Responsible Government as an Underenforced Norm of the Australian Constitution: *Some Interpretive Consequences*

Dan Meagher*[*] and Benjamin B Saunders[†]

Abstract

In this article we argue that responsible government is an underenforced constitutional norm and that it has the potential to play an important role in vindicating constitutional values, but through a principle of statutory interpretation — the principle of legality — rather than constitutional review. Constitutionalising responsible government would raise counter-majoritarian concerns and likely introduce rigidity where flexibility is required. We argue that where Parliament cannot or will not discharge its constitutional responsibilities with respect to executive-empowering legislation, the courts ought to apply the principle of legality to restrict the scope of the relevant powers conferred. Of especial concern in this regard are statutes which confer broadly framed powers and discretions on the executive arm of government including the power to make secondary legislation. We explain how the capacity for self-government is diminished in these legislative contexts and why the courts are justified in applying legality to vindicate the constitutional norm of responsible government to the extent interpretively possible.

Please cite this article as: Dan Meagher and Benjamin B Saunders, 'Responsible Government as an Underenforced Norm of the *Australian Constitution*: Some Interpretive Consequences' (2024) 46(1) *Sydney Law Review* 1.

DOI: https://doi.org/10.30722/slr.19651

This work is licensed via CC BY-ND 4.0 https://creativecommons.org/licenses/by-nd/4.0. Unmodified content is free to use with proper attribution.

* Professor and Chair in Law, Deakin Law School, Deakin University, Victoria, Australia. ORCID iD: https://orcid.org/0000-0002-1239-2668.

† Associate Professor, Deakin Law School, Deakin University, Victoria, Australia. Email: b.saunders@deakin.edu.au; ORCID iD: https://orcid.org/0000-0003-2379-4395.

We express our thanks to the anonymous reviewers for their helpful comments on an earlier version of this article.

© 2024 Sydney Law Review and authors

I Introduction

'Responsible government is one of the architectonic principles of the *Australian Constitution*'.[1] As the High Court observed in its unanimous judgment in *Lange*, 'That the *Constitution* intended to provide for the institutions of representative and responsible government is made clear both by the Convention Debates and by the terms of the *Constitution* itself'.[2] Yet the extent to which responsible government is *constitutionalised* — in the sense of being a legally binding principle of constitutional law enforceable by the courts — remains contested.[3] That is probably no surprise. With their origins in the unwritten English constitution, 'the rules relating to responsible government were developed as the result of ... conventions and not strict law'.[4] In Australia, moreover, the key constitutional provisions which provide for responsible government — ss 61, 62, 64 and 83 — do not define its core principles or explain how they are to function. Other than the constitutional mandate that Ministers must be 'a senator or a member of the House of Representatives'[5] the framers 'of the *Constitution* failed to go further than merely to establish ... the *machinery* by which the rules of responsible government could operate and develop'.[6] As Gleeson CJ observed, 'to have descended into greater specificity would have imposed an unnecessary and inappropriate degree of inflexibility upon constitutional arrangements that need to be capable of development and adaptability'.[7]

The principle of responsible government is, then, central to the operation of the *Australian Constitution*. Yet the manner of its operation — including its institutions, membership and processes — is fluid and occurs, primarily, at the sub-constitutional level. Even so, as we detail below, the core elements of responsible government are clear and durable. So too, in our view, is its constitutional essence. It is one of the 'constitutional imperatives which are intended — albeit the intention is imperfectly effected — to make both the legislative and executive branches of the government of the Commonwealth ultimately answerable to the Australian people'.[8] It does so by providing for the executive's accountability to Parliament: a constitutional relationship designed 'to enlarge the powers of self-government of the people of Australia'[9] which is, consequently and principally, mediated through electoral and parliamentary processes. In terms of the constitutional role of Parliament, that accountability is facilitated through Parliament's capacity to

1 Benjamin B Saunders, 'Responsible Government, Statutory Authorities and the *Australian Constitution*' (2020) 48(1) *Federal Law Review* 4, 4 (citations omitted).

2 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('*Lange*').

3 See Benjamin B Saunders, *Responsible Government and the Australian Constitution: A Government for a Sovereign People* (Hart Publishing, 2023) ch 7.

4 Geoffrey Lindell, 'Responsible Government' in PD Finn (ed), *Essays on Law and Government Volume 1: Principles and Values* (Law Book Company, 1995) 75, 80.

5 *Australian Constitution* s 64.

6 Lindell, 'Responsible Government' (n 4) 80 (emphasis in original).

7 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 402 [14] ('*Re Patterson*').

8 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 47 (Brennan J) (citations omitted).

9 *Official Report of the National Australasian Convention Debates*, Adelaide, 22 March to 5 May 1897, 17 (Sir Edmund Barton) ('*Convention Debates*').

undertake meaningful scrutiny which includes its responsibility for legislation that confers powers on and provides finance to the executive.[10] Of especial interest to our inquiry is the extent to which that political accountability is compromised by certain developments in the institutional and legal arrangements of modern government.

In any event, there can be little doubt that responsible government — and the political accountability which lies at its core — is a *constitutional* norm. Yet it remains orthodoxy in Australia, and properly so in our view, that the accountability required for the effective operation of responsible government is a matter for which Parliament is ultimately responsible. That is, 'the primary means by which the sovereign people are to govern themselves is through the political mechanisms of government, namely Parliament and the executive which is politically accountable to Parliament and the electorate'.[11] It is a constitutional norm which is vindicated, primarily, through the political rather than judicial process. In terms of the judicial role, then, we consider responsible government to be an 'underenforced constitutional norm'.[12] That is, most principles of responsible government in Australia are not legally binding rules of constitutional law enforceable by the courts.

We do, however, wish to argue that there is still an important role for the courts to protect and promote responsible government as a constitutional norm. In the American context, the notion of underenforced constitutional norms has been explained in the following terms: '[t]hey are essentially unenforceable by the Court as a direct limitation upon Congress's power, and are best left to the political process. But the Court may have a legitimate role in forcing the political process to pay attention to the constitutional values at stake'.[13] So too in Australia, in our view. Most relevantly, the constitutional norm of responsible government ought to inform, where appropriate, the application of statutes which confer broadly framed powers and discretions on the executive arm of government, including the power to make secondary legislation. To make that argument, we draw on an account of the judicial role in the context of the High Court's constitutional jurisprudence offered by the then Solicitor-General, Stephen Gageler.[14] That account proceeds from the following proposition:

> You start with the notion that the *Constitution* sets up a system to enlarge the powers of self-government of the people of Australia through institutions of government that are structured to be politically accountable to the people of Australia. You recognise that, within that system, political accountability provides the ordinary constitutional means of constraining governmental power.[15]

---

[10] See *Egan v Willis* (1998) 195 CLR 424, 451 (Gaudron, Gummow and Hayne JJ) ('*Egan*'); *Williams v Commonwealth* (2012) 248 CLR 156, 351–2 [516] (Crennan J) ('*Williams*'); Sir Maurice Byers, 'The Australian Constitution and Responsible Government' (1985) 1(3) *Australian Bar Review* 233.

[11] Saunders, *Responsible Government and the Australian Constitution* (n 3) 182.

[12] See Lawrence Gene Sager, 'Fair Measure: The Legal Status of Underenforced Constitutional Norms' (1978) 91 *Harvard Law Review* 1212.

[13] William N Eskridge Jr and Philip P Frickey, 'Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking' (1992) 45(3) *Vanderbilt Law Review* 593, 597.

[14] Stephen Gageler SC, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32(2) *Australian Bar Review* 138.

[15] Ibid 152.

The intensity with which judicial power is exercised is, then, calibrated 'to the strengths and weaknesses of the ordinary constitutional means of constraining government power'.[16] Relevantly, '[y]ou see judicial deference as appropriate where political accountability is inherently strong. You see judicial vigilance as appropriate where political accountability is either inherently weak or endangered'.[17] We consider that such an account is well suited to the status of responsible government as an underenforced constitutional norm. It provides an attractive normative justification for a judicial role which, in terms of the norm's vindication, is a modest but important one, and one which takes seriously the commitment to self-government which lies at the heart of Australia's constitutional arrangements. It provides also an analytical lens to assist in identifying those elements of responsible government where political accountability as a practical matter is weak.

