no restoration following a successful judicial review claim) leaves completely unaddressed the question of whether the same conduct might give rise to an independent proceeding in tort. Similarly, to argue that the availability of exemplary damages in tort and criminal proceedings represents an accountability overload (ie because an official might be punished both via criminal law and tort proceedings) completely ignores the extent to which legal rules operate to create relationships of mutual exclusivity between the remedies available in these proceedings. In order to develop a complete picture of the nature and degree of accountability deficits and overloads within the accountability system, an understanding of the relationship dynamics inherent within the system is fundamental.

¹¹³⁰ Ibid [62].

Conclusion

CONCLUSION

If accountability is indeed a ‘golden concept that no one can be against’,¹¹³¹ and that operates to support the legitimacy of government, it is of little surprise that the identification of accountability deficits has proved a popular topic in academic discourse over the past few decades. And if increases in accountability are thought capable of influencing government conduct to the extent envisaged by those on the hunt for accountability deficits, it is little wonder that calls for increased accountability have given rise to a new breed of concerns about accountability overloads. What this thesis has made clear is that there remains much work to be done in giving shape to these concepts if they are to be meaningful beyond a rhetorical call for change. If accountability is a contested and contestable concept, articulating shortfalls and excesses in that concept is even more so.

This thesis has argued that there are two core areas in which we must invest our efforts in order to take the concepts of accountability deficit and overload out of the realm of rhetoric. First, it is necessary to define a ‘benchmark’ of accountability. This benchmark would articulate, for the first time, what an ‘ideal amount’ of accountability would look like. On so doing, it would then be possible to utilise that benchmark to measure a given mechanism and to identify areas in which it falls short of expectations (giving rise to a potential accountability deficit), and areas in which it overperforms against expectations (giving rise to a potential accountability overload). It would be necessary to transform the mechanistic descriptions of accountability (ie who is accountable to whom, for what, and how?) into a normative benchmark (ie who *ought* to be accountable to whom, for what, and how?). This would require us not only to come to a landing on the underlying rationale(s) for accountability, which may encompass transparency, control, restoration, desert and deterrence, but also to consider the best means to achieve those ends. As outlined in Chapter 4, there are serious questions as to whether this is an achievable feat, as it raises many complex questions around the proper conception of government and what it means to hold that government to account. And if we admit that accountability may encompass a number

¹¹³¹ Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’, above n 8, 448.

Conclusion

of rationales, the shape of the benchmark thereby produced would be complex, with evident tensions between those various rationales.

Assuming that it were possible to define such a complex benchmark with the necessary degree of specificity, we would then be able to utilise that benchmark to assess the performance of a given mechanism. This, however, leads to the second core area requiring further attention; mapping out accountability mechanisms as a system. Chapter 5 of this thesis has argued that mechanisms within an accountability system encompass a variety of characteristic features and relationship dynamics. This means it is possible to view the various mechanisms as forming a delicate balance in terms of their degree of accessibility, cost, flexibility, coerciveness, autonomy, independence and permanence. It would be a mistake to focus on one of these areas as producing an accountability deficit (eg that the ombudsman lacks coercive powers), without appreciating that this limitation may be balanced out by a concomitant feature of another mechanism (eg the coercive powers of the courts). Further, it is necessary to appreciate the nature of the relationships between mechanisms in order to make a claim of accountability deficit or overload. So, for instance, it would be a mistake to focus on the fact that ex gratia compensation is available only pursuant to a highly discretionary and opaque regime without appreciating that this mechanism plays only a residual role within the accountability system. Likewise, it would be a mistake to point to the fact that an individual is subject to numerous accountability mechanisms as a potential area of accountability overload (eg the same conduct may be the subject of a parliamentary enquiry, investigation by an ombudsman and tort proceedings) without appreciating the extent to which these mechanisms are staged, or are mutually exclusive of one another.

In order to demonstrate the utility of investing further time and energy in pursuit of these two goals (namely, articulating an accountability benchmark and mapping out the dynamics in our accountability system), Part III of this thesis was framed as a hypothetical. It firstly adopted a hypothetical benchmark of accountability, which provided assumed answers to each of the accountability questions across the various rationales considered in this thesis. It secondly adopted a hypothetical accountability system—namely, the judicial causes of action comprising common law judicial review,

the tort of misfeasance in public office, and the criminal offence of misconduct in public office. This hypothetical analysis provided a foundation to draw a number of tentative conclusions about the task of identifying accountability deficits and overloads.

First, the hypothetical reinforced the point made in Chapter 4, namely, the degree of difficulty involved in crafting a benchmark of accountability. The hypothetical benchmark adopted for the purposes of Part III of this thesis purported to offer an answer to each of the various questions of *who* should be accountable *to whom* and so on for the purposes of the various rationales of accountability. So, for example, the hypothetical benchmark indicated that the control rationale would be relevant to contain the 'unlawful' exercise of public power, and the restoration rationale would be relevant to repair 'harm'. However, in order to apply this benchmark in practice, it would be necessary to drill further into these high-level labels and to specify the content of unlawfulness, harm, and so on. Unless we can describe a benchmark of accountability in sufficiently detailed terms, its application for the purposes of identifying potential accountability deficits and overloads produces more questions than it offers answers.

Secondly, the hypothetical has demonstrated that if it is possible to define a benchmark of accountability with sufficient specificity, it may indeed be possible to use that benchmark to assess the performance of a given mechanism and to identify potential areas of accountability deficit and overload. So, for instance, in areas where the hypothetical benchmark was sufficiently specific (eg in requiring that a control-oriented mechanism apply to those who are charged with the exercise of public power), the benchmark was able to reveal potential areas of deficit (eg the limited reach of judicial review to outsourced public powers).

Thirdly, if we adopt a variety of (potentially competing) rationales for accountability, we must in turn accept that accountability must be supported via a range of mechanisms. If we insist on multiple accountability functions being served by a single mechanism, we will find that our mechanism is internally conflicted, failing to perform any function to the degree anticipated by the benchmark. For example, this thesis has demonstrated that the rationales of restoration and desert will in many cases pull in different directions. As evidenced in the analysis of the tort of misfeasance in public office, assigning multiple competing rationales prevents that cause of action from

Conclusion

meeting the lofty expectations of either the restoration or desert aspects of the benchmark.

Fourthly (and related to the third point), if we accept that accountability functions are to be distributed between multiple mechanisms, there is little sense in looking at a single mechanism and measuring it against the benchmark as a whole. Chapter 6 of this thesis would have been a dull affair were each mechanism taken on its own and measured against *all* aspects of the hypothetical benchmark. For example, it would have been nonsensical to take the mechanism of judicial review and point out all the various ways in which it failed to measure up to the desert rationale. Instead, each mechanism was assessed by reference to its purported remedial contribution to the benchmark (for judicial review, the control aspect).

