THE 2018 AUSTRALIAN HIGH COURT CONSTITUTIONAL TERM: PLACING THE COURT IN ITS INTER-INSTITUTIONAL CONTEXT

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Drawing on the scholarly commentariat tradition now practised across the world, this article provides an overview and analysis of the 2018 Australian High Court's constitutional term. However, this article approaches this task through a slightly different lens: I consider the 2018 developments by reference to their inter-institutional context. That is, how the High Court's jurisdictional and doctrinal developments do and should impact the jurisdiction and behaviour of the other branches of government, and in the context of constitutional judicial review, particularly the Australian parliaments. In the article, I consider the High Court's 2018 constitutional jurisprudence in three areas of law, and how its decisions have and should impact the constitutional responsibilities and practice of parliaments. Placing the High Court's term in this inter-institutional context will give a better sense of the reach of the impact of the Court's jurisprudential developments, as well as serve as a reminder that constitutional responsibility will not always lie with the courts for the articulation and prioritisation of constitutional principle.

I INTRODUCTION

Drawing on a scholarly tradition that is now practised across the world, this article provides an overview and analysis of the 2018 Australian High Court's constitutional term.[1] However, I approach this task through a slightly different lens: I consider the Court's 2018 cases by reference to their inter-institutional context. I will explore how the conduct and jurisdiction of the other branches of government, and particularly the Australian parliaments, do and should impact the exercise of jurisdiction and inform the interpretative approach of the Court. From

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1 See, for instance, the practice of the *Harvard Law Review* in relation to the analysis of the United States Supreme Court's term.

the other side of this inter-institutional constitutional relationship, I will also contemplate how the Court's jurisdiction and doctrinal development do and should impact the jurisdiction and behaviour of parliaments.

What is revealed is a more complicated understanding of the 2018 constitutional term, in which the constitutional locus is sometimes with the Court, at other times with the parliaments. It often reveals a complex inter- and iterative relationship between them. Placing the High Court's term in this inter-institutional context will give a better sense of the reach of the impact of the Court's jurisdictional developments, as well as serve as a reminder that constitutional responsibility will not always lie with the courts for the articulation and prioritisation of constitutional principle.

Key to this claim is my starting point that understanding developments and advances in the rule of law and constitutionalism is contingent on the work of the courts, as well as on the actions and responses of the legislatures and the executives, and the myriad actors working within those branches. Constitutional law, therefore, should not be treated as co-extensive with study of the written constitutional text and the judicial interpretation of it; rather, it should be studied in its 'working',[2] or 'complete',[3] form, including the study of the *Australian Constitution*'s practice by the executive and legislature.

In the Australian constitutional tradition, the need for this study is exacerbated, and yet often overlooked. It is exacerbated by two key characteristics. The first is the many Westminster traditions to which we still adhere, including of course the important role of unwritten constitutional conventions and other rules that facilitate constitutional principles such as responsible government.[4] In these areas, the commitment and practice by political actors is determinative.[5] Second is the continued importance of political constitutionalism in contested public law areas in Australia, most particularly the protection of human rights, which places parliaments squarely as the locus of constitutional responsibility for the protection and prioritisation of constitutional values such as individual liberty and equality. And yet, as a system with a written constitution, Australian constitutional scholarship has continued its dominant focus on empirical and theoretical analysis and critiques of constitutional adjudicative method by *judicial actors*. As such, beyond important works examining matters of parliamentary privilege, powers and

2 This is the terminology preferred by Llewellyn: K N Llewellyn, 'The Constitution as an Institution' (1934) 34(1) *Columbia Law Review* 1, 6.

3 This is the terminology introduced by Matthew Palmer: see, eg, Matthew S R Palmer, 'Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution' (2006) 54(3) *American Journal of Comparative Law* 587.

4 Gabrielle Appleby, 'Unwritten Constitutional Rules' in Cheryl Saunders and Adrienne Stone (eds), *Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 209.

5 Although the practice of constitutional conventions may be informed by explicit constitutional provisions and judicial doctrine (for instance, the support of responsible government by the constitutional requirements of appropriation in sections 81 and 83, and the implied requirements of legislative spending authorisation articulated by the Court in *Williams v Commonwealth* (2012) 248 CLR 156), this does not detract from the position that they contain obligations unenforceable in the courts.

procedure,[6] there has been little exploration of the how the executive and the parliament (and the many officers and actors within those branches), engage with the constitution, understand their constitutional duties and their role in constitutional interpretation.[7]

Across the world, there is a recognised and critical need for greater attention to be paid to constitutional engagement by the non-judicial branches. In the United States, there is a growing literature exploring when constitutional construction does and should occur outside the courts.[8] This literature has engaged in debates about the supremacy of the courts, and when non-judicial branches may have unique institutional 'competence' to interpret the *United States Constitution* that is separate and distinct from the approach of the courts.[9]

Non-judicial branches of government must grapple with constitutional norms across many dimensions of their role. In this article I will consider two dimensions that are evident from the High Court's 2018 caseload. These dimensions are necessarily focussed on inter-institutional aspects of the non-judicial branches' constitutional obligations, and in particular how they inform the High Court's decision-making.

First, I explore how the High Court's reasoning is often informed, in different ways, by an understanding that the parliaments have their own constitutional responsibilities and powers. In *Burns v Corbett* ('*Burns*'),[10] we see two distinct judicial approaches that lead to the same outcome in invalidating the conferral of certain jurisdiction on state tribunals. Under one approach, however, the

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6 See, eg, Enid Campbell, *Parliamentary Privilege* (Federation Press, 2003); Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004); and the editions prepared by the Clerks of the Chambers: eg, at the federal level, D R Elder and P E Fowler (eds), *House of Representatives Practice* (Department of the House of Representatives, 7th ed, 2018); Harry Evans (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 14th edition, 2016).

7 Exceptions to this statement are Daryl Williams' writing in 1996 from a practitioner's perspective: Daryl Williams, 'The Australian Parliament and the High Court: Determination of Constitutional Questions' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996) 203; Andrew Lynch and Tessa Meyrick in the context of the passage of constitutionally dubious national security legislation: Andrew Lynch and Tessa Meyrick, 'The Constitution and Legislative Responsibility' (2007) 18(3) *Public Law Review* 158; Gabrielle J Appleby and John M Williams, 'A Tale of Two Clerks: When are Appropriations Appropriate in the Senate?' (2009) 20(3) *Public Law Review* 194; Gabrielle Appleby and Adam Webster, 'Parliament's Role in Constitutional Interpretation' (2013) 37(2) *Melbourne University Law Review* 255; Gabrielle Appleby and Anna Olijnyk, 'Parliamentary Deliberation on Constitutional Limits in the Legislative Process' (2017) 40(3) *University of New South Wales Law Journal* 976.

8 See, eg, Bruce Ackerman, *We the People: Foundations* (Belknap Press, 1991) vol 1; Louis Fisher, 'Separation of Powers: Interpretation outside the Courts' (1990) 18(1) *Pepperdine Law Review* 57; Keith E Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Harvard University Press, 2001); Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 1999); Mark Tushnet, 'Interpretation in Legislatures and Courts: Incentives and Institutional Design' in Richard W Bauman and Tsvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press, 2006) 355.

9 Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton University Press, 1988) 231; Cornelia T L Pillard, 'The Unfulfilled Promise of the Constitution in Executive Hands' (2005) 103(4) *Michigan Law Review* 676; Dawn E Johnsen, 'Faithfully Executing the Laws: Internal Legal Constraints on Executive Power' (2007) 54(6) *University of California Los Angeles Law Review* 1559.

10 (2018) 265 CLR 304 ('*Burns*').

Commonwealth Parliament retains the constitutional capacity to reverse the decision; and in the other it is constitutionally mandated, leaving it to the state parliaments the challenging task of navigating the consequences. In *Falzon v Minister for Immigration and Border Protection* ('*Falzon*'),[11] the possibility of an iterative constitutional relationship emerges between the courts and Parliament in the context of the Court's developing jurisprudence around necessity and proportionality. Finally, in *Alley v Gillespie* ('*Alley*'),[12] the Court refused to allow a collateral attack on the qualifications of parliamentary members, but indicated that this position could be allowed by a future parliamentary response.

Second, I explore how the High Court responds when it is invited to determine disputes in areas that were previously considered to be the exclusive jurisdiction of Parliament, such as parliamentary privilege. In the 2018 cases, we see a general reluctance by the Court to step into these areas. This informs the reasoning of the judges in the cases involving parliamentary disqualification: *Alley*,[13] *Re Gallagher*[14] and *Re Lambie*.[15] Finally, in the case of *Alford v Parliamentary Joint Committee on Corporations and Financial Services* ('*Alford*'),[16] the Court refuses to enter the sphere of parliamentary power to inquire at all, leaving the position (for now) to the parliament to determine.[17]

In considering the 2018 constitutional term in this way, I hope to reveal the importance of studying the Court's jurisprudence as engaging in an intersecting and iterative relationship with the other branches of government. This relationship helps us to make sense of the Court's jurisprudence, as well as turning the attention of constitutional scholars, and those seeking reform, towards the parliament as an important constitutional actor.