The focus of our analysis is legislation — specifically, those statutes which confer broadly framed powers and discretions on the executive arm of government including the power to make secondary legislation. The argument we offer suggests that there ought to be interpretive consequences for these statutes since the capacity for political accountability is inherently weak as to the manner of their operation. That is because, as Brendan Lim has observed, these kinds of statutes are problematically vague:

> Part of the vice that can attend such vagueness is the democratic deficit incurred when legislatures, by 'refus[ing] to draw the legally operative distinctions [and] leaving that chore to others', seek to avoid responsibility for choices that might be electorally unpalatable if articulated more precisely. Another aspect of that same vice is the distorting effect of delegating that ordinarily legislative responsibility to other branches. …
>
> Vagueness in the conferral of executive power can have the practical effect of delegating to the executive the task of defining the limits of its own authority.[18]

The constitutional norm of responsible government requires Parliament to effectively scrutinise, control and supervise its legislation. If that accountability is strong, the 'ordinary constitutional means of constraining governmental power'[19] are working as the *Constitution* intended. But if Parliament cannot or will not do so, then the capacity for self-government is diminished to that extent. If so, we consider that the courts have a modest but important role in vindicating this constitutional norm. To this end, we will argue that the most appropriate way to give effect to the norm of responsible government in these legislative contexts is through a canon of statutory interpretation, rather than by constitutional implication or a principle of constitutional interpretation. The relevant canon in Australia which may be used and developed to perform this interpretive role is the principle of legality. As Gageler and Keane JJ explained in *Lee v New South Wales Crime Commission*, the principle of legality 'exists to protect from inadvertent and collateral alteration rights,

---

16 Ibid.

17 Ibid.

18 Brendan Lim, 'Executive Power and the Principle of Legality' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 76, 76–7, quoting John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980) 130–1.

19 Gageler (n 14) 152.

freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law'.[20] Importantly, legality 'extends to the protection of fundamental principles and systemic values'.[21] The constitutional norm of responsible government is a quintessential principle and value of this kind. If so, then to extend the scope of legality to vindicate responsible government where interpretively possible and constitutionally appropriate is justified in our view. That is the novel doctrinal aspect of our argument. To develop it, we draw on the account of legality offered by Lim in his recent chapter 'Executive Power and the Principle of Legality'.[22] Its application to statutes which confer broadly framed powers and discretions on the executive arm of government would force the legislature to confront the cost of its actions but allow ultimate responsibility to rest with the Parliament.

In order to make our argument, the article will proceed as follows. Part II outlines the analytical framework to be used. It details the concept of underenforced constitutional norms and its relevance to responsible government in the Australian context. We then supplement this with the Gageler account of political accountability and judicial power and explain how it provides an attractive normative justification and useful analytical lens for the core argument offered. Part III considers first how the *Australian Constitution* recognises responsible government. It then explains why the designation of an underenforced constitutional norm is appropriate and what flows from this in terms of the judicial role regarding legislation. Finally, in Part IV, our core argument is fleshed out by way of contemporary examples. We suggest what ought to be the interpretive consequences when political accountability for legislation is strong and when it is weak. As to the latter, we identify those specific contexts where Parliament cannot or will not discharge its constitutional responsibilities with respect to executive-empowering legislation. This forms an important part of the wider context in which these statutes fall to be interpreted and applied. On our argument, there is a constitutional justification for applying the principle of legality to restrict the scope conferred by the relevant powers. To do so vindicates the norm of responsible government in legislative contexts where the ordinary processes of political accountability are blocked or weak.

II The Analytical and Theoretical Framework

A *Underenforced Constitutional Norms*

The concept of 'underenforced constitutional norms' was introduced into the American constitutional lexicon by Lawrence Sager.[23] In doing so, he rejected then 'conventional analysis' that 'the scope of a constitutional norm is considered to be

[20] *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 310 [313] ('*Lee*').

[21] Ibid. This important point — that the scope of the principle of legality is not confined to 'rights' — was made by Hayne and Bell JJ in *X7 v Australian Crime Commission* (2013) 248 CLR 92, 132 [87] ('*X7*'): see Dan Meagher, 'Legality' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 1069, 1089–94.

[22] Lim, 'Executive Power and the Principle of Legality' (n 18).

[23] Sager (n 12).

coterminous with the scope of its judicial enforcement'.[24] Sager rightly observed that due to institutional concerns — such as federalism and judicial competence — there are situations where the federal judiciary cannot 'enforce a provision of the [*United States*] *Constitution* to its full conceptual boundaries'.[25] Consequently, '[w]e … depend heavily upon other governmental actors for the preservation of the principles embodied in these constitutional provisions'.[26] Sager articulated a 'vision of shared responsibility for the safeguarding of constitutional values'.[27] This interesting and valuable insight (in its own right) led Professor Sager to conclude that 'constitutional norms which are significantly underenforced by the federal judiciary nevertheless ought to be regarded as legally valid to their conceptual boundaries:

> [T]he [Supreme] Court would welcome the efforts of Congress and the state courts to shape elusive constitutional norms at their margins, and all governmental officials would regard themselves as bound by the full reach of all constitutional norms, including those which partially elude federal judicial enforcement.[28]

In their seminal article 'Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking' William Eskridge Jr and Philip Frickey employed the concept of underenforced constitutional norms but for a quite different purpose. They did so to offer a possible normative justification for the suite of strong clear statement rules the Supreme Court had developed and applied to protect constitutional values and 'structures, especially structures associated with federalism'.[29] They characterised this as the court 'creating a domain of "quasi-constitutional law" in certain areas: Judicial review does not prevent Congress from legislating, but judicial interpretation of the resulting legislation requires an extraordinarily specific statement on the face of the statute for Congress to limit the states or the executive department'.[30] The development of this quasi-constitutional law was justified, arguably, because 'structural constitutional protections, especially those of federalism, are underenforced constitutional norms'.[31] In so arguing, Eskridge and Frickey employed Professor Sager's concept to explain how the *courts* (rather than other governmental actors) are justified in using their *interpretive* (rather than judicial review) powers to better realise the scope of underenforced constitutional norms. It is this conception which is of interest to our present inquiry.

Yet it is a more sophisticated account of underenforced constitutional norms offered by Ernest Young that will form one of the two bases — theoretical and analytical — of our core argument. First, this account suggests that such norms 'have two primary characteristics: They are plagued by line-drawing problems that make development of invalidation norms difficult, and they are fields in which we can expect *political* safeguards to play the primary role in protecting the underlying

---

[24] Ibid 1220.
[25] Ibid 1213.
[26] Ibid 1263.
[27] Ibid.
[28] Ibid 1264.
[29] Eskridge and Frickey (n 13) 597.
[30] Ibid.
[31] Ibid.

constitutional values'.[32] Second, and as a consequence, the strong normative canons of interpretation known as clear statement rules 'are the best way — and perhaps the *only* way — of giving voice to constitutional norms that are real, not phantoms, and that are generally left underenforced by more conventional types of doctrines'.[33] Third, the account is situated within the wider framework of the *United States Constitution* and the judicial task in applying interpretive principle to determine the legal meaning of a statute:

> [S]tatutory interpretation always takes place against a background of underlying purposes and values, including constitutional values. The basic continuity of statutory and constitutional interpretation, in turn, allows us to think of the avoidance canon and the clear statement rules not so much as substitutes for constitutional adjudication, but rather as a means by which constitutional principles are sometimes vindicated.[34]

On this account, these '[n]ormative canons … become another source of statutory meaning, not materially different from legislative history or judicial precedents'.[35] This proposition, moreover, addresses an important concern raised by Eskridge and Frickey that to use these interpretive canons to 'enforce' these constitutional norms amounts 'to a "backdoor" version of … constitutional activism'.[36] Relevantly, the essence of these constitutional norms is that their enforcement is, primarily, for the political process. If so, then is not the use of these interpretive canons 'a backdoor way for the Court to take these issues back from the political process?'[37] But, as Young observes, these (underenforced) constitutional norms form part of the wider legal context in which statutes fall to be interpreted and applied. That being so, 'the substantive constitutional values protected by the avoidance canon [and others] are inseparable from a court's search for statutory meaning'.[38] The *United States Constitution* — and the interpretive canons which it informs — is 'a source of statutory meaning which is no less legitimate than other "principles and policies" which frequently enter into interpretation'.[39] We would add that the political process is the primary — but not the only — means by which underenforced constitutional norms are vindicated. The fact that courts rarely (if ever) directly enforce these norms through strong judicial review does not, ipso facto, make their vindication through statutory interpretation inappropriate or illegitimate. Indeed, to do so 'integrate[s] statutes into the broader constitutional structure and vindicate[s] broader public values immanent in constitutional law'.[40] We agree with Professor Young that such an (interpretive) approach 'in a constitutional system that leaves

[32] Ernest A Young, 'Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review' (2000) 78(7) *Texas Law Review* 1549, 1603 (emphasis in original) ('Constitutional Avoidance').