Fifthly, any conclusions drawn in the analysis of a single mechanism can only ever stand as a tentative conclusion as to the potential presence of accountability deficits and overloads. For instance, potential accountability deficits were identified in looking at the tort of misfeasance in public office, including on the basis that the tort limits reparative remedies to cases where the agent had acted intentionally or recklessly, in contrast to the benchmark requirement that reparative remedies be made available for harm caused by unlawful conduct *per se*. However, it is not possible to reach a firm view about whether this is, in fact, an accountability deficit without appreciating the extent to which this tort fits into the wider accountability system. If another mechanism exists to provide a reparative remedy for loss caused by *ultra vires* conduct *per se*, for example, there is no deficit in limiting remedies to intentionally caused loss for the purposes of this tort. We can only make that judgment by locating the tort within the broader accountability system.

Sixthly, it is only possible to appreciate whether there are accountability deficits and overloads at a systemic level by looking at that system as a whole. Without looking at the hypothetical system as a whole, it was not possible to conclude that the deterrence rationale (as framed in this thesis) was unsupported by any of the accountability mechanisms under analysis. Likewise, it was not possible to say that there was a potential accountability overload due to the availability of punitive sanctions pursuant to each of the tort of misfeasance in public office and the criminal

Accountability Deficits and Overloads: A Missing Framework

offence of misconduct in public office. This only became apparent following the analysis of individual mechanisms on standing back to look at the system as a whole.

Finally, it is not possible to appreciate whether potential gaps and overlaps identified in the system are *in fact* accountability deficits and overloads without engaging in a critical analysis of the manner in which the system works together as a whole. Chapter 7 demonstrated that some of the potential sources of concern arising out of Chapter 6 (eg the availability of punitive sanctions in both tort and criminal law) are ameliorated on a systemic level. This was because these two causes of action and their available remedies were said to be capable of operating in a mutually exclusive or staged manner.

In summary, this thesis has demonstrated that, notwithstanding the rhetorical appeal of the concept of accountability and claims of accountability deficit and overload, much work remains to be done if we wish to give these ideas a firm foundation. The core problem, highlighted throughout this analysis, is that in order to make good a claim of either not enough, or too much, accountability, we need to be more prescriptive about what 'enough accountability' looks like. This draws us into complex normative territory and unresolved legal and philosophical debates about the nature of government and what we demand of it. These large questions are not of a kind that readily admits answers, but if there remains merit in searching for an ideal accountability balance, we must confront these issues head on.

Conclusion

BIBLIOGRAPHY

Articles/Books/Reports

- Ackerman, Bruce, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633
- Alder, John, 'Misconduct in Public Office: Modernising the Law' [2014] *Public Law* 369
- Alexander, Larry, Kimberly Kessler Ferzan and Stephen Morse, *Crime and Culpability: A Theory of Criminal Law* (Cambridge University Press, 2009)
- Allan, Alfred, 'Functional Apologies in Law' (2008) 15 *Psychiatry, Psychology and Law* 369
- Allars, Margaret, *Introduction to Australian Administrative Law* (Butterworths, 1990)
- Andenas, Mads and Duncan Fairgrieve, 'Misfeasance in Public Office, Governmental Liability, and European Influences' (2002) 51 *International and Comparative Law Quarterly* 757
- Appleby, Gabrielle, 'The Government as Litigant' (2014) 37 *University of New South Wales Law Journal* 94
- Appleby, Gabrielle, Alexander Reilly and Laura Grenfell, *Australian Public Law* (Oxford University Press, 2nd ed, 2014)
- Aronson, Mark, 'Jurisdictional Error Without the Tears' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 330
- Aronson, Mark, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35 *Melbourne University Law Review* 1
- Aronson, Mark, 'Public Law Values in the Common Law' in Mark Elliot and David Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge University Press, 2015) 134
- Aronson, Mark, 'Misfeasance in Public Office: Some Unfinished Business' (2016) 132 *Law Quarterly Review* 427
- Aronson, Mark, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017)
- Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985)

Bibliography

- Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000)
- Baer, Miriam H, 'Choosing Punishment' (2012) 92 *Boston University Law Review* 577
- Balkin, Rosalie and Jim Davis, *Law of Torts* (LexisNexis Butterworths, 5th ed, 2013)
- Bannister, Judith et al, *Government Accountability: Australian Administrative Law* (Cambridge University Press, 2015)
- Barendrecht, Maurits, 'Rule of Law, Measuring and Accountability: Problems To Be Solved Bottom Up' (2011) 3 *Hague Journal on the Rule of Law* 281
- Barker, Kit et al, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012)
- Barnard, Frederick, *Democratic Legitimacy: Plural Values and Political Power* (McGill-Queen's University Press, 2001)
- Barnett, Darrell, 'Statutory Corporations and "the Crown"' (2005) 28 *University of New South Wales Law Journal* 186
- Beaton-Wells, Caron, 'Judicial Review of Migration Decisions: Life After *S157*' (2005) 33 *Federal Law Review* 141
- Beever, Allan, 'The Structure of Aggravated and Exemplary Damages' (2003) 23 *Oxford Journal of Legal Studies* 87
- Behn, Robert D, *Rethinking Democratic Accountability* (Brookings Institution Press, 2001)
- Bittner, Thomas, 'Punishment for Criminal Attempts: A Legal Perspective on the Problem of Moral Luck' (2008) 38 *Canadian Journal of Philosophy* 51
- Black, Julia, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation and Governance* 137
- Blackstone, William, *Commentaries on the Laws of England* (Clarendon Press, 1765-9) vol 1
- Boughey, Janina and Lisa Burton Crawford, 'Reconsidering *R (on the application of Cart) v Upper Tribunal* and the Rationale for Jurisdictional Error' [2017] *Public Law* 592
- Boughey, Janina and Greg Weeks, "Officers of the Commonwealth" in the Private Sector: Can the High Court Review Outsourced Exercises of Power?' (2013) 36 *University of New South Wales Law Journal* 316
- Boughey, Janina and Greg Weeks, 'Government Accountability as a "Constitutional Value"' in Rosalind Dixon (ed), *Australian Constitutional Values* (Cambridge University Press, 2017) 99

Accountability Deficits and Overloads: A Missing Framework

Bovens, Mark, *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations* (Cambridge University Press, 1998)

Bovens, Mark, 'Public Accountability' in Ewan Ferlie, Laurence Lynn Jr and Christopher Pollitt (eds), *The Oxford Handbook of Public Management* (Oxford University Press, 2005) 182

Bovens, Mark, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 *European Law Journal* 447

Bovens, Mark, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism' (2010) 33 *West European Politics* 946

Bovens, Mark, Deirdre Curtin and Paul 't Hart, *The Real World of EU Accountability: What Deficit?* (Oxford University Press, 2010)

Bovens, Mark, Thomas Schillemans and Paul 't Hart, 'Does Public Accountability Work? An Assessment Tool' (2008) 86 *Public Administration* 225

Bovens, Mark, Thomas Schillemans and Robert Goodin, 'Public Accountability' in Mark Bovens, Robert Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014) 1

Braithwaite, John, 'On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers' (1997) 47 *University of Toronto Law Journal* 305

Braithwaite, John, 'Accountability and Responsibility Through Restorative Justice' in Michael Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press, 2006) 33

Braithwaite, John, 'Responsive Regulation and Developing Economies' (2006) 34 *World Development* 884