In the following analysis, I have taken the temporal dimension of the 2018 'term' tradition literally, and so the article canvasses only those cases decided in the calendar year of 2018.[18] Through the 2018 term, the High Court's membership was stable. There were no retirements, no appointments. As Andrew Lynch's statistics on the 2018 constitutional term inform us, we also continued to see a strong alliance between a number of the judges, led by Kiefel CJ.[19] In

11 (2018) 262 CLR 333 ('*Falzon*').
12 (2018) 264 CLR 328 ('*Alley*').
13 Ibid.
14 (2018) 263 CLR 460.
15 (2018) 263 CLR 601.
16 (2018) 264 CLR 289 ('*Alford*').
17 Ibid 303–4 [47]–[51] (Gordon J).
18 I will not consider two of the decisions in the term decided under section 44 of the *Australian Constitution*. *Re Kakoschke-Moore* (2018) 263 CLR 640 raised a series of weak, and swiftly, unanimously dismissed, arguments about well-established doctrines and practices with respect to the time and process for a special count of the votes where a Senator has been found to be ineligible under section 44. *Re Culleton* (2018) 92 ALJR 775 was not itself a question of section 44, but, rather, whether the Court should reopen its previously perfected orders in relation to Mr Culleton's disqualification because the Senate had been inquorate when referring him to the Court of Disputed Returns. Kiefel CJ, sitting alone, gave short thrift to the argument, relying on the high bar set to reopen the Court's orders and Culleton's lack of evidence of new material not available to him or his counsel in the original case.
19 See Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2018 Statistics' (2019) 42(4) *University of New South Wales Law Journal* 1443.

constitutional cases, Bell and Keane JJ joined Kiefel CJ in every case; and in every case they were in the majority.[20] Justice Gageler retained a large degree of independence in judgment writing. Statistically, Gageler J was most often in dissent, even when he joined in the outcome of the majority.[21] In one of the section 44 cases, he does join the joint judgment led by Kiefel CJ.[22] Justices Gordon, Nettle and Edelman also exercised their independence in judgment writing, although joining with the joint position led by the Chief Justice on occasion. The way in which these positionings played out meant that in every case in 2018 there was a clear majority. There was also a remarkable consistency in outcome, although often subtle but important divergences of reasoning, across the cases.

II *BURNS V CORBETT*

A Overview of Facts and Decision

The first case I will consider is *Burns*,[23] where the High Court inserted another constitutional norm into the mix of doctrines, principles and rules with which a conscientious state policy-maker and legislator must grapple when designing courts and tribunals.[24] *Burns* was an appeal involving a case in the New South Wales Civil and Administrative Tribunal ('NCAT'). The case was decided against the background of three matters of agreement between the parties: that the tribunal was not a Chapter III state court; that the case raised an exercise of judicial power by the tribunal under the *Anti-Discrimination Act 1977* (NSW); and that it involved parties resident in different states, that is, that it engaged what is referred to as 'diversity jurisdiction'. The issue for the Court to decide was whether the State Parliament could confer on the tribunal judicial power in matters that fell within those described in sections 75 and 76 of the *Constitution*, that is, matters of peculiarly federal concern, or what I will refer to as 'federal matters'.[25] These include section 75(iv), which pertains to diversity jurisdiction.

Four judges – Kiefel CJ, Bell and Keane JJ, with Gageler J writing separately – decided the case based on an implication drawn from Chapter III of the *Constitution*. These four judges considered that the conferral, in state legislation, of judicial power over matters in sections 75 and 76 of the *Constitution* on non-judicial tribunals was in direct breach of Chapter III.[26] For these judges, Chapter III was an exhaustive statement of the adjudicative authority of state courts *and*

20 Ibid 1450–2.
21 Ibid 1451–2.
22 Ibid.
23 (2018) 265 CLR 304.
24 For a more sustained consideration of these constitutional norms, see Gabrielle Appleby and Anna Olijnyk, 'The Impact of Uncertain Constitutional Norms on Government Policy: Tribunal Design after *Kirk*' (2015) 26(2) *Public Law Review* 91.
25 *Burns* (2018) 265 CLR 304, 325–6 [1]–[3] (Kiefel CJ, Bell and Keane JJ), 345 [67] (Gageler J), 371 [138] (Nettle J), 375 [148] (Gordon J), 392 [204] (Edelman J).
26 Ibid 326 [3], 344–5 [63] (Kiefel CJ, Bell and Keane JJ), 346 [68] (Gageler J).

other organs of government, Commonwealth or state, with respect to the matters listed.

Justices Nettle, Gordon, and Edelman came to the same result but adopted the section 109 approach favoured by the NSW Court of Appeal in the decision below. That is, they resolved the case on the basis that the state legislative conferral of judicial power in relation to matters in sections 75 and 76 of the *Constitution* was inconsistent with sections 38 and/or 39 of the *Judiciary Act 1903* (Cth), which purported to strip state judicial power from state Chapter III courts over these matters and vest them with exclusively federal jurisdiction pursuant to the power in section 77(ii).[27]

In doing so, Nettle and Gordon JJ addressed the question as to whether the Commonwealth can exclude the operation of state law in an area that is explicitly carved out from the Commonwealth head of power, such as occurs in relation to section 77(ii), which refers only to state courts and not non-judicial state tribunals. In finding that the Commonwealth could do so, they relied, respectively, on the incidental and express incidental legislative power.[28] Justice Edelman read section 77(ii) in a more strained manner to extend to exclude jurisdiction from state courts *and other bodies*, so that he did not have to address this issue.[29] Justice Gageler also grappled with the section 109 issue, but found against the idea that the Commonwealth could legislate exhaustively to create an inconsistency with state law beyond the penumbra of a legislative head of power. This was because, as Gageler J explained, to legislate exhaustively over a field first requires that the Commonwealth have power to legislate for that 'universe'.[30] The approach of Nettle and Gordon JJ potentially heralds an even wider ambit for the operation of section 109 in the constitutional federation. The judgments certainly provide a signal to the Commonwealth Parliament that such an expanded approach might be available, and it would now appear an open door for the Commonwealth to push against in future cases. For the purposes of this article, however, I will focus on the extent to which the role of Parliament informed the Court's reasoning in the case, and the impact of the case on state and territory tribunal design.

B Analysis: The Court and the Role of the Parliaments

The question of whether the majority or the minority approach was the most desirable approach for determining the substantive question in *Burns* has been discussed elsewhere.[31] Here, I want to focus instead on the differing extents to which the two approaches are informed by the constitutional powers and responsibilities of the parliaments.

The most important distinction between the majority and minority positions in this respect is the extent to which they countenanced the ability of the

27 Ibid 374 [145]–[146] (Nettle J), 391 [197], [199] (Gordon J), 413 [259] (Edelman J).
28 Ibid 366 [127], 372–3 [141]–[142] (Nettle J), 391 [196], [198] (Gordon J).
29 Ibid 398–400 [218]–[224] (Edelman J).
30 Ibid 353 [87] (Gageler J).
31 Stephen McDonald, '*Burns v Corbett*: Courts, Tribunals, and a New Implied Limit on State Legislative Power', *AUSPUBLAW* (Blog Post, 7 May 2018) <https://auspublaw.org/2018/05/burns-v-corbett-courts-tribunals/>.

Commonwealth Parliament itself to protect the exercise of jurisdiction over federal matters. For Kiefel CJ, Bell, Keane and Gageler JJ, the conferral of judicial power over matters in sections 75 and 76 of the *Constitution* on non-judicial state tribunals was constitutionally prohibited. That is, Chapter III denies the possibility that states could confer power over such matters. Kiefel CJ, Bell and Keane JJ explicitly rejected any argument that the position was informed by choices of the Commonwealth Parliament, whether that be in conferring jurisdiction under sections 75 and 76 of the *Constitution*,[32] or to exercise the power to make federal jurisdiction exclusive under section 77(ii) of the *Constitution* so as to engage section 109 of the *Constitution*.[33] Gageler J's drawing of the implied limit from Chapter III is made against the background of his finding that there is 'an absence of Commonwealth legislative power to achieve the same result'.[34] For Nettle, Gordon and Edelman JJ, in contrast, the Commonwealth Parliament is vested with the power to override state conferral of such power, and has done so in the relevant provisions of the *Judiciary Act 1903* (Cth).[35]

The minority's approach places the Commonwealth Parliament at the heart of the decision: the constitutional system leaves to the Commonwealth Parliament to decide whether the exercise of jurisdiction over federal matters should be exclusive of both the state judiciaries and non-judicial bodies. The importance of protecting the integrity of the federal judicial system in this way is left to the wisdom of the Parliament and not the Court. It leaves open the possibility that a future federal Parliament may choose to allow the exercise of these powers by state non-judicial bodies if, for instance, it is satisfied by arguments put by the states that the efficiency and efficacy of the administration of justice so requires it.