[33] Ibid 1585 (emphasis in original).

[34] Ernest A Young, 'The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey' (2010) 98(4) *California Law Review* 1371, 1384.

[35] Young, 'Constitutional Avoidance' (n 32) 1591.

[36] Eskridge and Frickey (n 13) 598.

[37] Ibid 635.

[38] Young, 'Constitutional Avoidance' (n 32) 1592.

[39] Ibid 1591 (citations omitted).

[40] Young, 'The Continuity of Statutory and Constitutional Interpretation' (n 34) 1387.

much of its institutional structure to be "constituted" by ordinary legislation … makes sense'.[41]

We will argue below that, on this account, responsible government is an underenforced constitutional norm of the *Australian Constitution*. Yet we consider that the interpretive consequences of such a designation need to be nuanced and context sensitive. Relevantly, it does not justify in our view the application of a strong interpretive canon such as the principle of legality *whenever* a statute implicates the principle. Indeed, on the contrary. The essence of responsible government as an underenforced constitutional norm is that its vindication is ultimately a matter for the political process; and when those institutional and legal mechanisms are functioning effectively, the judicial role is necessarily a limited one.

The existence of the implied freedom of political communication, which intends to ensure that any restrictions on the free flow of communication about government and political matters are proportionate to a legitimate end, has often been justified by reference to the centrality of representative and responsible government to the Australian constitutional system.[42] The implied freedom is best seen as ensuring that some of the conditions necessary for responsible government to function properly exist rather than any attempt to directly enforce the conventions of responsible government;[43] many other aspects of responsible government remain underenforced.

In terms of legislation, responsible government requires its effective scrutiny, control and supervision by Parliament. But if Parliament cannot or will not perform its constitutional functions, the principle — and the capacity for self-government — is undermined as a consequence. In these circumstances, we argue, the courts may have a modest but important interpretive role in vindicating the norm. But what is then needed is an analytical and theoretical approach to identify those legislative contexts. The account of political accountability and judicial power offered by then Solicitor-General Stephen Gageler could assist in doing so in our view. If used to supplement and inform the notion of responsible government as an underenforced constitutional norm of the *Australian Constitution*, it provides an attractive normative justification and useful analytical lens for the core argument offered below. It is to Gageler's account that we now turn.

---

41 Ibid 1392.

42 See, eg, *Lange* (n 2) 561–2, 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *McCloy v New South Wales* (2015) 257 CLR 178, 222–3 [101]–[102] (Gageler J) ('*McCloy*'); *Brown v Tasmania* (2017) 261 CLR 328, 359 [88] (Kiefel CJ, Bell and Keane JJ) ('*Brown*').

43 *Gerner v Victoria* (2020) 270 CLR 412, 426 [24] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ); *Unions NSW v New South Wales* (2013) 252 CLR 530, 578 [135] (Keane J); *Tajjour v New South Wales* (2014) 254 CLR 508, 593 [196], 601 [225] (Keane J); *Brown* (n 42) 359 [88] (Kiefel CJ, Bell and Keane JJ); *Unions NSW v New South Wales* (2019) 264 CLR 595, 614 [40] (Kiefel CJ, Bell and Keane JJ); *Clubb v Edwards* (2019) 267 CLR 171, 196 [51] (Kiefel CJ, Bell and Keane JJ); *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1, 22 [44] (Kiefel CJ, Keane and Gleeson JJ). For an account of the implied freedom of political communication which takes seriously the constitutional principles of representative and responsible government, see Dan Meagher, 'The Brennan Conception of the Implied Freedom: Theory, Proportionality and Deference' (2011) 30(1) *University of Queensland Law Journal* 119.

B *Political Accountability and Judicial Power: The Gageler Account*

We agree that statutory interpretation has the capacity to vindicate underenforced constitutional norms. But in terms of responsible government in the Australian constitutional context, it is important to explain how and when this exercise of judicial power is normatively justified. There are myriad ways and instances in which the principles of responsible government are engaged by statute. Yet it is ultimately the constitutional responsibility of Parliament to ensure that the relevant statutory powers, functions and responsibilities are properly exercised. That indeed is the essence of the constitutional norm. The judicial role is, then, ordinarily a limited one in the norm's vindication. If so, it becomes necessary to identify those statutory contexts where our judges are justified in using their interpretive powers to protect and promote responsible government. To this end, we draw on an account offered by then Solicitor-General Stephen Gageler in the published version of his 2009 Sir Maurice Byers Lecture.[44]

The aim of the account was to explain and defend 'some of the main themes of modern constitutional doctrine'.[45] This was done by offering an 'over-arching understanding of the structure and function of the *Australian Constitution* and of the role of the exercise of judicial power in maintaining that structure and function'[46] — specifically, how the structure of the *Constitution* has informed the function of judicial power and the manner of its exercise in the High Court's constitutional jurisprudence. In doing so the account has the capacity 'to explain and to guide judicial review within [Australia's] constitutional system'.[47] Though offered in the constitutional context of judicial review, the account can help explain when and how our judges are justified in using statutory interpretation to vindicate the (underenforced) norm of responsible government. This, we suggest, is no surprise for two reasons. First, Gageler's concern was to outline 'the role of the exercise of judicial power'[48] in the maintenance of constitutional text and structure. Yet the exercise of judicial power involves both judicial review *and* statutory interpretation. Indeed, the former cannot be undertaken without doing the latter first.[49] That being so, an account of the judicial role for the purposes of constitutional review provides a normative basis to ground a complementary approach to statutory interpretation. And second, the foundational premise of the Gageler account is that 'the *Constitution* sets up a system to enlarge the powers of self-government of the people of Australia through institutions of government that are structured to be politically accountable to the people of Australia'.[50] This account of Australia's constitutional system of government is underpinned by the principle of responsible government, a constitutional norm which, the High Court has noted, seeks 'to enlarge the powers

---

44 Gageler (n 14).
45 Ibid 139.
46 Ibid 140.
47 Ibid 151.
48 Ibid 140.
49 *Coleman v Power* (2004) 220 CLR 1, 21 [3] (Gleeson CJ), 36–41 [49]–[68] (McHugh J), 68 [158] (Gummow and Hayne JJ), 80–1 [207] (Kirby J), 115 [306] (Heydon J).
50 Gageler (n 14) 152. See also *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 408 ALR 381, 404 [86] (Gordon J) ('*Davis*').

of self-government of the people of Australia'[51] through the institutions and processes of political accountability.

The Gageler account recognises 'that, within that system, political accountability provides the ordinary constitutional means of constraining governmental power'.[52] That being so, Gageler suggested the following as the appropriate role and function of the courts:

> You see the judicious use of the judicial power as tailoring itself to the strengths and weaknesses of the ordinary constitutional means of constraining governmental power. You see judicial deference as appropriate where political accountability is inherently strong. You see judicial vigilance as appropriate where political accountability is either inherently weak or endangered.[53]

In terms of the constitutional norm of responsible government specifically, judicial deference will, necessarily, be the default position. This reflects the primacy of political accountability for the norm's vindication. Gageler's account draws on the account of judicial review advocated in John Ely's landmark work *Democracy and Distrust*, which argued that the courts ought to respect decisions reasonably reached by the democratic institutions of government and only exercise judicial review where those institutions gave rise to malfunctions or abuse.[54] According to such a 'representation-reinforcing' approach to judicial review, 'the intensity and strength of judicial review should vary according to the degree of recent and reasoned legislative deliberation'.[55]

In any event, Gageler's account makes good sense in the context of statutes that condition and mediate the relationship between Parliament and the executive. It is principally a matter for Parliament to determine the scope of the powers, functions and responsibilities which are conferred upon the executive arm of government. Parliament also plays a key role in supervising and scrutinising the exercise of power by the executive. But in those legislative contexts where Parliament cannot or will not discharge its constitutional responsibility, a more vigilant judicial role is justified. However, we argue that this ought to be through the principle of legality, a canon of statutory (not constitutional) interpretation. Relevantly, the courts ought to apply these statutes in a manner which vindicates the norm of responsible government to the extent interpretively possible and constitutionally appropriate. That is the core of our argument. To make good on it we turn first to explain why responsible government is an underenforced norm of the *Australian Constitution* before exploring when and what interpretive consequences may then arise.

---

[51] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 228 (McHugh J), quoting *Convention Debates* (n 9) 17 (Sir Edmund Barton) ('*Australian Capital Television*').

[52] Gageler (n 14) 152.

[53] Ibid.

[54] Ely (n 18).