Brand-Ballard, Jeffrey, 'Moral Emotions and Culpability for Resultant Harm' (2011) 42 *Rutgers Law Journal* 315

Brandsma, Gijs Jan and Thomas Schillemans, 'The Accountability Cube: Measuring Accountability' (2013) 23 *Journal of Public Administration Research and Theory* 953

Brehm, Jack Williams, *A Theory of Psychological Reactance* (Academic Press, 1966)

Brennan, H Geoffrey et al, *Explaining Norms* (Oxford University Press, 2013)

Brooks, Thom, *Punishment* (Routledge, 2012)

Brown, A J, 'Putting Administrative Law Back into Integrity and Putting Integrity Back into Administrative Law' (2006) 53 *AIAL Forum* 32

Bibliography

Brown, A J, 'The Integrity Branch: A "System", an "Industry", or a Sensible Emerging Fourth Arm of Government?' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 301

Brown, L Neville and John Bell, *French Administrative Law* (Clarendon Press, 5th ed, 1998)

Campbell, Enid, 'Private Claims on Public Funds' (1969) 3 *University of Tasmania Law Review* 138

Campbell, Enid, 'Relitigation in Government Cases: A Study of the Use of Estoppel Principles in Public Law Litigation' (1994) 20 *Monash University Law Review* 21

Campbell, Enid, 'Enforcement of Public Duties Which Are Impossible to Perform' (2003) 10 *Australian Journal of Administrative Law* 201

Cane, Peter, 'Standing Up for the Public' [1995] *Public Law* 276

Cane, Peter, *An Anatomy of Tort Law* (Hart Publishing, 1997)

Cane, Peter, 'Damages in Public Law' (1999) 9 *Otago Law Review* 489

Cane, Peter, 'Mens Rea in Tort Law' (2000) 20 *Oxford Journal of Legal Studies* 533

Cane, Peter, *Responsibility in Law and Morality* (Hart Publishing, 2002)

Cane, Peter, 'Tort Law and Public Functions' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press, 2014) 148

Cane, Peter, 'Tort Law and Government Liability in the Administrative State: Revolution and Evolution' in Kit Barker et al (eds), *Private Law and Power* (Hart Publishing, 2017) 83

Cane, Peter, Leighton McDonald and Kristen Rundle, *Principles of Administrative Law* (Oxford University Press, 3rd ed, 2018)

Chamberlain, Erika, 'The Need for a "Standing" Rule in Misfeasance in a Public Office' (2007) 7 *Oxford University Commonwealth Law Journal* 215

Chamberlain, Erika, *Misfeasance in a Public Office* (Carswell, 2016)

Chen, Bruce, 'A Right to Reasons: *Osmond* in Light of Contemporary Developments in Administrative Law' (2014) 21 *Australian Journal of Administrative Law* 208

Coffee, John C Jr, "'No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79(3) *Michigan Law Review* 386

Cohen, David, 'Regulating Regulators: The Legal Environment of the State' (1990) 40 *University of Toronto Law Journal* 213

Accountability Deficits and Overloads: A Missing Framework

Commonwealth Ombudsman, *To Compensate or Not to Compensate*, Report under s 35A of the *Ombudsman Act 1976* (Cth) (1999)

Considine, Mark, 'The End of the Line? Accountable Governance in the Age of Networks, Partnerships, and Joined-up Services' (2002) 15(1) *Governance* 21

Craig, Paul, 'Compensation in Public Law' (1980) 96 *Law Quarterly Review* 413

Craig, Paul, *Administrative Law* (Sweet and Maxwell, 7th ed, 2012)

Creyke, Robin, 'An "Integrity" Branch' (2012) 70 *AIAL Forum* 33

Cugueró-Escofet, Natàlia, Marion Fortin and Miguel-Angel Canela, 'Righting the Wrong for Third Parties: How Monetary Compensation, Procedure Changes and Apologies Can Restore Justice for Observers of Injustice' (2014) 122 *Journal of Business Ethics* 253

Dahl, Robert, 'The Concept of Power' (1957) 2 *Behavioral Science* 201

Davis, Jim, 'Misfeasance in Public Office, Exemplary Damages and Vicarious Liability' (2010) 64 *AIAL Forum* 59

De Bruijn, H, 'Performance Measurement in the Public Sector: Strategies to Cope with the Risks of Performance Measurement' (2002) 15 *International Journal of Public Sector Management* 578

De Smith, S A, 'The Prerogative Writs' (1951) 11 *Cambridge Law Journal* 40

Department of Finance, *Requests for Discretionary Financial Assistance under the Public Governance, Performance and Accountability Act 2013*, Resource Management Guide No 401, April 2018

Department of Finance, *Scheme for Compensation for Detriment Caused by Defective Administration*, Resource Management Guide No 409, May 2017

Deweese, Donald, David Duff and M Trebilcock, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (Oxford University Press, 1996)

Dicey, A V, *Introduction to the Study of the Law of the Constitution* (Macmillan, 8th ed, 1915)

Dingwall, Gavin, 'Prosecutorial Policy, Double Jeopardy and the Public Interest' (2000) 63 *Modern Law Review* 268

Doecke, Alison, 'Misfeasance in Public Office: Foreseen or Foreseeable Harm' (2014) 22 *Torts Law Journal* 20

Douglas, Roger, 'Collateral Attacks on Administrative Decisions: Anomalous but Efficient' (2006) 51 *AIAL Forum* 71

Bibliography

- Douglas, Roger, 'Standing' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 158
- Dubnick, Melvin, 'Accountability and Ethics: Reconsidering the Relationships' (2003) 6 *International Journal of Organization Theory and Behavior* 405
- Dubnick, Melvin, 'Accountability and the Promise of Performance: In Search of the Mechanisms' (2005) 28 *Public Performance and Management Review* 376
- Dubnick, Melvin, 'Accountability as a Cultural Keyword' in Mark Bovens, Robert Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014) 23
- Dyson, Matthew, 'The Timing of Tortious and Criminal Actions for the Same Wrong' (2012) 71 *Cambridge Law Journal* 86
- Dyzenhaus, David and Michael Taggart, 'Reasoned Decisions and Legal Theory' in Douglas Edlin (ed), *Common Law Theory* (Cambridge University Press, 2007) 134
- Elliot, Brogan, 'The Hidden Influences That Limit Governmental Independence: Controlling the Ombudsman's Apparent Independence' (2013) 21 *Australian Journal of Administrative Law* 27
- Elliot, Mark, 'Ombudsmen, Tribunals, Inquiries: Re-fashioning Accountability Beyond the Courts' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press, 2013) 233
- Endicott, Timothy, *Administrative Law* (Oxford University Press, 2nd ed, 2011)
- Evans, Harry and Rosemary Laing (eds), *Odgers' Australian Senate Practice* (Department of the Senate, 14th ed, 2016)
- Fairgrieve, Duncan, *State Liability in Tort: A Comparative Study* (Oxford University Press, 2003)
- Feinberg, Joel, 'The Expressive Function of Punishment' (1965) 49 *The Monist* 397
- Feinberg, Joel, 'Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It' (1995) 37(1) *Arizona Law Review* 117
- Feldthusen, Bruce, 'Punitive Damages: Hard Choices and High Stakes' [1998] *New Zealand Law Review* 741
- Fenna, Alan, Jane Robbins and John Summers, *Government and Politics in Australia* (Pearson Australia, 10th ed, 2014)
- Finer, Herman, 'Better Government Personnel' (1936) 51 *Political Science Quarterly* 569