The majority and minority positions thus characterise the Commonwealth Parliament's constitutional position very differently. In doing so, they leave open very different legislative responses to the decision by the state parliaments. Had the minority position prevailed, there would have remained the possibility that state parliaments could come to a political compromise with the Commonwealth Parliament that allowed the continuation of the current design and practice of state tribunals. Under the majority position, however, it is now for the state parliaments to navigate the boundaries of the Court's newly articulated constitutional prohibition.

The High Court's reasoning was silent on the state parliaments' task of re-designing their state tribunal system in light of the new prohibition. This may be explained by the fact that in the case itself a number of the legal issues that complicate this exercise were agreed between the parties. The parties accepted that the power that was being exercised was judicial power that fell clearly within the diversity jurisdiction; and they accepted that NCAT was not a court of the state. These issues, however, will not always be uncomplicated, and submissions were made to the Court highlighting how these challenging factual questions may constitutionally hamstring the state parliaments in designing their tribunal systems.

32 *Burns* (2018) 265 CLR 304, 335 [42]–[43] (Kiefel CJ, Bell and Keane JJ).
33 Ibid 326 [4].
34 Ibid 355–6 [95] (Gageler J).
35 Ibid 374 [145]–[146] (Nettle J), 391 [197], [199] (Gordon J), 413 [259] (Edelman J).

Of particular interest is the position put to the Court by the Attorney-General of Queensland, intervening in the case.

The Queensland submission reminded the Court that the question of whether a state tribunal was properly characterised as a 'court' for the purposes of Chapter III and whether it was exercising judicial or non-judicial power, while the subject of agreement in the *Burns* litigation, was not always easily drawn. French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ conceded as much in the earlier decision in *Kirk v Industrial Court of New South Wales* ('*Kirk*'),[36] noting, '[at] a State level that distinction [between a court and an administrative tribunal] may not always be drawn easily'.[37] Indeed, in New South Wales following the *Burns* decision, there has been ongoing litigation on this point: the Court of Appeal decision in *New South Wales v Gatsby*[38] held that NCAT was not a court of the State, overturning an earlier Appeal Panel of NCAT decision.[39] In South Australia, the Parliament attempted to avoid the *Burns* issue by making sure that all of its jurisdiction was conferred as non-judicial power, but in 2018, the South Australian Supreme Court found that, at least in residential tenancy jurisdiction, it was exercising judicial power, thus undermining the purported legislative response.[40]

The lack of clear definitional lines on these issues in many cases, Queensland submitted, would mean that the drawing of an implication from Chapter III of the *Constitution* such as determined by the majority in *Burns* would 'have far-reaching consequences for the way tribunals go about performing their functions as well as for the institutional design of State courts and tribunals'.[41] In particular, Queensland drew attention to the need for there to always be clarity as to whether a state tribunal is exercising judicial or non-judicial power, as the emergence of a federal matter may occur at any time in a proceeding.[42] Indeed, given this emergence is 'a latent potentiality in the exercise of any judicial power in Australia',[43] Queensland went so far as to warn the Court that drawing such an implication would, as a matter of practicality to avoid undue complexity, uncertainty and delay in state tribunals, require the states to 'reallocate *all* State judicial power to courts, thereby inaugurating a de facto separation of powers at

36 (2010) 239 CLR 531.

37 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 573 [69] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Kirk*').

38 *A-G (NSW) v Gatsby* (2018) 99 NSWLR 1.

39 Ibid 37 [192] (Bathurst CJ, Beazley P agreeing at 39 [197], McColl JA agreeing at 39 [198], Basten JA agreeing at 46–7 [228], Leeming JA agreeing at 62 [290]).

40 *A-G (SA) v Raschke* (2019) 133 SASR 215, confirming the decision in *Raschke v Firinauskas* [2018] SACAT 19. See the guidance offered to litigants on the South Australia Civil and Administrative Tribunal website following this decision: South Australia Civil and Administrative Tribunal,'Frequently Asked Questions about the Impact of the Decisions of *Burns v Corbett* and *Raschke v Firinauskas*' (Fact Sheet, 15 June 2018) <http://www.sacat.sa.gov.au/upload/FAQ%20-%20impact%20of%20the%20decisions%20in%20Burns%20v%20Corbett%20and%20Raschke%20v%20Firinauskas.pdf>.

41 A-G (Qld), 'Submissions for the Attorney-General for the State of Queensland (Intervening)', Submission in *Burns v Corbett*, S183/2017, 24 August 2017, [37].

42 Ibid.

43 Ibid [38].

the State level'.[44] This, Queensland submitted, 'would radically alter the structure of State courts and tribunals as we know them and have known them since well before federation'.[45]

Following the decision, Stephen McDonald and Anna Olijnyk have considered six possible responsive design options that sit on a multi-axied spectrum, of varying constitutional certainty, regulatory flexibility and workability for tribunals and litigants.[46] In fact there are a number of policy responses to the issues raised, including the designation of state tribunals as courts of record,[47] or the creation of new processes to transfer federal jurisdiction if it arises to the state courts.[48] Each of these responses carries with it different design compromises in terms of navigating the constitutional parameters while maintaining the simplicity and efficiency of the tribunal system.

Submissions of the nature of those made by Queensland form part of a well-established practice of state parties drawing the attention of the High Court to the practical consequences of their decisions for the other branches of government.[49] These submissions will often, although as we see in *Burns* not always, inform the High Court's reasoning. In this case, Queensland's warnings were largely ignored in the judgments. Gageler J, for instance, appeared unmoved by the submissions, observing somewhat dismissively:

> Judicial explication of the *Constitution* has sometimes disappointed expectations and has sometimes called past practices into question. That it will continue on occasions to do so is almost inevitable if the judiciary is to continue to perform its constitutional function of interpreting the *Constitution* only as and when required in the context of determining controversies that are truly controversial.[50]

The *Burns* decision has had significant consequences for state parliaments across the country, as they must now re-evaluate the design of their tribunal systems in light of the new constitutional development. Of course, decisions of the High Court will often have significant consequences for the legislative and executive branches; in the *Burns* decision, however, the Court was invited to more explicitly engage with the role of the Commonwealth and state parliaments in responding to its position. In refusing to do so, the Court has created a particular inter-institutional constitutional dynamic. It has denied the Commonwealth Parliament any future role in allowing state tribunals to exercise federal jurisdiction, perhaps through a process of negotiation with the states in terms of achieving an effective state tribunal system that achieves its objectives of efficient

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44 Ibid (emphasis in original).

45 Ibid.

46 Stephen McDonald and Anna Olijnyk, 'State Tribunals, Judicial Power and the Constitution: Some Practical Responses' (2018) 29(2) *Public Law Review* 104.

47 See, eg, section 164 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), which states that the Tribunal is a court of record. See also *Owen v Menzies* [2013] 2 Qd R 327.

48 See, eg, the response of New South Wales, contained in the *Justice Legislation Amendment Act (No 2) 2017* (NSW) sch 1 cl 1.2 and the *Justice Legislation Amendment Act (No 3) 2018* (NSW) sch 1 cl 1.6.

49 See extended discussion of this in Gabrielle Appleby, *The Role of the Solicitor-General: Negotiating Law, Politics and the Public Interest* (Bloomsbury Publishing, 2016) 240–4.

50 *Burns* (2018) 265 CLR 304, 363 [117] (Gageler J).

and simple justice. Rather, it has left the navigation of the realigned constitutional landscape to the state parliaments.

III *FALZON V MINISTER FOR IMMIGRATION AND BORDER PROTECTION*

A Overview of Facts and Decision

The second Chapter III case that I will consider was decided in early 2018: *Falzon*.[51] This was a case involving the application of the limitations first established in C*hu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ('*Lim*')[52] in the context of a challenge to section 501(3A) of the *Migration Act 1958* (Cth). This requires the Minister to cancel a person's visa if the Minister is satisfied that the person fails the character test because the person has been convicted of a serious criminal offence and the person is currently serving a period of imprisonment.

The argument that was run against the scheme was that the provision was in breach of Chapter III because it amounted to the Minister imposing a punishment – the cancellation of a visa which led, pursuant to the legislative scheme, to detention and deportation – which was in addition to that which had been imposed as a result of the determination of criminal guilt. The High Court dismissed the challenge, with the majority – Kiefel CJ, Bell, Keane and Edelman JJ – accepting that the decision did not amount to the imposition of punishment.[53] Rather, the detention was part of a legislative scheme that involved lawful detention, *that happened to be* triggered by a conviction and service of a sentence of imprisonment.[54] Justices Gageler and Gordon, and Nettle J, writing separately, broadly agreed, although Nettle J took the widest view of the power of detention under section 51(xix), indicating it extended to making laws 'for the deportation of non-citizens for whatever reason Parliament thinks fit'.[55]

In this article, I will focus on one particular dimension of the reasoning, which relates to the comments made particularly by Kiefel CJ, Bell, Keane and Edelman JJ in determining whether actions amount to punishment in breach of the *Lim* principle, and on the irrelevance of 'proportionality' testing to that inquiry.