[55] Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press, 2023) 1, 6.

III Responsible Government as an Underenforced Norm of the A*ustralian Constitution*

A *Why Judicial Enforcement of Responsible Government as a Constitutional Norm Is Contested*

Many High Court decisions have noted the centrality of responsible government to the *Australian Constitution*. Isaacs J famously described responsible government as 'part of the fabric on which the written words of the *Constitution* are superimposed'[56] and the High Court has described it as 'the central feature of the Australian constitutional system'.[57] However, the text of the *Constitution* relating to the executive is sparse and reveals few of the key features of responsible government;[58] as put by Harrison Moore, the *Constitution* establishes little more than a parliamentary executive, leaving the rest to custom and convention.[59] This means that the nature and meaning of responsible government must be sought from sources external to the *Constitution*,[60] and also, as a result, that its nature is open to contestation.

Some emphasise accountability as the heart of responsible government. Gordon J wrote in *Comcare v Banerji* that '[s]ecuring accountability of government activity is the very essence of "responsible government" — the system of government by which the executive is responsible to the legislature'.[61] Responsible government provides the means by which the executive is held accountable to Parliament.[62] As such, it might be thought that accountability is a core focus of the constitutional norm of responsible government, and that there ought to be increased vigilance when accountability is threatened or undermined.

However, while accountability is a core feature of responsible government, there are other values or features which are also fundamental to it, which include the following. First, the Australian conception of responsible government is a strongly political conception, emphasising that the mechanisms of accountability are primarily political — through the institutions of Parliament and the electoral process

---

[56] *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393, 413.

[57] *R v Kirby; Ex parte Boilermakers' Society* (1956) 94 CLR 254, 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). See also *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 146–7 (Knox CJ, Isaacs, Rich and Starke JJ) ('*Engineers*'); *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 114 (Evatt J) ('*Dignan*'); *Lange* (n 2) 557–8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *McCloy* (n 42) 224 [106] (Gageler J), 279 [301] (Gordon J); *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 112 [260] (Gordon J); *Comcare v Banerji* (2019) 267 CLR 373, 437 [149] (Gordon J) ('*Comcare*').

[58] Colin Howard and Cheryl Saunders, 'The Blocking of the Budget and Dismissal of the Government' in Gareth Evans (ed), *Labor and the Constitution: 1972–1975* (Heinemann, 1977) 251, 265.

[59] W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Charles F Maxwell, 2nd ed, 1910) 168–9.

[60] Brian Galligan, 'The Founders' Design and Intentions Regarding Responsible Government' (1980) 15(2) *Politics* 1, 1.

[61] *Comcare* (n 57) 436 [146] (Gordon J).

[62] *Comcare* (n 57) 436–7 [146]–[148] (Gordon J); *Williams* (n 10) 349–50 [509], 351 [515] (Crennan J); *Egan* (n 10) 451 (Gaudron, Gummow and Hayne JJ); *Dignan* (n 57) 123 (Evatt J); *Commonwealth v Colonial Combing, Spinning & Weaving Co Ltd* (1922) 31 CLR 421, 449 (Isaacs J); *Davis* (n 50) 402–3 [78], [80] (Gordon J).

— and not judicial. Second, responsible government is inherently flexible, intended to allow significant changes in the structure of government and mechanisms of accountability so as to adapt to social and political changes.[63] Third, a key feature of responsible government is popular sovereignty; as Gageler observed, 'the *Constitution* sets up a system to enlarge the powers of self-government of the people of Australia through institutions of government that are structured to be politically accountable to the people of Australia'.[64]

Some have argued that responsible government ought to be constitutionalised or at least given greater legal effect, for reasons such as to reduce the discretionary power of the Governor-General, to ensure greater ministerial control over non-departmental executive agencies, and to ensure that the will of the people is made effective.[65] However, despite the centrality of responsible government to the constitutional structure, the High Court has shown a reluctance to enforce its principles. There are several reasons for this. The first is due to the sparsity of the constitutional text. As noted, the *Constitution* contains little recognition of the core features of responsible government and does not mandate or entrench its conventions or structures.[66] As such, its meaning must be gleaned from sources external to the *Constitution*. Attempting to enforce responsible government by reference to extra-constitutional sources would not sit easily with the High Court's standard insistence that its task in constitutional interpretation is to interpret and apply the text of the *Constitution*, read in light of the *Constitution* as a whole and informed by history.[67] Implications may only be drawn where these are 'necessary or obvious'.[68]

The second reason for the under-enforcement of responsible government relates to the need to preserve flexibility. The sparse text of the *Constitution* is intended to allow the practical working of responsible government to be determined by legislation and constitutional convention, thus preserving flexibility in governmental arrangements. In *Re Patterson; Ex parte Taylor* Gummow and Hayne JJ considered that the Court 'should favour a construction of s 64 which is fairly open and which allows for development in a system of responsible ministerial

---

[63] *Re Patterson* (n 7) 401 [11], 402 [14] (Gleeson CJ), 459 [211] (Gummow and Hayne JJ); Byers (n 10) 233.

[64] Gageler (n 14) 152.

[65] Geoffrey Lindell, *Responsible Government and the Australian Constitution: Conventions Transformed into Law?* (Federation Press, 2004) 18; JE Richardson, 'The Executive Power of the Commonwealth' in Leslie Zines (ed), *Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer* (Butterworths, 1977) 50, 84–5; George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, 1983) 4–5, 125; James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) 369.

[66] The obvious exception to this is s 64 of the *Constitution*, which requires ministers to be members of Parliament.

[67] *Engineers* (n 57) 142, 149 (Knox CJ, Isaacs, Rich and Starke JJ); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 549 [35], 551 [40] (McHugh J); *Eastman v The Queen* (2000) 203 CLR 1, 45–7 [145]–[147], 49 [154] (McHugh J); *Singh v Commonwealth* (2004) 222 CLR 322, 336 [19] (Gleeson CJ), 348 [52] (McHugh J), 413 [247] (Kirby J), 425 [295] (Callinan J); *Al-Kateb v Godwin* (2004) 219 CLR 562, 622 [167] (Kirby J).

[68] *Cunliffe v Commonwealth* (1994) 182 CLR 272, 362 (Dawson J). See also *Australian Capital Television* (n 51) 135 (Mason CJ); *Lange* (n 2) 570 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

government'[69] and Gleeson CJ held that the provisions of Ch II of the *Constitution* 'are expressed in a form which allows the flexibility that is appropriate to the practical subject of governmental administration'.[70] There has been a judicial reluctance to enforce the conventions of responsible government as rigid constitutional rules, no doubt partly motivated by a desire to preserve flexibility.[71]

Third, responsible government reflects a strongly political model of constitutionalism under which it is considered that it is primarily for the political process, and not the courts, to police compliance with the principles of responsible government. Brennan J wrote in *Australian Capital Television v Commonwealth*:

> The Parliament chosen by the people — not the courts, not the Executive Government — bears the chief responsibility for maintaining representative democracy in the Australian Commonwealth. Representative democracy, as a principle or institution of our *Constitution*, can be protected to some extent by decree of the Courts and can be fostered by Executive action but, if performance of the duties of members of the Parliament were to be subverted by obligations to large benefactors or if the parties to which they belong were to trade their commitment to published policies in exchange for funds to conduct expensive campaigns, no curial decree could, and no executive action would, restore representative democracy to the Australian people.[72]

Because of the limited judicial recognition and enforcement of responsible government, it might seem an obvious conclusion that responsible government is an underenforced constitutional norm. But this is not straightforwardly the case. Sager distinguishes judicial underenforcement of a constitutional concept for analytical reasons from underenforcement for institutional reasons. According to Sager, an underenforced constitutional norm is one that is underenforced primarily for institutional reasons rather than conceptual reasons — that is, where the judiciary is unwilling to enforce the norm because of concerns about capacity or propriety.[73] Judicial restraint which arises from a correct understanding of the concept itself is not underenforced according to Sager's definition.

Responsible government is, perhaps, a unique category because it does not fall neatly on either side of this binary but is underenforced for both analytical and institutional reasons.[74] Indeed, the conduct of government in accordance with constitutional conventions is fundamental to responsible government. That is, the institutional restraint of the judiciary is inherent to the political nature of the concept of responsible government. This means that arguments that responsible government should receive greater levels of recognition and enforcement by the judiciary are not simply calls for the greater enforcement of an underenforced constitutional norm:

---

[69] *Re Patterson* (n 7) 460 [211] (Gummow and Hayne JJ).

[70] Ibid 401 [11], 402 [14] (Gleeson CJ).

[71] Cf Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge University Press, 2018) 28–9.