Accountability Deficits and Overloads: A Missing Framework

- Finn, PD, 'Official Misconduct' (1978) 2 *Criminal Law Journal* 307
- Fisher, Elizabeth, 'The European Union in the Age of Accountability' (2004) 24 *Oxford Journal of Legal Studies* 495
- Fisher, Elizabeth and Jeremy Kirk, 'Still Standing: An Argument for Open Standing in Australia and England' (1997) 71 *Australian Law Journal* 370
- Fletcher, George, *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial* (University of Chicago Press, 1988)
- Flinders, Matthew, 'The Future and Relevance of Accountability Studies' in Mark Bovens, Robert Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014) 661
- Franklin, Mark, Stuart Soroka and Christopher Wlezien, 'Elections' in Mark Bovens, Robert Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014) 389
- French, Chief Justice Robert, 'Administrative Law in Australia: Themes and Values Revisited' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 24
- Friedrich, Carl, *Problems of the American Public Service* (McGraw-Hill, 1935)
- Gageler, Stephen, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?' (2000) 28 *Federal Law Review* 303
- Gageler, Stephen, 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 92
- Grant, Ruth and Robert Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99(1) *American Political Science Review* 29
- Groves, Matthew, 'Outsourcing and Non-Delegable Duties' (2005) 16 *Public Law Review* 265
- Groves, Matthew, 'Outsourcing and s 75(v) of the Constitution' (2011) 22 *Public Law Review* 3
- Groves, Matthew and Greg Weeks, 'Substantive (Procedural) Review in Australia' in Hanna Wilberg and Mark Elliot (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing, 2015) 133
- Halachmi, Arie, 'Accountability Overloads' in Mark Bovens, Robert Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014) 560

Bibliography

Halligan, John, John Power and Robin Miller, 'The Three Committee Systems of the Australian Parliament—A Developmental Overview' in Paul Reynolds (ed), *Parliament 2000—Towards a Modern Committee System* (Queensland Parliamentary Library, 2001) 111

Handley, Justice K R, 'Anshun Today' (1997) 71 *Australian Law Journal* 934

Harlow, Carol, 'Damages and Human Rights' [2004] *New Zealand Law Review* 429

Harlow, Carol, *Compensation and Government Torts* (Sweet and Maxwell, 1982)

Harlow, Carol, *Accountability in the European Union* (Oxford University Press, 2002)

Harlow, Carol, 'Public Law and Popular Justice' (2002) 65 *Modern Law Review* 1

Harlow, Carol, *State Liability: Tort Law and Beyond* (Oxford University Press, 2004)

Harlow, Carol, *Understanding Tort Law* (Sweet and Maxwell, 3rd ed ed, 2005)

Harlow, Carol, 'A Punitive Role for Tort Law?' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 247

Harlow, Carol, 'Accountability as a Value in Global Governance and for Global Administrative Law' in Gordon Anthony et al (eds), *Values in Global Administrative Law* (Hart Publishing, 2011) 173

Harlow, Carol, 'Accountability and Constitutional Law' in Mark Bovens, Robert Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014) 195

Harlow, Carol and Richard Rawlings, 'Promoting Accountability in Multilevel Governance: A Network Approach' (2007) 13 *European Law Journal* 542

Hart, H L A, *The Concept of Law* (Clarendon Press, 1961)

Hart, H L A, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 2nd ed, 2008)

Hart, H L A and Tony Honoré, *Causation in the Law* (Oxford University Press, 2nd ed, 1985)

Heydon, J D, *Cross on Evidence* (LexisNexis, 10th ed, 2014)

Hogg, Peter, Patrick Monahan and Wade Wright, *Liability of the Crown* (Carswell, 4th ed, 2011)

Honoré, Tony, *Responsibility and Fault* (Hart Publishing, 1999)

Accountability Deficits and Overloads: A Missing Framework

Horder, Jeremy, *Ashworth's Principles of Criminal Law* (Oxford University Press, 8th ed, 2016)

Horder, Jeremy, *Criminal Misconduct in Office: Law and Politics* (Oxford University Press, 2018)

Hume, David, 'Of the Independency of Parliament' in Eugene F Miller (ed), *Essays, Moral, Political, and Literary* (Liberty Fund, 1987) 40

Integrity Commission, *Prosecuting Serious Misconduct in Tasmania: The Missing Link*, (October 2014)

Jackson, Michael, 'Responsibility Versus Accountability in the Friedrich-Finer Debate' (2009) 15 *Journal of Management History* 66

Jaffe, Louis, 'Standing to Secure Judicial Review: Public Actions' (1961) 74 *Harvard Law Review* 1265

Kadish, Sanford, 'Foreword: The Criminal Law and the Luck of the Draw' (1994) 84 *Journal of Criminal Law and Criminology* 679

Kelly, Janet, 'The Accountability Trap' (2007) 96(3) *National Civic Review* 46

King, Jeff, 'The Instrumental Value of Legal Accountability' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press, 2013) 124

Kinley, David, 'Governmental Accountability in Australia and the United Kingdom: A Conceptual Analysis of the Role of Non-Parliamentary Institutions and Devices' (1995) 18 *University of New South Wales Law Journal* 409

Kirby, Michael, 'Judicial Accountability in Australia' (2003) 6 *Legal Ethics* 41

Kirchengast, Tyrone, *The Victim in Criminal Law and Justice* (Palgrave Macmillan, 2006)

Koppell, Jonathan, 'Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder"' (2005) 65 *Public Administration Review* 94

Lee, H P and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2012)

Leeming, Mark, 'Standing to Seek Injunctions Against Officers of the Commonwealth' (2006) 1 *Journal of Equity* 3

Lewis, David, 'The Punishment that Leaves Something to Chance' (1989) 18 *Philosophy and Public Affairs* 53