In *Lim*, the majority accepted that, for the detention of an alien under section 51(xix) to be lawful, that is, not in breach of Chapter III because it represents the executive exercise of the exclusively judicial power to punish, it must be 'reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered'.[56] This reasonable necessity test has been further elaborated and

51 (2018) 262 CLR 333.
52 (1992) 176 CLR 1 ('*Lim*').
53 *Falzon* (2018) 262 CLR 333, 347–8 [47] (Kiefel CJ, Bell, Keane and Edelman JJ).
54 Ibid 349–50 [56]–[57].
55 Ibid 358 [92] (Nettle J).
56 *Lim* (1992) 176 CLR 1, 33 (Brennan, Deane and Dawson JJ), with Mason CJ appearing to be in agreement on this point at 10; and Gaudron J adopting it at 57–8; McHugh J at 65–6, 71.

debated in subsequent cases.[57] In a number of these cases, including *Re Woolley; Ex parte Applicants M276/2000*,[58] *Al-Kateb v Godwin,*[59] *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs*,[60] the Court has held that the conditions of detention, including relating to the length of detention, are not relevant to determining whether that detention is punitive in nature. In *Plaintiff S4/2014 v Minister for Immigration and Border Protection*, the Court clarified that immigration detention would be valid where it was pursued for one of three purposes:

- 'the purpose of removal from Australia;
- the purpose of receiving, investigating and determining an application for a visa permitting the alien to enter and remain in Australia; or,
- the purpose of determining whether to permit a valid application for a visa'.[61]

The Court explained that detention was an incident of executive power to pursue these purposes, and as such 'it must serve the purposes of the Act and its duration must be fixed by reference to what is both *necessary and incidental* to the execution of those powers and the fulfilment of those purposes'.[62]

Chief Justice Kiefel, Bell, Keane and Edelman JJ in *Falzon* reaffirmed the relevance of necessity for determining whether detention is for a non-punitive or punitive purpose, but they went out of their way to *reject* the plaintiff's submission that 'any restriction on such a freedom must be justified by showing that the legislative restriction is *proportionate*'.[63]

The judges emphasise that what must be determined is whether the detention is 'necessary' to the non-punitive purpose, so as to be considered an incident of the executive power.[64] If it goes further than the purpose requires, 'it may be inferred that the law has a purpose of its own, a purpose to effect punishment'.[65] The Court thus appears to be deploying the necessity criterion to test the *true purpose* of the law.

They then go on to explain how this is fundamentally different from the 'reasonable necessity' step in the structured proportionality test a majority of the Court adopted in *McCloy v New South Wales* ('*McCloy*'),[66] because 'they arise in different constitutional contexts'.[67] Under the *McCloy* reformulation of the

57 See, eg, Gummow J in *Kruger v Commonwealth* (1997) 190 CLR 1 at 162, and Gaudron J, in that same case at 110–11.

58 (2004) 225 CLR 1, 14 [26] (Gleeson CJ), 38 [93]–[95] (McHugh J), 77 [227] (Hayne J, Heydon J agreeing at 87 [270]), 85 [263] (Callinan J).

59 (2004) 219 CLR 562, 572 [45] (McHugh J); 637–8 [268] (Hayne J); 647 [295], 648 [298] (Callinan J); 649 [303] (Heydon J).

60 (2004) 219 CLR 486, 499 [21] (Gleeson CJ), 507 [53] (McHugh, Gummow and Heydon JJ), 534 [176] (Hayne J), 559 [218] (Callinan J).

61 (2014) 253 CLR 219, 231 [26] (French CJ, Hayne, Crennan, Kiefel and Keane JJ).

62 Ibid 232 [29] (emphasis added).

63 *Falzon* (2018) 262 CLR 333, 343 [25] (Kiefel CJ, Bell, Keane and Edelman JJ) (emphasis added).

64 Ibid 343–4 [29].

65 Ibid.

66 (2015) 257 CLR 178 ('*McCloy*').

67 *Falzon* (2018) 262 CLR 333, 344 [31] (Kiefel CJ, Bell, Keane and Edelman JJ).

implied freedom test, reasonable necessity arises as part of the second limb of the inquiry after it has been established that a law constitutes a burden on political communication.[68] Under this second limb, the Court is trying to ascertain whether a law that constitutes such a burden may nonetheless be constitutionally valid if it is proportionate in the achievement of a relevant legislative purpose.[69] Adopting a three-stage test that is well-established in rights-based jurisdictions, the Court asks:

- first, whether the law is *suitable*, whether it has a rational connection to the objective;[70]
- second, whether the law is *necessary*, in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;[71] and
- third, whether the law is adequate in its balance, requiring a judgment between the importance of the purpose served by the measure and the extent of the restriction on the freedom.[72]

B Analysis: The Roles of the Court and Parliament in Necessity and Proportionality Testing

In this section, I will consider the impact of this jurisprudence on how the legislature approaches questions of necessity and proportionality. To understand this, it is first necessary to attempt to understand the strong statement of difference made by Kiefel CJ, Bell, Keane and Edelman JJ between proportionality in the implied freedom context, and necessity in the *Lim* immigration detention context. While it can be accepted that, as the judges assert, the structured proportionality test developed under the implied freedom and the necessity test originally formulated in *Lim* are being deployed in different constitutional contexts, nonetheless they appear to be used in both contexts for the same objective. In *Lim*, it is deployed to determine the true purpose of the law authorising detention. In *McCloy*, together with the suitability test, it is deployed to determine whether the law is, as a matter of substance, appropriately directed to the stated purpose; or, to put it another way, whether the stated purpose is its true purpose.

The different constitutional contexts are, of course, important. Under the implied freedom, proportionality operates to, in effect, save laws that would otherwise constitute an impermissible burden on the freedom because they are proportionate to a legitimate government objective. Under Chapter III, it is not a situation in which a law that would otherwise breach Chapter III is 'saved' in this way. Rather, the necessity test is deployed as part of determining whether a law is not in breach of Chapter III because it is reasonably necessary for a legitimate non-punitive purpose. However, despite the different point at which these inquiries arise, they nonetheless are deployed for the same objective: to determine the *true*

68 Ibid 210 [57] (French CJ, Kiefel, Bell and Keane JJ).
69 Ibid.
70 Ibid 203 [31].
71 Ibid 210 [57].
72 Ibid 213–14 [69].

purpose of the law. Leslie Zines has previously been critical of the McHugh J's position, which now appears adopted in part in the joint judgment in *Falzon*:

> McHugh in *Woolley* said that a law which authorised imprisonment of an asylum seeker in solitary confinement 'without justification' would be in breach of Chapter III because 'it would go beyond what was necessary to achieve its non-punitive object' (at 33 [78].) But that is surely what the concept of proportionality or 'reasonably regarded as necessary' is all about. There could be no doubt that solitary confinement would achieve the object of preventing the alien from mixing with the Australian community. It would, however, be disproportionate in relation to the end.[73]

The judges' strong statement as to the difference between *Lim* necessity testing and proportionality because of differences in constitutional context is even more difficult to reconcile with the majority position in *Betfair v Western Australia* ('*Betfair [No 1]*').[74] *Betfair [No 1]* considered the objectives of deploying a form of proportionality testing in determining the scope of the regulatory exception to section 92. The majority of the Court explained that the necessity test it ultimately preferred over the appropriate and adapted test previously favoured was used to determine whether a law is, in substance, a law that is for the stated constitutionally permissible, non-protectionist purpose.[75] So, again, while arising in a different constitutional context, we see necessity as part of testing of the true purpose of the law.

If it is correct that there are close similarities between the nature of the necessity testing in the *Lim* jurisprudence and the implied freedom and section 92 tests, it has important repercussions for the inter-institutional relationship between the Court and parliaments. It has been recognised that doctrinal requirements of necessity under the proportionality test bring with them the possibility of a highly productive, iterative relationship between the judicial and legislative branches of government. The High Court has indicated, at least with respect to proportionality testing, that when it engages in this scrutiny, it will be informed by a number of factors, including, at times, the evidence that was before the Parliament to inform its legislative choice, and what alternative regulatory options might have been available to it, and even the quality of Parliament's deliberation.[76] We have seen such analysis in *McCloy*[77] in relation to the implied freedom, and earlier in *Betfair [No 1]* in relation to section 92.[78] The Court has continued to signal its readiness to engage in this type of scrutiny in its two more recent implied freedom cases

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73 Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 289.

74 (2008) 234 CLR 418 ('*Betfair [No 1]*').