[72] *Australian Capital Television* (n 51) 156 (Brennan J). See also *Lange* (n 2) 559 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[73] Sager (n 12) 1217–8.

[74] We noted above in Part II(A) that the implied freedom establishes one of the conditions necessary for the proper functioning of responsible government but does not directly seek to enforce its conventions.

arguably, they are calls for the recognition of quite a different conception of responsible government.

B *Vindicating the Constitutional Norm of Responsible Government through Statutory Interpretation*

According to Sager, underenforced constitutional norms should be considered valid to their full conceptual limits, and government officials other than the courts have an important role to play in giving effect to such norms.[75] This is uncontroversially true with respect to responsible government, given that government is conducted in accordance with constitutional conventions which are considered politically binding on relevant actors, and subject to accountability by means of the political process. Further, we consider that the courts ought to play an important role in giving effect to responsible government as well. That role, however, ought to be limited in the constitutional realm. In particular, the courts ought to be cautious before drawing implications from the *Constitution* which limit the freedom of Parliament to structure the institutions of government.[76] We argue that principles of statutory interpretation are the most democratically legitimate means of giving full conceptual effect to the norm of responsible government by the courts, and the means most consistent with its inherently political nature.[77] To this end, a restrictive canon of interpretation such as the principle of legality ought to be applied to statutes that threaten or undermine the core principles of responsible government.

Central to responsible government is a strongly political conception under which courts have a particular constitutional and institutional role. Thus, our argument recognises that there are areas of power within the Australian constitutional system that properly belong to the other branches of government, which are politically accountable.[78] To adapt an argument made by Lynsey Blayden, this is a view of the role of the courts that is 'calibrated for a constitutional system committed to majoritarian principles'.[79] Our argument, moreover, complements that of Lisa Burton Crawford, who has proposed an institutional justification for the principle of legality, based on the accepted constitutional functions of Parliament and the courts.[80] Indeed, the arguments mirror each other: in light of the inadequacy of the democracy-enhancing justification, Crawford is concerned to defend the principle of legality by reference to institutional considerations; our argument aims to vindicate institutional considerations, especially the constitutional principle of responsible government and the values it seeks to promote, by means of the principle of legality.

---

[75] Ibid 1226–7.

[76] Saunders, *Responsible Government and the Australian Constitution* (n 3) 182.

[77] Our argument is broadly consistent with the approach taken in *Davis* (n 50), where the High Court employed the constitutional principle of parliamentary supremacy when interpreting the scope of executive power conferred by s 351 of the *Migration Act 1958* (Cth).

[78] Lynsey Blayden, 'Institutional Values in Judicial Review of Administrative Action: Re-Reading *Attorney-General (NSW) v Quin*' (2021) 49(4) *Federal Law Review* 594, 611.

[79] Ibid 611.

[80] Lisa Burton Crawford, 'An Institutional Justification for the Principle of Legality' (2022) 45(2) *Melbourne University Law Review* 511.

Our argument is also consistent with the typically incremental development of constitutional doctrine in Australia. There is a strong emphasis on the text and structure of the *Constitution* in constitutional interpretation; as the High Court held in *Amalgamated Society of Engineers v Adelaide Steamship Co*, 'it is the chief and special duty of this Court faithfully to expound and give effect to it according to its own terms, finding the intention from the words of the compact, and upholding it throughout precisely as framed'.[81] According to such an approach, the conventions of responsible government should not be judicially enforceable without clear warrant from the text and structure of the *Constitution*.

Cass Sunstein has argued that interpretive principles and canons of interpretation are desirable and inevitable given that statutory interpretation 'cannot occur without background principles that fill gaps in the face of legislative silence and provide the backdrop against which to read linguistic commands'.[82] The *Constitution* and constitutional norms provide arguably the most important aspect of these background principles against which statutes are enacted and interpreted.[83] The *Constitution* 'is not an ordinary statute: it is a fundamental law' and 'the basic law of the nation'.[84] As such, Sunstein argues that many constitutional norms 'deserve a prominent place in statutory interpretation'.[85] Indeed, 'statutory interpretation always takes place against a background of underlying purposes and values, including constitutional values'.[86]

Several authors have argued that statutory interpretation is one way that courts can uphold constitutional norms without running into counter-majoritarian difficulties, thereby making up for cautious constitutional interpretation.[87] Significant political decisions should be made by those branches of government that are democratically accountable to the people, and so judicial review is an exceptional power which should only be exercised where a statute is clearly inconsistent with the *Constitution*.[88] Thus, canons of statutory interpretation such as presumptions and clear statement rules are one means of enforcing constitutional norms, namely by raising 'the costs of statutory provisions invading such norms', but without striking down the relevant statute as unconstitutional.[89] Implementing constitutional values 'through super-strong clear statement rules (quasi-constitutional law) is less countermajoritarian than [implementing] those values through direct judicial review (constitutional law)'[90] because it forces the legislature to confront the political cost

[81] *Engineers* (n 57) 142 (Knox CJ, Isaacs, Rich and Starke JJ). See also at 149 (Knox CJ, Isaacs, Rich and Starke JJ).
[82] Cass R Sunstein, 'Interpreting Statutes in the Regulatory State' (1989) 103(2) *Harvard Law Review* 405, 504.
[83] Ibid 466, 468.
[84] *Victoria v Commonwealth* (1971) 122 CLR 353, 396 (Windeyer J); *Ha v New South Wales* (1996) 137 ALR 40, 43 (Kirby J). See also *Brownlee v The Queen* (2001) 207 CLR 278, 313 [103] (Kirby J).
[85] Sunstein (n 82) 468.
[86] Young, 'The Continuity of Statutory and Constitutional Interpretation' (n 34) 1384.
[87] Eskridge and Frickey (n 13) 596–7.
[88] Ibid 630.
[89] Ibid 631.
[90] Ibid 637.

of what it is doing, but leaves ultimate responsibility to the legislature.[91] Statutory interpretation results in 'less disruption to the political and legislative processes' than constitutional adjudication.[92] Interpretive canons may lead to results contrary to that desired by the legislature,[93] but this is consistent with the proper role of the courts given that the legislature retains power to override those positions by passing legislation.

Ernest Young has argued that certain constitutional norms ought to be considered as 'resistance norms' — that is, norms that protect structural constitutional values that may be more or less yielding to government action, without being a form of strong judicial review.[94] Young argues that resistance norms are valuable where political safeguards play the primary role in protecting the underlying constitutional values; resistance norms can enhance rather than override these safeguards. Young argues that the *Constitution* does not forbid incursions on resistance norms; it rather makes such incursions more difficult.[95]

In our view, this provides a nuanced and helpful framework for the recognition and enforcement of responsible government in Australian law. As noted, responsible government is central to the Australian constitutional system. There are, however, conceptual and institutional difficulties with seeking to enforce the principles of responsible government judicially. Consistent with the argument of Sager, we argue that, even though responsible government is not fully judicially enforceable as a constitutional norm, it should be considered valid to its full conceptual limits. We have argued above that the norms of accountability, flexibility and popular sovereignty are central to the Australian constitutional conception of responsible government. This means that any attempt to give effect to or recognise responsible government in Australian law must do so in a nuanced way that recognises the primarily political nature of the norm, preserves the ability of the people of Australia to govern themselves and enables flexibility in governance arrangements. As we have noted, responsible government is inherently political, which means that many matters are best dealt with by the political process.[96]

We consider that the principle of legality — a canon of statutory interpretation that can be trumped by the legislature — is consistent with these requirements, unlike the arguments for constitutional recognition proposed by scholars such as Professor Geoffrey Lindell and others.[97] We therefore propose that responsible government should be protected and promoted in Australia through this canon of statutory interpretation rather than judicially enforced constitutional

---

91 It is true that judicial interpretations may persist where Parliament fails to pass legislation overturning a decision it disagrees with: Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37(2) *Melbourne University Law Review* 372, 400.

92 Daniel B Rodriguez, 'The Presumption of Reviewability: A Study in Canonical Construction and its Consequences' (1992) 45(3) *Vanderbilt Law Review* 743, 744.