Linden, Allen, 'Tort Law as Ombudsman' (1973) 51 *Canadian Bar Review* 155

Bibliography

- Lusty, David, 'Revival of the Common Law Offence of Misconduct in Public Office' (2014) 38 *Criminal Law Journal* 337
- Mansbridge, Jane, 'A Contingency Theory of Accountability' in Mark Bovens, Robert Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014) 55
- Mashaw, Jerry, 'Accountability and Institutional Design: Some Thoughts on the Grammar of Governance' in M Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press, 2006) 115
- McDonald, Leighton, 'The Entrenched Minimum Provision of Judicial Review and the Rule of Law' (2010) 21 *Public Law Review* 14
- McDonald, Leighton, 'Reasons, Reasonableness and Intelligible Justification in Judicial Review' (2015) 37 *Sydney Law Review* 467
- McGarrity, Nicola and George Williams, 'Recognition of Local Government in the Commonwealth Constitution' (2010) 21 *Public Law Review* 164
- McGregor, Harvey, *McGregor on Damages* (Sweet and Maxwell, 19th ed, 2014)
- McLean, Janet, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (Cambridge University Press, 2012)
- McMillan, John, 'Re-thinking the Separation of Powers' (2010) 38 *Federal Law Review* 423
- Mercurio, Bryan and George Williams, 'Australian Electoral Law: "Free and Fair"?' (2004) 32 *Federal Law Review* 365
- Mill, John Stuart, *Considerations on Representative Government* (Parker, Son, and Bourn, 1861)
- Mill, John Stuart, *On Liberty* (Cambridge University Press, 1989)
- Moore, Michael, *Placing Blame: A General Theory of the Criminal Law* (Clarendon Press, 1997)
- Moore, Michael, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (Oxford University Press, 2009)
- Moore, Michael and Heidi Hurd, 'Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence' (2011) 5 *Criminal Law and Philosophy* 147
- Mosher, Frederick C, 'The Changing Responsibilities and Tactics of the Federal Government' (1980) 40 *Public Administration Review* 541
- Mulgan, Richard, '"Accountability": An Ever-Expanding Concept?' (2000) 78 *Public Administration* 555

Accountability Deficits and Overloads: A Missing Framework

Mulgan, Richard, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave Macmillan, 2003)

Mulgan, Richard, 'One Cheer for Hierarchy—Accountability in Disjointed Governance' (2003) 55(2) *Political Science* 6

Mulgan, Richard, 'Government Accountability For Outsourced Services' (2006) 65(2) *Australian Journal of Public Administration* 48

Mulgan, Richard, 'Assessing Ministerial Responsibility in Australia' in Keith Dowding and Chris Lewis (eds), *Ministerial Careers and Accountability in the Australian Commonwealth Government* (ANU E Press, 2012) 177

Mulgan, Richard, 'Accountability Deficits' in Mark Bovens, Robert Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014) 545

Mulgan, Richard, *Making Open Government Work* (Palgrave Macmillan, 2014)

Mulgan, Richard and John Uhr, 'Accountability and Governance' in Glyn Davis and Patrick Weller (eds), *Are You Being Served? State, Citizens and Governance* (Allen and Unwin, 2001) 152

Nagel, Thomas, *Mortal Questions* (Cambridge University Press, 1979)

Nettheim, Garth, 'Open Justice Versus Justice' (1985) 9 *Adelaide Law Review* 487

Nolan, Donal, 'A Public Law Tort: Understanding Misfeasance in Public Office' in Kit Barker et al (eds), *Private Law and Power* (Hart Publishing, 2017) 177

Norris, Pippa, 'Watchdog Journalism' in Mark Bovens, Robert Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014) 525

O'Malley, Pat, *The Currency of Justice: Fines and Damages in Consumer Societies* (Routledge-Cavendish, 2009)

O'Malley, Pat, 'Theorizing Fines' (2009) 11 *Punishment and Society* 67

O'Neill, Onora, *A Question of Trust* (Cambridge University Press, 2002)

O'Connell, Lenahan, 'Program Accountability as an Emergent Property: The Role of Stakeholders in a Program's Field' (2005) 65 *Public Administration Review* 85

Oliver, Dawn, 'Standards of Conduct in Public Life—What Standards?' [1995] *Public Law* 497

Oliver, Dawn, *Government in the United Kingdom: The Search for Accountability, Effectiveness, and Citizenship* (Open University Press, 1991)

Bibliography

- Page, Stephen, 'Measuring Accountability for Results in Interagency Collaboratives' (2004) 64 *Public Administration Review* 591
- Panetta, Rossana, 'Damages for Wrongful Administrative Decisions' (1999) 6 *Australian Journal of Administrative Law* 163
- Pannam, Clifford, 'Felonious Tort Rule' (1965) 39 *Australian Law Journal* 164
- Phegan, C S, 'Damages for Improper Exercise of Statutory Powers' (1980) 9 *Sydney Law Review* 93
- Philp, Mark, 'Delimiting Democratic Accountability' (2009) 57 *Political Studies* 28
- Plant, Jeremy, 'Carl J Friedrich on Responsibility and Authority' (2011) 71 *Public Administration Review* 471
- Pollitt, Christopher, *The Essential Public Manager* (Open University Press, 2003)
- Rock, Ellen, 'Accountability: A Core Public Law Value?' (2017) 24 *Australian Journal of Administrative Law* 189
- Rock, Ellen, 'Fault and Accountability in Public Law' in Mark Elliot, Jason Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law* (Hart Publishing, 2018) 171
- Rock, Ellen and Greg Weeks, 'Monetary Awards for Public Law Wrongs: Australia's Resistant Legal Landscape' (2018) 41 *University of New South Wales Law Journal* (forthcoming)
- Roughley, Fiona, 'Royal Commissions and Contempt of Court: The Effect of Curial Proceedings' (2015) 38 *University of New South Wales Law Journal* 1123
- Rubinstein, Amnon, *Jurisdiction and Illegality: A Study in Public Law* (Clarendon Press, 1965)
- Salmond, Sir John William, R F V Heuston and R A Buckley, *Salmond and Heuston on the Law of Torts* (Sweet and Maxwell, 21st ed, 1996)
- Schedler, Andreas, 'Conceptualizing Accountability' in Andreas Schedler, Larry Diamond and Marc F Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers, 1999) 13
- Schuck, Peter H, *Suing Government: Citizen Remedies for Official Wrongs* (Yale University Press, 1983)
- Scott, Colin, 'Accountability in the Regulatory State' (2000) 27 *Journal of Law and Society* 38
- Select Committee on a Certain Maritime Incident, Senate, *A Certain Maritime Incident* (2002)

Accountability Deficits and Overloads: A Missing Framework

- Select Committee on a National Integrity Commission, Senate, *Report* (2017)
- Selway, Bradley, 'Of Kings and Officers: The Judicial Development of Public Law' (2005) 33 *Federal Law Review* 187
- Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978* (1979)
- Sinclair, Amanda, 'The Chameleon of Accountability: Forms and Discourses' (1995) 20 *Accounting, Organizations and Society* 219
- Spigelman, The Hon JJ, 'Seen To Be Done: The Principle of Open Justice' (2000) 74 *Australian Law Journal* 290
- Spigelman, The Hon JJ, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724
- Stapleton, Jane, 'Law, Causation and Common Sense' (1988) 8 *Oxford Journal of Legal Studies* 111
- Stapleton, Jane, 'Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence' (1995) 111 *Law Quarterly Review* 301
- Stapleton, Jane, 'Civil Prosecutions Part 1: Double Jeopardy and Abuse of Process' (1999) 7 *Torts Law Journal* 244
- Stapleton, Jane, 'Civil Prosecutions Part 2: Civil Claims for Killing or Rape' (2000) 8 *Torts Law Journal* 15
- Stapleton, Jane, 'Perspectives on Causation' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence (Fourth Series)* (Oxford University Press, 2000) 61
- Stapleton, Jane, 'Choosing What We Mean by "Causation" in the Law' (2008) 73 *Missouri Law Review* 433
- Stephen, James Fitzjames, *A History of the Criminal Law of England* (Macmillan, 1883) vol 1
- Stone's Justices Manual*, (40th ed, 1908)
- Stone, Bruce, 'Administrative Accountability in the "Westminster" Democracies: Towards a New Conceptual Framework' (1995) 8 *Governance* 505
- Strom, Kaare, 'Parliamentary Democracy and Delegation' in Kaare Strom, Wolfgang Muller and Torbjorn Bergman (eds), *Delegation and Accountability in Parliamentary Democracies* (Oxford University Press, 2003) 55