75 Ibid 476–7 [101]–[103] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

76 For a more comprehensive consideration of the relationship between facts, proportionality and the Parliament in the Australian context, see Gabrielle Appleby and Anne Carter, 'Parliaments, Proportionality and Facts' (forthcoming).

77 Where the Court considered the evidence available to inform the legislative measures in the form of reports from the Independent Commission Against Corruption: *McCloy* (2015) 257 CLR 178, 208–9 [51]–[52] (French CJ, Kiefel, Bell and Keane JJ).

78 Where the Court considered regulatory alternatives adopted in other jurisdictions: *Betfair [No 1]* (2008) 234 CLR 418, 479–80 [110]–[111] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Bell JJ).

decided in 2019: *Unions NSW v New South Wales* ('*Unions NSW [No 2]*')[79] and *Clubb v Edwards*.[80]

There are good reasons why such a relationship might be beneficial for the holistic operation of the constitutional system. Both normative and empirical reasons exist for encouraging judicial restraint when Parliament has engaged in a wide-ranging and robust inquiry into proportionality and necessity questions. Normatively, these include respect for the legislature's democratic authority, in determining contested questions of policy such as the necessity of a particular measure. Empirically, the legislature is obviously better equipped to investigate factual issues that might be required to inform the answer to such a question. Murray Wesson has commented after the *Unions NSW [No 2]* decision that it would seem appropriate that the Court develop a doctrine in which it acknowledged 'the expertise of Parliament and its democratic legitimacy by attaching weight to its determinations'.[81]

In those jurisdictions in which there is a more developed doctrine, the possibilities that inhere in this productive inter-institutional relationship have been further explored.[82] This has occurred, of course, in a different constitutional context in which the proportionality and necessity testing has arisen in the judicial rights discourse. However, given the similarities of the doctrines that are developing in Australia, it is worth considering the response to these developments elsewhere. In the United Kingdom ('UK') and European context, Aileen Kavanagh[83] has considered whether a court deciding on the human rights compatibility of legislation should inquire into whether the human rights issue has actually been considered during parliamentary debate and, if so, how seriously. She develops an argument that in both the European and UK domestic contexts, the extent and quality of parliamentary engagement with the human rights issue should have a bearing on the degree of judicial deference to the resulting legislative provision. In the course of her argument, and being careful to navigate what she sees as the justiciability restrictions imposed by article 9 of the *Bill of Rights 1688*, 1 Wm & M sess 2, c 2 ('*Bill of Rights*') relating to protection of the parliamentary privilege of free speech, Kavanagh articulates a distinction between the '*quality of the substantive reasons*' offered by Ministers of Parliament during parliamentary

79 (2019) 264 CLR 595, where the Court regarded the lack of parliamentary inquiry into the appropriate regulation of third-party campaigners to be fatal to the legislation, given there had been a recent parliamentary inquiry recommending further research should inform such regulation: at 618 [53] (Kiefel CJ, Bell and Keane JJ), 633 [99] (Gageler J), 640–1 [117] (Nettle J), 674 [222] (Edelman J).

80 (2019) 267 CLR 171, where the Court reviewed a variety of materials that had been considered by the state parliaments that informed their regulatory choice: ibid at 195–6 [48]–[51] (Kiefel CJ, Bell and Keane JJ), 232–233 [186]–[188] (Gageler J), 280–1 [306]–[309] (Nettle J), 329–39 [461]–[485] (Edelman J).

81 Murray Wesson, '*Unions NSW v New South Wales [No 2]*: Unresolved Issues for the Implied Freedom of Political Communication' (2019) 23(1) *Media and Arts Law Review* 93, 103.

82 I consider, below, some of the scholarship in the United Kingdom and European contexts. In Canada, see also Vanessa MacDonnell, 'The New Parliamentary Sovereignty' (2016) 21(1) *Review of Constitutional Studies* 13.

83 Aileen Kavanagh, 'Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory' (2014) 34(3) *Oxford Journal of Legal Studies* 443.

debate,[84] and the '*quality of the decision-making process*' in Parliament.[85] The European Court of Human Rights, as well as the suggestions in the UK decisions, are concerned, Kavanagh explains, with the quality of decision-making process and not the quality of statements that are put forward.[86] This position, Kavanagh suggests, gives Parliament an incentive to take rights seriously during the legislative process.[87]

Liora Lazarus and Natasha Simonsen have further contributed to this position, positing a normative proposal that they argue will develop the partnership between the courts and Parliament in the joint endeavour of protecting human rights. Using the UK doctrine of due deference, they argue that an appropriately transparent judicial doctrine that sets *criteria* for when deference will be paid to legislative decision-making will increase the quality of that decision-making.[88]

It is arguable that the 2018 case of *Falzon* should be viewed as an important development because of its potential to herald a more productive inter-institutional dialogue between the Court and Parliament beyond the emerging relationship we see in the implied freedom cases. While it still remains unclear the exact distinctions between the necessity test under the *Lim* principle and the necessity testing required under the implied freedom, it may be that both import a potential for a relationship between the courts and Parliament, in which a responsible parliament, engaging in careful and informed deliberation about the necessity of particular measures, can inform the future judicial application of the doctrine. The development of a jurisprudence that would create a productive interaction between the two branches would improve the holistic functioning of the constitutional system.

IV *ALLEY V GILLESPIE*

A Overview of Facts and Decision

Alley[89] concerned a case stated to the Full Court in relation to the Court's jurisdiction to determine eligibility of members under section 44 in proceedings that were brought under section 3(1) of the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth) ('*Common Informers Act*'). The *Common Informers Act* limited the possible penalty for an action that had, in the original framing of the *Constitution*, been contained in section 46. It is thus necessary to sketch first the relevant constitutional and legislative framework.

The *Constitution*, in section 47, states that 'any question' of parliamentary disqualification is to be determined by the Houses of Parliament themselves. But

84 Ibid 465 (emphasis in original).
85 Ibid (emphasis in original).
86 Ibid 478.
87 Ibid.
88 Liora Lazarus and Natasha Simonsen, 'Judicial Review and Parliamentary Debate: Enriching the Doctrine of Due Deference' in Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 386.
89 (2018) 264 CLR 328.

it also contemplates that Parliament may decide to create an alternative means for deciding that question. Where the Houses themselves determine membership, the powers and privileges of section 49 of the *Constitution* attach, and the Court lacks jurisdiction to oversee these determinations. However, even at Federation, this position was increasingly viewed as a threat to the rule of law and constitutionalism, with deep concerns that the Houses have an institutional impediment that prevents them from interpreting and administering the *Constitution* in a non-partisan manner. In Australia, the response to this has been that the Parliament has otherwise provided in section 47, and has invited the Courts into this adjudicative space. Two provisions of the current *Commonwealth Electoral Act 1918* (Cth) ('*Electoral Act*') give effect to this:

(a) the House can refer matters to the High Court sitting as the Court of Disputed Returns under section 376 of the *Electoral Act*; and
(b) a petition can be brought by an individual within the stated time limit (within 40 days of the return of the writs)[90] to the Court sitting as the Court of Disputed Returns under section 353 of the *Electoral Act*.

Within this constitutional and legislative scheme, the Houses retain two important adjudicative powers. First, *Sue v Hill* indicated that the Houses retain the power to themselves make determinations under section 47 of the *Constitution*.[91] Any institutional conflict over an actual decision by a House if the matter is also the subject of a petition or a referral (although that would be unlikely) is addressed in the *Electoral Act*,[92] which states that a decision of the Court 'shall be final and conclusive and without appeal, and shall not be questioned in any way'.[93] Second, outside of the petitioning period, the Houses retain the discretion as to when to refer matters to the High Court.[94]

To return then to the case of *Alley.* Peter Alley, an unsuccessful Labor candidate in the 2016 election, had brought the common informer action against Lyne MP David Gillespie. The basis for Alley's application for a penalty against Gillespie under the *Common Informers Act* was, in essence, a test of the High Court's broadening of the test in *Re Day [No 2]*[95] in relation to when an indirect pecuniary interest will disqualify a person under section 44(v).[96] Ultimately, the Court did not have to decide the substantive section 44(v) question, because, unanimously, albeit with separate judgments written, the Court held it did not have jurisdiction to decide the question of qualification under the common informers legislation. Rather, this must be previously declared by the *Constitution*, that is, previously determined by either Parliament or the Court pursuant to a process provided for under section 47 of the *Constitution*.

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90 *Commonwealth Electoral Act 1918* (Cth) s 355(e).
91 *Sue v Hill* (1999) 199 CLR 462, 480 [26] (Gleeson, Gummow and Hayne JJ), 554–5 [239] (McHugh J).
92 *Commonwealth Electoral Act 1918* (Cth) s 381.
93 Ibid s 368.
94 In relation to the themes explored in this part, see further analysis in Graeme Orr and George Williams, 'Electoral Challenges: Judicial Review of Parliamentary Elections in Australia' (2001) 23(1) *Sydney Law Review* 53.
95 (2017) 263 CLR 201.
96 See excellent analysis in Tony Blackshield, 'Close of Day', *AUSPUBLAW* (Blog Post, 12 April 2017) <https://auspublaw.org/2017/04/close-of-day/>.