93 Sunstein (n 82) 454.

94 Young, 'Constitutional Avoidance' (n 32) 1594.

95 Ibid 1553, 1596.

96 See Blayden, 'Institutional Values in Judicial Review of Administrative Action' (n 78).

97 See above n 65. Here, we disagree with Brendan Lim that the counter-majoritarian difficulty is 'no less acute (and in some circumstances more acute) in the case of "mere" interpretation' because a judicial interpretation may persist in situations where Parliament fails to pass legislation overturning a decision it disagrees with: Lim, 'The Normativity of the Principle of Legality' (n 91) 400.

implications. We outline below the legislative contexts in which legality ought to be applied and why. On our account, responsible government should be given effect to as a form of quasi-constitutional law, providing a resistance norm that is more or less yielding depending on the statutory and wider context. As with Gageler's account, the intensity of review scales up when core values are threatened or undermined. Such an approach would force the legislature to confront the political cost of implementing arrangements that significantly entrench upon core values which underlie responsible government, but would leave ultimate responsibility with the democratic branches of government.

We argue that the constitutional norm of responsible government may find recognition in the principle that when the ordinary constitutional mechanisms of accountability are deficient, the courts apply the principle of legality to interpret legislation in a manner that supports accountability or applies heightened scrutiny: and especially so where the statute is problematically vague. Yet legality would not be applied to all statutes that condition and mediate the relationship between Parliament and the executive. As we detail in Part IVA below, in those contexts where Parliament effectively scrutinises, controls and supervises this legislation, political accountability is strong and the 'ordinary constitutional means of constraining governmental power'[98] are working as the *Constitution* intended. Instead, we argue that the principle of legality ought only to be applied to statutes that threaten or undermine the core values of political accountability and democratic legitimacy. As the analysis undertaken in Part IVB will demonstrate, legality's application will usually operate to restrict the scope of the powers conferred on the executive by the relevant statute. This is done to vindicate the constitutional norm of responsible government. For in those contexts where Parliament cannot or will not discharge its constitutional responsibilities with respect to executive-empowering legislation, the capacity for self-government is diminished to that extent.[99]

IV Interpretive Consequences

Ministerial responsibility to Parliament for the conduct of the executive is a core feature of the accountability contemplated by responsible government. However, due to factors such as the sheer size of the executive and the dominance of the party system, ministerial accountability is often considered to provide a weak constraint on the government.[100] In many ways, this ought not to be considered problematic given that there exist extensive mechanisms of review and scrutiny in relation to the executive; these include judicial review and the mechanisms of administrative law

---

[98] Gageler (n 14) 152.

[99] Our argument as to how (and when) the application of the principle of legality ought to vindicate the constitutional norm of responsible government illustrates the point made by Lisa Burton Crawford 'that the principles and process of statutory interpretation are informed by constitutional norms and the constitutional distribution of powers': Crawford (n 80) 527.

[100] See, eg, Gabrielle Appleby, 'Unwritten Rules' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 209, 229–30; Janina Boughey and Greg Weeks, 'Government Accountability as a Constitutional Value' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 99, 108–12; *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 467 [93] (Kirby J).

such as merits review, as well as scrutiny bodies such as ombudsmen, auditors-general and anti-corruption commissions which exist in many Australian jurisdictions. In addition, many public sector office-holders are subject to enforceable duties[101] and public authorities in some jurisdictions are required to act compatibly with human rights.[102] In many contexts, therefore, there exist effective extra-parliamentary mechanisms to hold the executive to account and ensure compliance with human rights norms. Contrary to stereotypes of the executive as the champion of arbitrary power which are still invoked,[103] executives have a strong incentive to impose mechanisms of scrutiny and control on themselves.[104] Parliamentary committees can also play an important role in improving the effectiveness of rights protection in the development and content of legislation.[105]

While it is difficult to measure accountability,[106] there is some evidence that these mechanisms of accountability function effectively. Greg Weeks has argued that 'there can be no doubt that the Ombudsman is effective in holding the government to account, both by responding to complaints and exercising its own investigatory powers'.[107] Brian Head has argued that specialised integrity agencies 'have often been effective not only in tackling corrupt or fraudulent activities, but also in helping senior office-holders to avoid conflicts of interest and in contributing to a culture of accountability and transparency'.[108] Parliamentary inquiries in different jurisdictions have found that auditors-general perform their role effectively.[109] Mechanisms of accountability such as these provide scrutiny through independent officers who are not subject to the demands of party allegiance and discipline, which helps to fill the gaps in democratic scrutiny and executive accountability that are not sufficiently addressed by the structures of responsible government.[110]

However, there are gaps in the applicability of these mechanisms. Administrative law remedies have limited application to government-owned

---

101 *Public Governance, Performance and Accountability Act 2013* (Cth) ss 15–29.

102 *Human Rights Act 2004* (ACT) s 40B; *Human Rights Act 2019* (Qld) s 58; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38.

103 *Williams* (n 10) 352 [521] (Crennan J).

104 Terence Daintith and Alan Page, *The Executive in the Constitution: Structure, Autonomy, and Internal Control* (Oxford University Press, 1999) 105, 396; Eric A Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press, 2010) ch 4.

105 Sarah Moulds, *Committees of Influence: Parliamentary Rights Scrutiny and Counter-Terrorism Lawmaking in Australia* (Springer, 2020).

106 See generally Brian W Head, AJ Brown and Carmel Connors (eds), *Promoting Integrity: Evaluating and Improving Public Institutions* (Ashgate, 2008); Ellen Rock, *Measuring Accountability in Public Governance Regimes* (Cambridge University Press, 2020).

107 Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing, 2016) 244.

108 Brian W Head, 'The Contribution of Integrity Agencies to Good Governance' (2012) 33(1) *Policy Studies* 7, 7.

109 Public Accounts Committee, Parliament of New South Wales, *Efficiency and Effectiveness of the Audit Office of New South Wales* (Report, September 2013); Joint Standing Committee on Audit, Parliament of Western Australia, *Review of the Operation and Effectiveness of the Auditor General Act 2006* (Report, August 2016).

110 Blayden, 'Institutional Values in Judicial Review of Administrative Action' (n 78) 618. On the adoption of the new administrative law reforms, see Lynsey Blayden, 'Designing Administrative Law for an Administrative State: The Carefully Calibrated Approach of the Kerr Committee' (2021) 28(4) *Australian Journal of Administrative Law* 205.

companies and statutory agencies[111] and there is limited enforcement of the duties owed by public sector officials.[112] Structural agency concerns limit the effectiveness of the mechanisms of ministerial responsibility in relation to non-departmental agencies.[113] Further, the primary mechanism for scrutiny of secondary legislation is through Parliament, and extra-parliamentary mechanisms typically have limited applicability in relation to secondary legislation. This suggests that there are areas of executive activity where existing mechanisms of scrutiny are weak. It is in these contexts that the principle of legality may have important work to do to facilitate the political accountability which lies at the core of the constitutional norm of responsible government.

Our core argument is that in contexts where Parliament cannot or will not discharge its constitutional responsibilities with respect to executive-empowering legislation, the courts ought to apply the principle of legality to restrict the scope of the relevant powers conferred or require a clear statement which confronts the cost of conferring such power on the executive. That is justified when legislation (or the manner of its application) undermines the mechanisms and processes of political accountability which lie at the core of responsible government. And legislation does so, in our view, when it confers broadly framed powers and discretions on the executive arm of government including the power to make secondary legislation. To this end, we identify below specific legislative contexts where legality may have meaningful interpretive work to do.

The principle underlying our proposed interpretive approach is the following. We argue that the application of the principle of legality would require an unambiguously clear statement before a court would interpret legislation so as to depart from the core principles of responsible government.[114] We have argued that accountability, popular sovereignty and the need to preserve flexibility are central to responsible government. In our view, the court should not readily construe legislation in such a manner as to depart from these norms but should require an unambiguous statement to that effect. We outline below four examples of situations where the requirement of an unambiguously clear statement would apply, and how it might impact the interpretation of legislation. These legislative contexts are instances where the 'ordinary constitutional means of constraining governmental power'[115] are not working as the *Constitution* intended.

A *The Exemption of Delegated Legislation from Disallowance*

First, the promulgation of secondary legislation by the executive government is, by definition, authorised but not enacted by Parliament. In terms of the constitutional norm of responsible government, 'Parliament must retain control over its delegated

---

111 Yee-Fui Ng, 'In the Moonlight? The Control and Accountability of Government Corporations in Australia' (2019) 43(1) *Melbourne University Law Review* 303.

112 Benjamin B Saunders and David Lau, 'An Analysis of the Enforcement of Duties Owed by Public Sector Officials' (2021) 32(4) *Public Law Review* 313.

113 Benjamin B Saunders, 'Ministers, Statutory Authorities and Government Corporations: The Agency Problem in Public Sector Governance' (2022) 45(2) *Melbourne University Law Review* 695.