Bibliography

- Taggart, Michael, 'Osmond in the High Court of Australia: An Opportunity Lost' in Michael Taggart (ed), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, 1986) 53
- Taggart, Michael, 'The Province of Administrative Law Determined' in Michael Taggart (ed), *The Province of Administrative Law* (Hart Publishing, 1997) 1
- Turpin, Colin, *British Government and the Constitution: Text, Cases and Materials* (Weidenfeld and Nicolson, 1990)
- Twomey, Anne, 'Responsible Government and the Divisibility of the Crown' [2008] *Public Law* 742
- Uhr, John, *Terms of Trust: Arguments Over Ethics in Australian Government* (UNSW Press, 2005)
- Varuhas, Jason N E, 'The Development of the Damages Remedy under the *New Zealand Bill of Rights Act 1990*: From Torts to Administrative Law' [2016] *New Zealand Law Review* 213
- Varuhas, Jason N E, *Damages and Human Rights* (Hart Publishing, 2016)
- Vesely, Arnost, 'Accountability in Central and Eastern Europe: Concept and Reality' (2013) 79 *International Review of Administrative Sciences* 310
- Victorian Ombudsman, *Apologies*, Report under ss 25 and 25AA of the *Ombudsman Act 1973* (Vic) (2017)
- Vines, Prue, 'Apologising to Avoid Liability: Cynical Civility or Practical Morality?' (2005) 27 *Sydney Law Review* 483
- Vines, Prue, 'Misfeasance in Public Office: Old Tort, New Tricks' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Thomson Reuters, 2011) 221
- Wade, Sir William and Christopher Forsyth, *Administrative Law* (Oxford University Press, 11th ed, 2014)
- Walen, Alec, 'Proof Beyond a Reasonable Doubt: A Balanced Retributive Account' (2015) 76 *Louisiana Law Review* 355
- Walker, Kristen, 'Jurisdictional Error Since *Craig*' (2016) 86 *AIAL Forum* 35
- Warne, Stephen, 'Compromise of Litigation and Lawyers' Liability: Forensic Immunity, Litigation Estoppels, the Rule Against Collateral Attack, Confidentiality and the Modified Duty of Care' (2002) 10 *Torts Law Journal* 167
- Weeks, Greg, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing, 2016)

Accountability Deficits and Overloads: A Missing Framework

Wille, Anchrut, 'The European Commission's Accountability Paradox' in Mark Bovens, Deirdre Curtin and Paul 't Hart (eds), *The Real World of EU Accountability: What Deficit?* (Oxford University Press, 2010) 63

Williams, Glanville, 'The Aims of the Law of Tort' (1951) 4 *Current Legal Problems* 137

Wright, Richard, 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts' (1988) 73 *Iowa Law Review* 1001

Zaibert, Leo, *Punishment and Retribution* (Ashgate Publishing, 2006)

Zellick, G, 'Bribery of Members of Parliament and the Criminal Law' [1979] *Public Law* 31

Cases

Abebe v Commonwealth (1999) 197 CLR 510

Aboriginal Land Council (NSW) v Aboriginal and Torres Strait Island Commission (Unreported, Federal Court, Hill J, 30 August 1995)

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564

Amalgamated Television Services Pty Ltd v Marsden [No 2] (2003) 57 NSWLR 338

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147

Arnold v National Westminster Bank Plc [1991] 2 AC 93

Ashby v White (1703) 2 Ld Raym 938

Attorney-General (Cth) v The Queen (1957) 95 CLR 529

Attorney-General (Ex rel McKinlay) v Commonwealth (1975) 135 CLR 1

Attorney-General (NSW) v Quin (1990) 170 CLR 1

Australian Capital Television Pty Ltd v Commonwealth [No 2] (1992) 177 CLR 106

Australian Communist Party v Commonwealth (1951) 83 CLR 1

Australian Conservation Foundation Inc v Commonwealth (1980) 146 CLR 493

Australian Securities and Investments Commission (ASIC) v ActiveSuper Pty Ltd [No 1] (2012) 92 ACSR 614

Bibliography

- Bailey v Director General, Department of Natural Resources* [2014] NSWSC 1012
- Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129
- Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts* (2011) 180 LGERA 99
- Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247
- Beaudesert Shire Council v Smith* (1966) 120 CLR 145
- Blackstock v The Queen* [2013] NSWCCA 172
- Blair v Curran* (1939) 62 CLR 464
- Blundell v Musgrave* (1956) 96 CLR 73
- Bradlaugh v Clarke* (1883) 8 App Cas 354
- Bread Manufacturers of New South Wales v Evans* (1981) 180 CLR 404
- Briginshaw v Briginshaw* (1938) 60 CLR 336
- Broadbent v Medical Board of Queensland* (2011) 195 FCR 438
- Businessworld Computers Pty Ltd v Australian Telecommunications Commission* (1988) 82 ALR 499
- Caesar v Sommer* [1980] 2 NSWLR 929
- Cain v Doyle* (1946) 72 CLR 409
- Campbelltown City Council v Vegan* (2006) 67 NSWLR 372
- Cannon v Tahche* (2002) 5 VR 317
- Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560
- Chagos Islanders v Attorney General* [2004] EWCA Civ 997
- Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502
- Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1991) 31 FCR 29
- Chapel Road Pty Ltd v Australian Securities Investments Commission [No 10]* (2014) 307 ALR 428
- Charafeddine v Morgan* (2014) 66 MVR 232

Accountability Deficits and Overloads: A Missing Framework

- Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393
- Cheng v Farjudi* (2016) 93 NSWLR 95
- Chevalley v Industrial Court (NSW)* (2011) 82 NSWLR 634
- Chordas v Bryant (Wellington) Pty Ltd* (1988) 20 FCR 91
- Citation Resources Ltd v Landau* (2016) 116 ACSR 410
- Commonwealth v Mewett* (1997) 191 CLR 471
- Cornwall v Rowan* (2004) 90 SASR 269
- Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135
- CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514
- Craig v South Australia* (1995) 184 CLR 163
- Croatia Sydney Soccer Football Club Ltd v Soccer Australia Ltd* (Unreported, Supreme Court of NSW, Einstein J, 23 September 1997)
- Daniels v Thompson* [1998] 3 NZLR 22
- Deputy Commissioner of Taxation v Frangieh [No 3]* (2017) 321 FLR 1
- Dickason v Dickason* (1913) 17 CLR 50
- Director of Housing v Sudi* (2011) 33 VR 559
- DPP (Cth) v Besim* [2017] VSCA 158
- DPP (Cth) v MHK (a pseudonym)* [2017] VSCA 157
- DPP v Kent and Sussex Contractors Ltd* [1944] KB 146
- Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60
- Dunlop v Woollahra Municipal Council* [1982] AC 158
- Dunshea v Ryan* (1901) 1 SR (NSW) 163
- Effem Foods Pty Ltd v Trawl Industries of Australia Pty Ltd (in liq)* (1993) 43 FCR 510
- Egan v Chadwick* (1999) 46 NSWLR 563
- Egan v Willis* (1998) 195 CLR 424