The Court delivered three judgments, but was unanimous in its view of the limited nature of the jurisdiction conferred by the *Common Informers Act*.

For Kiefel CJ, Bell, Keane and Edelman JJ, this was because of the relationship between key constitutional provisions: sections 44, 45, 46 and 47 of the *Constitution*. Their Honours explained that section 47 was included to reflect 'the long-standing tradition of the House of Commons in the United Kingdom', reserving to the House questions of disputed returns and qualifications.[97] Under such a model, it is for the Houses to either decide the question of qualification themselves, or determine an alternative process for that determination. Chief Justice Kiefel, Bell, Keane and Edelman JJ found that section 46 provides a jurisdiction to determine quantum, but no express authorisation to determine qualification.[98]

Justice Gageler wrote separately, but also reinforced the importance of the relationship between sections 46 and 47. In addition to the silence in the section itself and its relationship to section 47, he also noted that if section 46 were to confer the Court with such jurisdiction it would give rise to potential inconsistent interpretations of the provision between the Parliament and the Court, which 'countenances legal uncertainty and institutional disharmony'.[99]

Justices Nettle and Gordon wrote a separate but concurring joint judgment, in which they explained that this interpretation of section 46 was consistent with the common law principle of exclusive cognisance: 'each House of Parliament has "the exclusive right … to manage its own affairs without interferences from the other or from outside Parliament"'.[100] Only Parliament could itself decide to relinquish areas within exclusive cognisance, as it has done with respect to the scheme now found in the *Electoral Act*.

As had Gageler J, Nettle and Gordon JJ also addressed the question of uncertainty from inconsistent determinations;[101] in addition, they were concerned about the uncertainty that would arise in Parliament by permitting an action to be brought by individuals up to seven years after an election in the Senate and up to four years after an election for the House of Representatives.[102]

B Analysis: Shifting Final Constitutional Responsibility to the Parliament

In *Alley*, the High Court's decision preferences certain higher order constitutional principles, or values, over other principles that have emerged to the fore in other cases. This opens the Court to criticism as to its choice of principles to elevate. Regardless of the veracity of these criticisms, it also significantly shifts constitutional responsibility from the Court to the Parliament, which, unusually in constitutional judicial review, retains the capacity to reorder these constitutional

97 *Alley* (2018) 264 CLR 328, 341 [29] (Kiefel CJ, Bell, Keane and Edelman JJ).
98 Ibid 346 [50].
99 Ibid 351–2 [76] (Gageler J).
100 Ibid 357 [108] (Nettle and Gordon JJ), quoting *R v Chaytor* [2011] 1 AC 684, 712 [63] (Lord Phillips PSC).
101 *Alley* (2018) 264 CLR 328, 359 [112] (Nettle and Gordon JJ).
102 Ibid.

priorities itself, in more flexible and possibly innovative ways than were available to the Court.

Across the different judgments of *Alley,* we see, in particular, three values elevated. First is the exclusive cognisance of the Parliament and the need to respect the traditional authority of the Parliament within its sphere (in this case, determinations of qualification of members). Second is the undesirability of the potential for two conflicting institutional determinations on qualification questions under a scheme in which, unusually, the *Constitution* explicitly confers on the Parliament the power to determine constitutional questions. Third was the need to promote the stability of the composition of Parliament, presumably to facilitate its ability to conduct its work as the representative legislature without the destabilising possibility of collateral challenges.

These principles are prioritised over others. Primary among these other principles are the rule of law tenets that emphasise the right of individuals to be able to challenge the actions of the state, and to ensure compliance with requirements fixed by the *Constitution*. In other areas, particularly in relation to the High Court's interpretation of Chapter III provisions guaranteeing the jurisdiction of the High Court and state Supreme Courts, the High Court has privileged these principles, referring, for instance, to the undesirability of immunising exercises of executive and judicial power by persons and bodies other than the courts from judicial supervision, thus creating the 'islands of power immune from supervision and restraint' warned of in *Kirk*.[103] Further, while the decision draws on representative government as a justification for prioritising stability of the institution of Parliament, representative government could have equally required a decision that elevated an interpretation that facilitated a collateral challenge to ensure the integrity of the composition of the Houses of Parliament.

This raises a question as to why the Court might elevate or prioritise some constitutional principles in particular areas of jurisprudence. In expounding her theory of functionalist constitutional interpretation, Rosalind Dixon explains that once constitutional values are seen as legitimately informing interpretative development, judges will be confronted by the possibility of conflict, or point towards different outcomes. She explains that '[judges] will thus need to exercise clear evaluative judgment in determining how *best* to balance, or prioritise, competing values'.[104] In *Alley*, the Court has not provided a clear explanation as to their evaluation.

It can be hypothesised that there are a number of reasons behind the Court's decision. Some were no doubt unarticulated in the judgment. For instance, there was perhaps a judicial desire to stay out of highly partisan-charged questions around qualification of members, which often arise in parliaments in which the qualification of single members can bring the downfall of a government.

103 *Kirk* (2010) 239 CLR 531, 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel, Bell JJ).

104 Rosalind Dixon, 'The Functional Constitution: Re-reading the 2014 High Court Constitutional Term' (2015) 43(3) *Federal Law Review* 455, 464 (emphasis in original).

Other reasons can be taken more directly from the High Court's reasons. In particular, it is clear that the judges consider this area of constitutional law as historically distinct because of the historical constitutional imperative to maintain the autonomy of the workings of Parliament. The judges claim that distinctiveness is captured in the text of the written constitution itself, referring to sections 47 and 49 of the *Constitution*. This, however, prioritises these principles over rule of law based objectives of incentivising citizen-led challenges.

Another explanation of the Court's preferencing of these principles over others is revealed in Gageler J's judgment in *Alley*.[105] He provides the reminder that the Parliament can, under section 47 of the *Constitution*, provide for other mechanisms for individuals to challenge qualification of members. Therefore, in the absence of the Court opening up pathways for collateral attack, it is for *Parliament* to decide the most appropriate order of constitutional principles, and how principles of accountability under the rule of law might be balanced against the desire for certainty in our democratic institutions. Importantly, if it is Parliament who decides to reprioritise constitutional principles, it will retain Parliament's initiative over these matters, thus continuing to respect its historical autonomy. Further, parliamentary reordering of constitutional principle has the capacity to provide a flexible response to navigate the competing constitutional principles outlined above.

What *Alley* does then is move our constitutional focus from the Courts as the agents for prioritising constitutional principle, to the Parliament. Parliament is *the* responsible constitutional agent in this arena. At present, the decision in *Alley* leaves us with a combined constitutional and legislative framework where, after the period for a petition has passed, questions over the eligibility of parliamentarians must either be decided by the Houses themselves, or referred by the Houses to the Court of Disputed Returns. The position is open to the legitimate criticism that this position is likely to be distorted by partisan considerations, undermining rule of law principles. *Alley* provides Parliament with a moment of pause to reflect upon this order of constitutional principles, and respond innovatively to these challenges. There are alterative frameworks that achieve a balance between the principles. For instance, Parliament might allow petitions to be brought outside the period of 40 days after the return of the writs. To prevent the danger of instability in membership of the Houses and abuse of the petition power, the Court might be required to give leave for such a petition to proceed. The Court should exercise that discretion only where doing otherwise would bring the Parliament into disrepute.[106] This, of course, is likely to arise whenever a serious legal doubt arises as to the eligibility of a member.

The Court's unanimous decision in *Alley* has necessitated a pivot: the location of constitutional responsibility now lies with Parliament to determine the appropriate avenues for challenging qualifications and not with the Court. Two observations flow from this shift in constitutional focus. The first is that a range of

105 *Alley* (2018) 264 CLR 328, 352–3 [79] (Gageler J).

106 See further elaboration on this proposal in Gabrielle Appleby, Rosalind Dixon and Lachlan Peake, Submission No 44 to the Joint Standing Committee on Electoral Matters, Parliament of Australia, *Inquiry into Matters Relating to Section 44 of the Constitution* (9 February 2018).

innovative responses to balancing constitutional principles become available that were unlikely to be available within the range of legitimate constitutional choices for the Court in interpreting the existing text. The second is that the nature of arguments to achieve any change from constitutional lawyers and others will necessarily have to shift from those appropriately made before the Court – governments, politicians and parliamentarians are rarely swayed by arguments based on constitutional text and structure – towards more explicitly value-based arguments in which open and robust debate is had, and campaigning is done, about the social, political and economic governance benefits of reform.