114 Sunstein (n 82) 457–8.

115 Gageler (n 14) 152.

legislative power and be in a position to supervise the exercise of delegated legislative powers in order to be effective in exercising that control'.[116] But problematic in this regard is the increasing reliance of executive governments 'on delegated legislation which is partially or totally exempt from parliamentary disallowance and other forms of scrutiny'.[117] In 2019, for example, at the Commonwealth level '20 per cent of the 1,675 laws made by the executive were exempt from disallowance' and many exemptions received little parliamentary consideration when they were enacted.[118] While there may be legitimate reasons for specific disallowance exemptions,[119] the practice nevertheless undermines Parliament's constitutional role to provide effective scrutiny and supervision of secondary legislation. Parliamentary accountability is weakened as a consequence.

However, one might reasonably posit that as Parliament has caused the problem, it is Parliament that has the power and constitutional responsibility to fix it, should the political will exist to do so. This proposition is clearly correct as a matter of principle. But an important aspect of our system of constitutional government undercuts the practical utility of this principle. Relevantly, governments of both political stripes benefit (when in power) from secondary law-making power which is exempt from parliamentary disallowance and other forms of scrutiny. There is, then, a bipartisan political interest in the maintenance of statutory provisions that provide these exemptions. That being so, there is a justification, in our view, for the courts to apply the principle of legality to presumptively restrict the scope of the secondary law-making power so far as interpretively possible and constitutionally appropriate. To do so would reflect the fact that the ordinary processes of political accountability for this secondary legislation are not functioning optimally; a restrictive interpretation would operate to *minimise* the scope of executive (law-making) power which is not subject to parliamentary scrutiny and supervision. A strict(er) application of legality might, for example, confine the scope of the secondary law-making power to only what is expressly provided and to those matters which are authorised by 'necessary implication' where the test of what is 'necessary' is a stringent one.[120] Relevantly, the matter said to arise by implication is only 'necessary' if the purpose(s) of the statute would otherwise be 'defeated'.[121] This approach may operate within an interpretive and review framework for secondary

116 Anne Twomey, Submission No 18 to Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight* (28 June 2020) 1, quoted in *Final Report* (March 2021) 19 [3.41].

117 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight: Interim Report* (December 2020) 3 [1.3].

118 Ibid xiii, xiv.

119 Ibid 13.

120 This proposition draws on the account of legality offered in the seminal case of *Coco v The Queen* (1994) 179 CLR 427 ('*Coco*') where Mason CJ, Brennan, Gaudron and McHugh JJ stated that the test to rebut the principle of legality by necessary implication was 'a very stringent one': at 438 (citations omitted).

121 This proposition draws on the account of legality offered by Hayne and Bell JJ (Kiefel J agreeing) in *X7* (n 21) 149 [142] where it was stated that to rebut the principle of legality 'the implication must be necessary, not just available or somehow thought to be desirable'. Relevantly, the statutory 'purpose or purposes … would be defeated' if the law did not impliedly authorise infringement of the fundamental rights implicated.

legislation which tailors the intensity with which legality is applied to the importance of the constitutional norm of responsible government and the threat to its core value of political accountability which arises in this legislative context.[122]

This will not remove the threat to responsible government and the capacity for self-government which is posed by this worrying contemporary development. But it will at least minimise the extent to which responsible government is undermined by the absence of effective political accountability in this increasingly important secondary legislative context.

B *Interpretation of Powers Conferred on the Executive*

Second, the courts ought to apply legality to construe powers conferred on executive bodies and officials narrowly, especially non-elected bodies and where broadly framed powers and discretions are conferred.[123] In some contexts extremely broad discretions are conferred on executive officers, especially under migration legislation,[124] to the extent of conferring nearly unlimited discretions on decision-makers.[125] As noted above, Lim has observed that these sorts of statutes are problematically vague because of 'the democratic deficit incurred when legislatures … seek to avoid responsibility for choices that might be electorally unpalatable if articulated more precisely'.[126] Moreover, this species of statutory vagueness 'can have the practical effect of delegating to the executive the task of defining the limits of its own authority'.[127] If so, the constitutional norm of responsible government is imperilled by these drafting techniques which undermine the capacity for meaningful parliamentary scrutiny and accountability.

> Insistence by courts upon clearer authorisation, as achieved through interpretive techniques like the principle of legality, not only facilitates electoral discipline of the legislature, but also reduces the practical scope and incentive for legislatures to delegate to the executive such a self-defining role.[128]

So, for example, legality may have meaningful work to do in determining the proper scope of statutory provisions such as s 195A of the *Migration Act 1958* (Cth). That section confers on the Minister a non-compellable power to grant a particular class of visa '[i]f the Minister thinks that it is in the public interest to do so' and 'whether or not the person has applied for the visa'. Importantly, in *Plaintiff M79 v Minister for Immigration and Citizenship* the High Court held that s 195A authorises the Minister 'to grant visas which might not otherwise be able to be granted because of

---

[122] See Dan Meagher, Patrick Emerton and Matthew Groves, 'The Principle of Legality and Secondary Legislation: The Role of Proportionality' (2024) 47(2) *Melbourne University Law Review* (forthcoming) pt II.

[123] On broadly framed powers see Bret Walker SC and David Hume, 'Broadly Framed Powers and the Constitution' in Neil Williams (ed), *Key Issues in Public Law* (Federation Press, 2018) 144.

[124] Gabrielle Appleby and Alexander Reilly, 'Unveiling the Public Interest: The Parameters of Executive Discretion in Australian Migration Legislation' (2017) 28(4) *Public Law Review* 293.

[125] Matthew Groves, 'The Return of the (Almost) Absolute Statutory Discretion' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 129.

[126] Lim, 'Executive Power and the Principle of Legality' (n 18) 76.

[127] Ibid 77.

[128] Ibid.

non-satisfaction of substantive or procedural requirements'.[129] Hayne J, in dissent, disagreed. His Honour rejected the Minister's argument that s 195A permitted him to 'grant any class of visas and to do that guided only by public interest considerations', 'relieve[d] from the application of otherwise binding provisions of the Act'.[130] His Honour suggested that such an unfettered discretionary power may amount to executive suspension of the law without parliamentary consent,[131] and also that 'it may well be that any ambiguity in or uncertainty about the reach of a provision like s 195A must be resolved in a way that confines rather than expands the relevant power'.[132] On our account, the application of the principle of legality would buttress such an approach; and it would do so, again, to minimise the incapacity to self-government which the exercise of such extraordinary powers without parliamentary supervision would occasion.

In terms of statutory powers conferred on non-elected executive bodies and officials, Cass Sunstein has argued that '[c]ourts should construe statutes so that those who are politically accountable and highly visible will make regulatory decisions'.[133] Sunstein justifies this canon on the basis of the principle of democratic legitimacy based on electoral accountability, arguing that, where there is doubt, 'statutes should be construed to limit the discretion of regulatory agencies'.[134] Given the importance of the constitutional norm of responsible government, this arguably applies with all the more force in the Australian context. Consider, for example, the Victorian Supreme Court case of *Loielo v Giles*, which concerned the validity of emergency powers that were exercised to impose a curfew on Victorian residents during the COVID-19 pandemic.[135] They were not enacted by a minister who was accountable to Parliament, but a departmental medical officer. Ginnane J wrote as follows:

> One matter that I have reflected on in interpreting the extent of the powers in pt 10 of the [*Public Health and Wellbeing Act 2008* (Vic)], although it has ultimately not been decisive in my decision, is that they can be exercised by an authorised officer. That could potentially result in a person not accountable to Parliament and, perhaps not even a senior administrative officer, exercising powers to close all of Victoria during a state of emergency and confine all the people of Victoria to their homes.[136]

On our account the principle of legality ought to apply in cases such as these, so that the court would not readily find that such extensive powers of this nature have been conferred on unelected bureaucrats without clear language. And again, as noted, this may occur through an interpretive and review framework which tailors the (stricter) intensity with which legality is applied in this legislative context to reflect the

---

129 *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336, 350 (French CJ, Crennan and Bell JJ) ('*Plaintiff M79*').
130 Ibid 366 [85], 367 [87] (Hayne J).
131 Ibid 367 [87] (Hayne J).
132 Ibid.
133 Sunstein (n 82) 477 (citations omitted).
134 Ibid 458.
135 *Loielo v Giles* (2020) 63 VR 1.
136 Ibid 40–1 [131]. See also at 9 [13], 46 [151].

importance of the constitutional norm of responsible government and the threat posed to its core value of political accountability.[137]