Bibliography

- Emanuele v Hedley* (1998) 179 FCR 290
- Farrington v Thomson* [1959] VR 286
- Fatimi Pty Ltd v Bryant* (2004) 59 NSWLR 678
- Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146
- Fernando v Commonwealth* (2014) 231 FCR 251
- Fernando v Commonwealth [No 4]* (2010) 119 ALD 371
- Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630
- Fleet v Royal Society for the Prevention of Cruelty to Animals NSW* [2005] NSWSC 926
- Giannarelli v Wraith* (1988) 165 CLR 543
- Gouriet v Union of Post Office Workers* [1978] AC 435
- Gray v Motor Accident Commission* (1998) 196 CLR 1
- Hamilton v Whitehead* (1988) 166 CLR 121
- Hart-Roach v Public Trustee* [1998] WASC 34
- Harvey v Derrick* [1995] 1 NZLR 314
- Hawkesbury City Council v Foster* (1997) 97 LGERA 12
- Health Care Complaints Commission v Litchfield* (1997) 41 NSWLR 630
- Hollington v F Hewthorn & Co Ltd* [1943] KB 587
- Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438
- Hunter v Chief Constable of West Midlands Police* [1982] AC 529
- Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649
- Jacobs v OneSteel Manufacturing Pty Ltd* (2006) 93 SASR 568
- Jain v Trent Strategic Health Authority* [2009] 1 AC 853
- James v Commonwealth* (1939) 62 CLR 339
- James v Hill* [2004] NSWCA 301
- John Fairfax & Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465

Accountability Deficits and Overloads: A Missing Framework

Johnson v Emerson (1871) LR 6 Exch 329

K v NSW Ombudsman [2000] NSWSC 771

Kable v DPP (NSW) (1996) 189 CLR 51

King-Brooks v Roberts (1991) 5 WAR 500

Kirk v Industrial Court (NSW) (2010) 239 CLR 531

Kong v Minister for Immigration and Citizenship (2011) 199 FCR 375

Kuddus v Chief Constable of Leicestershire Constabulary [2002] 2 AC 122

Lamb v Cotogno (1987) 164 CLR 1

Lange v Australian Broadcasting Corporation (1997) 189 CLR 520

Leerdam v Noori (2009) 255 ALR 553

Leinenga v Logan City Council [2006] QSC 294

Livingstone v Rawyards Coal Co (1880) 5 App Cas 25

Lock v Australian Securities and Investments Commission (2016) 248 FCR 547

LVR (WA) Pty Ltd v Administrative Appeals Tribunal (2012) 203 FCR 166

MacLaurin v Hall (1913) 13 SR (NSW) 114

Macquarie Bank Ltd v National Mutual Life Association of Australia Ltd (1996) 40 NSWLR 543

Marbury v Madison, 5 US (1 Cranch) 137 (1803)

Maxwell v The Queen (1996) 184 CLR 501

May v O'Sullivan (1955) 92 CLR 654

MBA Land Holdings Pty Ltd v Gungahlin Development Authority (2000) 206 FLR 120

McGinty v Western Australia (1996) 186 CLR 140

McIlraith v Institute of Chartered Accountants [2003] NSWSC 208

McMahon v Gould (1982) 7 ACLR 202

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24

Minister for Immigration and Citizenship v Li (2013) 249 CLR 332

Bibliography

- Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139
- MM Constructions (Aust) Pty Ltd v Port Stephens Council [No 6]* (2011) 185 LGERA 276
- Moore v Secretary, Department of Social Services* [2015] AATA 669
- Municipal Council of Sydney v Campbell* [1925] AC 338
- NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277
- Neil Pearson & Co Pty Ltd v Comptroller-General of Customs* (1995) 38 NSWLR 443
- Neilson v City of Swan* (2006) 147 LGERA 136
- New South Wales v Ibbett* (2006) 229 CLR 638
- New South Wales v Roberson* (2016) 338 ALR 166
- Niven v SS* [2006] NSWCA 338
- Northern Territory v Mengel* (1995) 185 CLR 307
- Nyoni v Shire of Kellerberrin* (2017) 248 FCR 311
- O'Shane v Harbour Radio Pty Ltd* (2013) 85 NSWLR 698
- Obeid v Andrew Ipp* [2017] NSWSC 271
- Obeid v Lockley* [2018] NSWCA 71
- Obeid v The Queen* (2015) 91 NSWLR 226
- Obeid v The Queen* (2017) 350 ALR 103
- Obeid v The Queen* [2018] HCATrans 54
- Okwume v Commonwealth* [2016] FCA 1252
- Orpen v Haymarket Capital Ltd* (1931) 145 LT 614
- Ousley v The Queen* (1997) 192 CLR 69
- P E Bakers Pty Ltd v Yehuda* (1988) 15 NSWLR 437
- Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319
- Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476
- Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589

Accountability Deficits and Overloads: A Missing Framework

Prince Alfred College Inc v ADC (2016) 258 CLR 134

Public Service Board (NSW) v Osmond (1986) 159 CLR 656

Pyrenees Shire Council v Day (1998) 192 CLR 330

R (Lumba) v Secretary of State for the Home Department [2012] 1 AC 245

R v Bevan; Ex parte Elias and Gordon (1942) 66 CLR 452

R v Carroll (2002) 213 CLR 635

R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth; Ex parte Wachmann [1993] 2 All ER 249

R v Commissioners of Customs and Excise; Ex parte Cook [1970] 1 WLR 460

R v Disciplinary Committee of the Jockey Club; Ex parte Aga Khan [1993] 2 All ER 853

R v G [2004] 1 AC 1034

R v ICR Haulage Ltd [1944] KB 551

R v Justices of Surrey (1870) LR 5 QB 466

R v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254

R v Macdonald [2017] NSWSC 337

R v Obeid [No 11] (2016) 260 A Crim R 94

R v Obeid [No 12] [2016] NSWSC 1815

R v Panel on Takeovers and Mergers; Ex parte Datafin Plc [1987] QB 815

R v Quach (2010) 27 VR 310

R v Secretary of State for the Environment; Ex parte Hackney London Borough Council [1983] 1 WLR 524

R v Secretary of State for the Environment; Ex parte Hackney London Borough Council [1984] 1 WLR 592