V *RE GALLAGHER* AND *RE LAMBIE*

A Overview of Facts and Decision

When the Court is invited into section 44 determinations, what we saw in 2017 and what we see again in 2018 is a judicial branch that seems *particularly cautious* about the approach it is taking and the need for 'certainty' in its doctrine. This is, the members of the Court explain, because of concerns about how its approach to the provisions will be interpreted by members of Parliament and prospective nominees, and also the impact of the approach on the operation of the Parliament as an institution of representative government. We saw such concerns expressed in *Re Day [No 2]* by Gageler J,[107] as well as by a unanimous Court in the 'Citizenship 7' case of 2017, *Re Canavan*.[108]

Re Gallagher[109] was a case that re-litigated the constitutional imperative that the Court had first developed in *Sykes v Cleary*[110] and then elaborated upon in *Re Canavan*. In *Re Canavan*, the Court held that generally the words in section 44(i) have their ordinary and natural meaning regardless of the person's knowledge of their dual citizenship status, or their intention to act upon any foreign duty of allegiance.[111] The exception to retain the constitutional imperative of representative democratic government is where the duty of citizenship is imposed involuntarily and irremediably by operation of foreign law notwithstanding that person has taken reasonable steps to renounce.[112]

Re Gallagher involved a Senate referral to the Court of the case of Katy Gallagher. Ms Gallagher had applied to renounce her UK citizenship, and paid the relevant fee, prior to nominating as a candidate. However, she had not provided the UK Home Office with the relevant documentation for it to process her application; as a result Gallagher's application was not processed and registered by the Home Office of the UK until after she had been elected. Gallagher claimed

107 (2017) 263 CLR 201, 232 [94]–[96].
108 (2017) 263 CLR 284, 299 [19] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
109 (2018) 263 CLR 460.
110 (1992) 176 CLR 77.
111 *Re Canavan* (2018) 263 CLR 460, 313 [71] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
112 Ibid 313–4 [72].

that she had taken all reasonable steps to renounce, and that was all that was required under the *Re Canavan* imperative. The Court disagreed.

Chief Justice Kiefel, Bell, Keane, Nettle and Gordon JJ explained that the exception existed to prevent a situation where Australian citizens were *irremediably* unable to participate in the Australian democratic system, when they had taken all reasonable steps to renounce their citizenship.[113] This was a narrow construction of the imperative, but they said there was no warrant in the text or structure of the *Constitution* for reading it more widely. Gageler J, writing separately, was in broad agreement.[114] Edelman J also wrote separately, and while he agreed with the other judges, he discussed a possibly broader understanding of limit expounded in *Re Canavan*.[115]

Re Lambie was a referral in relation to Tasmanian Senator Jacqui Lambie.[116] However, substantively it concerned the eligibility of Mr Steven Martin, who, if eligible, would be declared elected to fill the seat vacated by Ms Lambie because of her UK citizenship. Mr Martin's questionable eligibility arose under section 44(iv), and whether he held an office of profit under the Crown because at the time of the election he was the mayor and local councillor of the town of Devonport. Under the Tasmanian *Local Government Act 1993* (Tas), Mr Martin has a statutory entitlement to be paid a substantial allowance by the Council.[117]

All of the judgments accepted that a mayor and local councillor were offices of profit, but the question was whether they were 'under' the Crown. Chief Justice Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ looked to the purpose of the disqualification to draw conclusions from that about its construction. Here, they referred to its role in securing an independent parliament,[118] that is, '"eliminating or reducing … executive influence over the House"',[119] essential in a system of responsible government.[120] Consistently with the approach in *Re Canavan* and *Re Gallagher*, Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ were also concerned with the need to create certainty. They said: 'the provision's "limiting effect on democratic participation tells in favour of an interpretation which gives the disqualification set out … *the greatest certainty of operation that is consistent with its language and purpose*"'.[121] This, they held would be achieved by adopting a two-step test that had been proposed in the submissions of the Commonwealth Attorney-General:

> An office of profit is 'under' the Crown within the meaning of the provision if the holding or continued holding of that office, or the receipt of profit from it, depends on the will or continuing will of the executive government of the Commonwealth or of a State.[122]

113 Ibid 468–9 [10]–[12], 473 [30] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
114 Ibid 477 [44]–[45] (Gageler J).
115 Ibid 482 [59] (Edelman J).
116 (2018) 263 CLR 601.
117 *Local Government Act 1993* (Tas) s 340A.
118 Ibid 614 [19] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
119 Ibid 615 [22], quoting *Sykes v Cleary* (1992) 176 CLR 77, 97 (Mason CJ, Toohey and McHugh JJ).
120 *Re Lambie* (2018) 263 CLR 601, 615 [23] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
121 Ibid 615 [22], quoting *Re Day [No 2]* (2017) 263 CLR 201, 232–3 [97] (Gageler J) (emphasis added).
122 *Re Lambie* (2018) 263 CLR 601, 618 [31] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

This position, it was explained, was a more *certain* submission than that of other parties, who had advocated for a more subjective evaluation of all the incidents of the office, and the extent to which it is controlled by the executive. Having decided the test, and after a careful consideration of the Tasmanian local government legislation, Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ found that Mr Martin had neither been appointed at the will of the executive, or continued to hold office dependent on the will of the executive in relation to the elected position of mayor or local councillor. Writing alone but in agreement with the outcome, Edelman J did not adopt the Commonwealth Attorney-General's submission, but developed a test he claimed was more closely anchored in legal usage and precedent.[123]

B Analysis: Where Should Final Constitutional Responsibility Lie?

In both *Re Gallagher* and *Re Lambie*, we see again the Court deploying an approach that is informed by not just the text and structure, but by the constitutional value of 'certainty', and its close association with stability of representative institutions. We have already observed a similar approach in *Alley*, and it has previously been observed in relation to the 2017 decision in *Re Canavan*.[124]

Yet again, then, we see the High Court's decisions preferencing certain higher order constitutional principles or values over others. In these cases, concerning the substance of two different section 44 qualifications, the Court could have prioritised inclusivity of the representative institutions, that is, an interpretation that would have allowed a broader participation in the representative institutions of government. Such a position would have most markedly resulted in a different interpretation of the requirements of the constitutional imperative in *Re Gallagher*. Inclusivity and broadening participation in electoral institutions are values that are evident in the High Court's franchise decisions, most notably *Roach v Electoral Commissioner*[125] and *Rowe v Electoral Commissioner*.[126] In those cases the Court implied a constitutional limitation on the Commonwealth Parliament's power to restrict the franchise, unless it could demonstrate a substantial reason existed for that restriction.

Again, then, a question is raised as to why the Court has informed itself in the interpretation of section 44 by some but not other values, particularly when we see these other values evident in other areas of its jurisprudence. Here, unlike in relation to the interpretation of section 46 of the *Constitution*, there is no concern about constitutional uncertainty should there result in two conflicting constitutional interpretations. By opting for the least subjective formulation of the different tests in *Re Gallagher* and *Re Lambie*, the Court has achieved two aims.

123 *Re Lambie* (2018) 263 CLR 601, 628 [58].

124 For an analysis of *Re Canavan* that explains this approach, see Rosalind Dixon, 'The High Court and Dual Citizenship: Zines and Constitutional Method 30 Years On' in John Griffiths and James Stellios (eds) *Current Issues in Constitutional Law: Tributes to Professor Leslie Zines* (Federation Press, 2020) 135, 157.

125 (2007) 233 CLR 162.

126 (2010) 243 CLR 1.

The first is its explicit aim: to create further certainty and stability for those already participating in representative institutions, and therefore for the institutions themselves. The second is that alluded to above in relation to the *Alley* decision: the judicial desire to reduce the Court's role in determining substantive questions under section 44, which often occur in a highly charged, high stakes partisan political environment.

Unlike *Alley*, the response to the Court's prioritisation of constitutional values is not a simple pivot from the Court to the Parliament. Rather, it is a pivot from the Court to the Parliament plus the Australian people: any reprioritisation of constitutional values would require a constitutional amendment to the substantive text of section 44. This has led to calls for constitutional reform, predominantly based on arguments that there is now a lack of flexibility to the doctrines that, many have argued, means individuals are disqualified where, in Australia's multicultural egalitarian society, they should not be. This is particularly the case in relation to those who might be disqualified because of dual citizenship under section 44(i) or those who hold offices of profit, such as public school teachers, under section 44(iv), and are not in an economic position to resign before nomination.

Responding to the concerns about the adequacy of the Court's doctrine in late 2017 following the *Re Canavan* decision, on 28 November 2017 Parliament referred to the parliamentary Joint Standing Committee on Electoral Matters ('Committee') a number of questions in relation to section 44, including ways of reducing the risk of breach of section 44, and possible constitutional amendment of section 44. The Committee's recommendations were that a constitutional amendment be pursued not to lock in new text as to the disqualifications of members, but, rather, to either repeal section 44 (and leave disqualifications to be determined by Parliament) or to add into the current section 44 the words '"[until] the Parliament otherwise provides"'.[127] While the Parliament has responded to some of the Committee's recommendations to implement a number of non-constitutional changes to assist candidates navigate section 44 and mitigate its impact,[128] there has been no further movement towards a referendum to implement the recommended constitutional reforms.