C Conferral of Powers which Authorise the Infringement of Fundamental Rights

The third context is the conferral of law-making power in broad and purposive terms which the executive takes to authorise the promulgation of secondary legislation which infringes fundamental rights. This is a legislative approach which became increasingly common, and of concern, during the COVID-19 pandemic.[138] In doctrinal terms, the authorisation for such infringements can *only* arise by necessary implication.[139] This raises at least two issues for the constitutional norm of responsible government. First, as Lord Hoffman noted in his classic articulation of the principle of legality, fundamental human rights 'cannot be overridden by general or ambiguous words' because this carries 'too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process'.[140] The risk identified here is particularly acute when a law-making power is conferred in broad and purposive terms. This proposition (and problem) is buttressed by the constitutional fact that 'Parliament is the organ of government in which legislative power is vested and Parliament should not be held to have delegated to another repository more power than is clearly denoted by the words it has used'.[141]

The weakness in political accountability which attends this form of legislative process provides a normative justification for the courts to apply the principle of legality more strictly to such secondary law-making powers.[142] The principle of legality would apply by requiring a high threshold before an implication to infringe fundamental rights is considered 'necessary' in the relevant sense in such contexts.[143] And the strictness with which the principle of legality is applied in any specific legislative context of this kind may turn also on those factors we detailed above. Relevantly, the greater the extent to which Parliament has retained control and supervision over such secondary legislation (for example, by way of tabling requirements, disallowance processes, regular renewals by responsible ministers) the more likely that some degree of fundamental rights infringement was authorised in the exercise of these broad and purposive law-making powers. Our account provides an additional normative justification for a stricter conception and application of legality in this (increasingly common and often problematic) legislative context. It does so to provide stricter judicial scrutiny of secondary legislation where political

---

137 Meagher, Emerton and Groves (n 122) pts II, III.

138 See Bruce Chen, 'COVID-19 Stay at Home Restrictions and the Interpretation of Emergency Powers: A Comparative Analysis' (2023) 44(1) *Statute Law Review* 1.

139 *Coco* (n 120) 437–8 (Mason CJ, Brennan, Gaudron and McHugh JJ). See Dan Meagher, 'Fundamental Rights and Necessary Implication' (2023) 51(1) *Federal Law Review* 102.

140 *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131.

141 *South Australia v Tanner* (1989) 166 CLR 161, 174 (Brennan J).

142 Dan Meagher and Matthew Groves, 'The Common Law Principle of Legality and Secondary Legislation' (2016) 39(2) *University of New South Wales Law Journal* 450, 486.

143 See Meagher, 'Fundamental Rights and Necessary Implication' (n 139) 125–6.

accountability for any fundamental rights infringement is inherently weak.[144] This, again, vindicates the constitutional norm of responsible government to the extent interpretively possible.

D *Henry VIII Clauses*

Finally, it would seem logical that the principle of legality ought to be presumptively applied to statutory provisions which include Henry VIII clauses. For the inclusion in a statute of a delegated law-making power to amend that or any other statute seems the paradigmatic example of Parliament failing to discharge its constitutional responsibilities regarding executive-empowering legislation. Of additional concern is that 'the use of Henry VIII clauses in the Australian jurisdictions has become more common'.[145] In principle, then, these powers subvert the orthodox constitutional relationship between Parliament and the executive with respect to legislation. If so, the constitutional norm of responsible government is seriously undermined in this legislative context. So, to restrict, so far as interpretively possible, the scope of these law-making powers *and* the secondary legislation which they empower would minimise the incapacity to self-government which the exercise of these extraordinary powers seem to inevitably occasion.

Interestingly, however, Dennis Pearce and Stephen Argument have observed that in Australia 'the various parliamentary committees charged with reviewing the exercise of such powers have largely been able to monitor and report on their use, ensuring that the various parliaments are at least conscious of the use of these mechanisms'.[146] The significance of this form of political accountability (along with parliamentary notice and tabling requirements) was noted by Gageler J in *ADCO Constructions*:

> That parliamentary oversight, together with the scope for judicial review of the exercise of the regulation-making power, diminishes the utility of the pejorative labelling of the empowering provisions as 'Henry VIII clauses'. The empowering provisions reflect not a return to the executive autocracy of a Tudor monarch, but the striking of a legislated balance between flexibility

---

[144] See Lim, 'Executive Power and the Principle of Legality' (n 18) 85 for the compelling (arguably related) justification for the strict application of the principle of legality to executive power: 'The inherent asymmetry of the principle of legality tells us something important about the kinds of "infringement" to which it can legitimately respond. Put perhaps crudely, the infringement must be of a kind on which the Court is able to "take sides" by applying such an asymmetrical rule of interpretation. It would seem that where legislation "infringes" rights by adjusting the balance of rights involved in a symmetrical relationship between subject and subject, there is good reason to doubt the correctness of an approach to construction that would presumptively privilege one side of the relationship over the other. … Conversely, where legislation "infringes" rights by conferring power on the executive branch of government, the existing and long-recognised asymmetry involved in the relationship between government and subject means that there is not the same objection to applying the presumptive techniques of the principle of legality in a way that favours the subject over the government'. See further Dan Meagher, 'The Principle of Legality as Clear Statement Rule: Significance and Problems' (2014) 36(3) *Sydney Law Review* 413, 435–9.

[145] Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 5th ed, 2017) 22–3.

[146] Ibid 23.

> and accountability in the working out of the detail of replacing one modern complex statutory scheme with another.[147]

That being so, the *presumptive* application of legality may be inappropriate in those specific contexts (concerning Henry VIII clauses) where the processes of political accountability are strong. Yet the very nature of these clauses triggers issues of constitutional significance. They *are* extraordinary executive law-making powers which, in our view, warrant heightened scrutiny from both Parliament *and* the courts. That is especially so when the relevant statutes become an ongoing fixture of the statute book; the subject matter with which they deal is important matters of substantive and contested policy; and their usage is increasingly common and unexceptional.[148] There is existing authority which suggests that these delegated law-making powers 'should be restrictively interpreted if there is any doubt about the scope of the power'.[149] That is precisely how the principle of legality ought to operate in this context. Further, in terms of secondary legislation made under such powers, our account provides a normative justification for a similar interpretive approach to *supplement* the existing mechanisms of political accountability.[150] To do so is justified to vindicate the norm of responsible government to the extent interpretively possible in this constitutionally challenging legislative context.

V Conclusion

Recent works have examined the core values which underlie the Australian constitutional system and how best to give effect to those values.[151] In this article we have examined how to give effect to responsible government, a norm which is central to the *Australian Constitution*. We have emphasised that care needs to be taken when giving effect to responsible government. It is a complex and contested constitutional concept with a rich history, the effective operation of which is primarily a matter for Parliament. This led to our characterisation of responsible government as an underenforced norm of the *Constitution*. Consequently, we argued that the most appropriate way to give effect to the norm is through the application of an interpretive canon to restrict the scope of certain kinds of executive-empowering statutes, one which operates as a 'resistance norm' to vindicate responsible government in the relevant statutory context but falls short of strong judicial review. To accord responsible government a significant role in constitutional interpretation is not, in our view, consistent with the true nature of responsible government under the *Constitution* and raises significant counter-majoritarian concerns.

---

[147] *ADCO Constructions Pty Ltd v Gouappel* (2014) 254 CLR 1, 25 (citations omitted) ('*ADCO Constructions*').

[148] See, eg, Pearce and Argument (n 145) 153–4.

[149] Ibid 498, citing *Public Service Association and Professional Officers' Association Amalgamated Union (NSW) v New South Wales* (2014) 242 IR 338, 359–61 [102]–[108] and *Cvetanovski v The Queen* (2015) A Crim R 191, 200 [53].

[150] Pearce and Argument (n 145) 498 where the authors note that 'there appears to be no authority for this principle'.

[151] See, eg, Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2020); Blayden, 'Institutional Values in Judicial Review of Administrative Action' (n 78).

On our account, however, the application of the principle of legality must be nuanced and context sensitive. If political accountability is strong, the 'ordinary constitutional means of constraining governmental power'[152] are working as the *Constitution* intended. But if Parliament cannot or will not discharge its constitutional responsibilities regarding executive-empowering statutes, the capacity for self-government is diminished. As detailed, the statutes of especial concern in this regard are those which confer broadly framed powers and discretions on the executive arm of government including the power to make secondary legislation. In these legislative contexts, the courts have an important but limited role in vindicating the constitutional norm of responsible government where interpretively possible and constitutionally justified. To give effect to responsible government in this way is consistent with democratic concerns about the legitimacy of strong judicial review. In addition, it takes seriously the inherently political and flexible nature of responsible government as it operates under the *Australian Constitution*.

[152] Gageler (n 14) 152.