R v Stewart [1896] 1 QB 300

R v Sussex Justices; Ex parte McCarthy [1924] 1 KB 256

R v Thompson (1991) 58 A Crim R 81

R v Whitaker [1914] 3 KB 1283

Bibliography

- R v Whiteway; Ex parte Stephenson* [1961] VR 168
- Racz v Home Office* [1994] 2 AC 45
- Rawlinson v Rice* [1998] 1 NZLR 454
- Re Jarman; Ex parte Cook* (1997) 188 CLR 595
- Re Judiciary and Navigation Acts* (1921) 29 CLR 257
- Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372
- Re McC (A Minor)* [1985] AC 528
- Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 58 ALD 609
- Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212
- Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82
- Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330
- Roberts v Western Australia* (2005) 29 WAR 445
- Rogers v The Queen* (1994) 181 CLR 251
- Rookes v Barnard* [1964] AC 1129
- Ruddock v Taylor* (2005) 222 CLR 612
- SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294
- Sanders v Snell* (1998) 196 CLR 329
- Scott v Scott* [1913] AC 417
- Shi v Migration Agents Registration Authority* (2008) 235 CLR 286
- Shire of Kellerberrin v Nyoni* [2018] HCATrans 27
- Singh (Migration)* [2017] AATA 850
- Sinkovich v Attorney General (NSW)* (2013) 85 NSWLR 783
- Sirros v Moore* [1975] QB 118
- Smith v Selwyn* [1914] 3 KB 98

Accountability Deficits and Overloads: A Missing Framework

- Soh v Commonwealth* (2008) 220 FCR 127
- Somanader v Minister for Immigration and Multicultural Affairs* (2000) 63 ALD 670
- South Australia v Lampard-Trevorrow* (2010) 106 SASR 331
- South Australia v Totani* (2010) 242 CLR 1
- Spautz v Gibbs* (1990) 21 NSWLR 230
- Sutherland Shire Council v Heyman* (1985) 157 CLR 424
- SZRWS v Minister for Immigration and Border Protection* [2017] FCCA 3101
- T v Medical Board (SA)* (1992) 58 SASR 382
- Tang v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1494
- Tang v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1042
- Taylor v Ansett Transport Industries* (1987) 18 FCR 342
- Tesco Supermarkets Ltd v Nattrass* [1972] AC 153
- Three Rivers District Council v Bank of England [No 3]* [2003] 2 AC 1
- Trevorrow v South Australia [No 5]* (2007) 98 SASR 136
- Truth About Motorways Pty Ltd v Macquarie Infrastructure Management Ltd* (2000) 200 CLR 591
- United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520
- Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118
- A v New South Wales* (2007) 230 CLR 500
- Victoria v Master Builders' Association of Victoria* [1995] 2 VR 121
- Vietnam Veterans' Affairs Association of Australia New South Wales Branch Inc v Cohen* (1996) 70 FCR 419
- W v W* [1999] 2 NZLR 1
- Wainohu v New South Wales* (2011) 243 CLR 181
- Walton v Gardiner* (1993) 177 CLR 378

Bibliography

Waterhouse v Australian Broadcasting Corp (Unreported, Federal Court, Wilcox J, 21 October 1987)

Watkins v Secretary of State for the Home Department [2006] 2 AC 395

Websyte Corporation Pty Ltd v Alexander [No 2] [2012] FCA 562

Whitbread v Rail Corporation New South Wales [2011] NSWCA 130

Wickham v Gatril (1854) 65 ER 433

Wilkes v Wood (1763) Lofft 1

Williams v Commonwealth (2012) 248 CLR 156

Wilson v Official Trustee in Bankruptcy [2000] FCA 1251

Wong v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 146 FCR 10

Woolwich Equitable Building Society v Inland Revenue Commissioners [1993] AC 70

XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1985) 155 CLR 448

Legislation

Administrative Appeals Tribunal Act 1975 (Cth)

Administrative Decisions (Judicial Review) Act 1977 (Cth)

Administrative Decisions (Judicial Review) Act 1989 (ACT)

Administrative Law Act 1978 (Vic)

Australian Constitution

Civil Liability Act 2002 (NSW)

Commonwealth Electoral Act 1918 (Cth)

Corporations Act 2001 (Cth)

Court Procedures Act 2004 (ACT)

Court Suppression and Non-publication Orders Act 2010 (NSW)

Crimes (Sentencing Procedure) Act 1999 (NSW)

Accountability Deficits and Overloads: A Missing Framework

Crimes Act 1900 (ACT)

Crimes Act 1900 (NSW)

Crimes Act 1914 (Cth)

Crimes Act 1958 (Vic)

Criminal Code (Cth)

Criminal Code (NT)

Criminal Code (Tas)

Criminal Code (WA)

Criminal Code 1899 (Qld)

Criminal Code 2002 (ACT)

Criminal Law Consolidation Act 1935 (SA)

Criminal Procedure Act 1986 (NSW)

Criminal Procedure Act 2004 (WA)

Crown Proceedings Act 1958 (Vic)

Crown Proceedings Act 1980 (Qld)

Crown Proceedings Act 1988 (NSW)

Crown Proceedings Act 1992 (SA)

Crown Proceedings Act 1993 (Tas)

Crown Proceedings Act (NT)

Crown Suits Act 1947 (WA)

Director of Public Prosecutions Act 1986 (NSW)

Director of Public Prosecutions Regulation 2015 (NSW)

Evidence (National Uniform Legislation) Act 2011 (NT)

Evidence Act 1995 (Cth)

Evidence Act 1995 (NSW)

Bibliography

Evidence Act 2001 (Tas)
Evidence Act 2008 (Vic)
Evidence Act 2011 (ACT)
Freedom of Information Act 1982 (Cth)
Freedom of Information Act 1982 (Vic)
Freedom of Information Act 1989 (ACT)
Freedom of Information Act 1991 (SA)
Freedom of Information Act 1992 (WA)
Government Information (Public Access) Act 2009 (NSW)
High Court Rules 2004 (Cth)
Independent Commission Against Corruption Act 1988 (NSW)
Information Act (NT)
Judicial Review Act 1991 (Qld)
Judicial Review Act 2000 (Tas)
Judiciary Act 1903 (Cth)
Legal Services Directions 2017 (Cth)
Ombudsman Act 1974 (NSW)
Ombudsman Act 1976 (Cth)
Public Governance, Performance and Accountability Act 2013 (Cth)
Right to Information Act 2009 (Tas)
Right to Information Act 2009 (Qld)
Royal Commissions Act 1902 (Cth)
Uniform Civil Procedure Rules 2005 (NSW)
Victims Rights and Support Act 2013 (NSW)

Other

Commonwealth, *Parliamentary Debates*, Senate, 13 May 2004 (Senator Faulkner, Leader of the Opposition in the Senate)

Dubnick, Melvin, 'Seeking Salvation for Accountability' (Paper presented at the Annual Meeting of the American Political Science Association, Boston, 29 August to 1 September 2002)

Gribbin, Caitlyn, 'Peter Dutton Blames 'Politics' as Bid to Deport Six Refugees Fails', *ABC News Online*, 16 May 2017 <<http://www.abc.net.au/news/2017-05-16/peter-dutton-blames-politics-over-blocked-bid-to-deport-refugees/8530060>>

Koziol, Michael, 'George Brandis Clears out 'Infuriating' Administrative Appeals Tribunal', *The Sydney Morning Herald Online*, 28 June 2017 <<http://www.smh.com.au/federal-politics/political-news/george-brandis-clears-out-infuriating-tribunal-20170628-gxo71l.html>>