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127 Joint Standing Committee on Electoral Matters, Parliament of Australia, *Excluded: The Impact of Section 44 on Australian Democracy* (Report, May 2018) 102, recommendation 1 [5.45]. This followed earlier inquiries also recommending reform: Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *The Constitutional Qualifications of Members of Parliament* (Report, 1981); House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Aspects of Section 44 of the Australian Constitution: Subsections 44(i) and (iv)* (Report, 25 August 1997). See also the recommendations for reform made by the 1988 Constitutional Commission: Constitutional Commission, *Final Report of the Constitutional Commission* (Report, 1988) vol 1, 11–12; Joint Standing Committee on Electoral Matters, Parliament of Australia, *The 1988 Federal Election: Report of the Inquiry into the Conduct of the 1998 Federal Election and Matters Related Thereto* (Report, June 2000) 144 [5.94]–[5.96].

128 Joint Standing Committee on Electoral Matters, Parliament of Australia, *Excluded: The Impact of Section 44 on Australian Democracy* (Report, May 2018) 61–5 [4.16]–[4.34]. See further in relation to the response of the Australian Electoral Commission during the 2019 federal election: 'Electoral

The Committee's recommended constitutional response would *return to Parliament* the final authority and jurisdiction to determine the appropriateness of parliamentary qualifications in contemporary Australian society, while maintaining the interpretative function of those disqualifications with the Court. That is, as we saw in relation to the section 46 issue in *Alley*, it would refocus the constitutional locus to the *Parliament* as the ultimate determiner of the priority and expression of constitutional values.

VI *ALFORD V PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES*

A Overview of Facts and Decision

This year we also saw examination of the Commonwealth Parliament's powers of inquiry, looking at the compulsive powers of joint parliamentary committees in *Alford*.[129] *Alford* was decided by Gordon J sitting alone. Her Honour refused to entertain an application for an interlocutory order enjoining the Committee from compelling two executives of the Retail Food Group, Mr Alford and Ms Atkinson, to appear before it to give evidence.[130] The plaintiffs claimed that the Joint Committee did not have power to compel them to appear as witnesses. Gordon J dismissed the summons seeking interlocutory relief,[131] and made discouraging remarks about the claim for full relief.[132] In the course of dismissing the application, Gordon J also noted, referring to article 9 of the *Bill of Rights* and section 16(2) of the *Parliamentary Privileges Act 1987* (Cth) that the issues raised by the plaintiffs 'should generally be resolved by the Parliament, not the Courts'.[133] The High Court has been consistently respectful of this inter-institutional jurisdictional limitation in previous cases.[134]

However, despite these strong statements of Parliament's constitutional responsibility in this area, Gordon J did nonetheless go on to consider the issues

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Backgrounder: Constitutional Disqualification and Intending Candidates', *Australian Electoral Commission* (Web Page, 4 April 2019) <https://www.aec.gov.au/about_aec/Publications/Backgrounders/constitutional-disqual-intending-candidates.htm>.

129 (2018) 264 CLR 289.

130 The Committee had requested the plaintiffs to appear before its inquiry into the operation and effectiveness of the Franchising Code of Conduct on a number of occasions before directing them to appear.

131 Injunctive relief was the correct form, she explained, rather than a stay as had been requested: *Alford* (2018) 264 CLR 289, 291–2 [3]–[4] (Gordon J).

132 These included that it lacked merit, that it did not raise a serious question to be tried and there was little if any prospect of the plaintiffs receiving the final order: ibid 292–3 [7].

133 Ibid 292–3 [7], 299 [28]–[29].

134 In *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, 162, Dixon CJ said: 'it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise': at 162. This was affirmed by Gaudron, Gummow and Hayne JJ in *Egan v Willis* (1998) 195 CLR 424, 446 [27].

raised by the plaintiffs, each of which she rejected.[135] The most significant dimension of Gordon J's discussion from the perspective of the Parliament must be her unresolved consideration of the existence of the Parliament's general and unrestricted inquisitorial function.

This is a function that, it is generally accepted,[136] the House of Commons in the UK enjoyed at the time of Federation. This is in addition to the House's power to inquire as relevant to its legislative function. In *Alford*, the plaintiffs relied on a statement of Forster J of the Federal Court in *Attorney-General (Cth) v MacFarlane* ('*MacFarlane*'),[137] that even if the House of Commons had this general inquisitorial function in 1900, the only function given to the Commonwealth Parliament was the legislative function.[138] Gordon J did not address the question as to whether the statement reflected the correct position. Rather, she distinguished the case, indicating that the Corporations and Financial Services Committee was, in any event, acting in accordance with or in aid of the Parliament's legislative functions.[139]

Noticeably absent in Gordon J's reasoning was reference to the House's power to inquire as part of performing their accountability function within the constitutional framework of responsible government, that is, the investigative powers the High Court referred to in *Egan v Willis* as reasonably necessary to perform this role.[140]

B Analysis: Exclusive Parliamentary Responsibility

In the *Alford* judgment, Gordon J has left as an open question whether the Parliament possesses this power of general inquiry. *Alford* represents a rare foray into parliamentary powers and procedure, but, perhaps unsurprising for a single judge, did not clarify for the future Houses the extent of their constitutional powers. The current edition of *House of Representatives Practice* observed of the general power to inquire that, for a number of pragmatic reasons: 'It may be a very long time before the courts make any authoritative judgment on the limits on the Houses in these matters'.[141]

Indeed, some have argued that the Court should not. Neil Laurie, Clerk of the Queensland Parliament has argued that there would be a grave constitutional danger posed by the Court determining the scope of the inquisitorial powers of the

135 Of the most substantive arguments, her Honour briskly rejects the contention that the joint committee is outside of the definition of 'committees of each House' in section 49 of the *Constitution*: *Alford* (2018) 264 CLR 289, 300 [31]–[32] (Gordon J).

136 Geoffrey Lindell, 'Parliamentary Inquiries and Government Witnesses' (1995) 20(2) *Melbourne University Law Review* 383, 385.

137 (1971) 18 FLR 150.

138 *Alford* (2018) 264 CLR 289, 302 [40] (Gordon J).

139 Ibid 302–3 [43] (Gordon J).

140 *Egan v Willis* (1998) 195 CLR 424, 451–2 [42], 453 [45] (Gaudron, Gummow and Hayne JJ), 477–8 [106]–[107] (McHugh J), 502–3 [154]–[155] (Kirby J), 512 [185] (Callinan J).

141 Elder and Fowler (n 6) 666.

Parliament, that it would 'have the power to stifle the freedom of Parliament to consider matters'.[142]

In the absence of any judicial pronouncement, at least to date, how should the Houses approach the question of their power to inquire as responsible constitutional agents? The scope of the Commonwealth and indeed state parliaments' power to conduct inquiries is the subject of ongoing debate in parliaments across Australia, as evidenced in the various texts of parliamentary practice.

This debate reflects different deliberative choices amongst the parliamentary clerks and their staff who author these texts, as to the most appropriate constitutional position to take. In New South Wales there is an assertion that the inquiry power 'is not simply a power incidental to the Parliament's legislative power, it is a fundamental mechanism to assist the Parliament to discharge its broader functions as an integral part of a system of responsible government'.[143] This view builds on the view expressed by Laurie, which was influenced by those of Geoffrey Lindell.[144] Laurie argues that the argument advanced by Forster J in *MacFarlane* overlooks the constitutional role of the Parliament as 'a fundamental mechanism to assist the Parliament to discharge its broader functions as an integral part of a system of responsible government upon which the *Constitution* is founded'.[145] However, *Odgers' Australian Senate Practice* takes an implicitly narrower view, accepting a limit on the power of inquiry to the legislative function, as it refers to the power to inquire 'into matters of concern as a necessary preliminary to debating those matters and legislating in respect of them'.[146] Harry Evans, former clerk to the Senate and author of this title, has, however, argued that even if it were accepted that there was a constitutional limitation related to the legislative powers of the Parliament, this could be easily worked around by 'cunning drafting of terms of reference and careful framing of questions'.[147]

Unless and until there is a future judicial intervention, one that Gordon J indicated the Court would be reluctant to make, the resolution of this question will pivot on the Houses' interpretation of the scope of their power of investigations. In approaching that interpretation, as has been urged by clerks and academics, the Houses should be informed by an understanding of their constitutional functions, not just as legislators, but as the institutional mechanism through which government accountability to the Parliament is achieved.

Before moving from the constitutional responsibility of the Parliament in determining the scope of its inquiry power, mention must be made of Parliament's responsibility in exercising that power. This is because in this sphere, Parliament

142 Neil Laurie, 'The Grand Inquest of the Nation: A Notion of the Past?' (2001) 16(2) *Australasian Parliamentary Review* 173, 179–80.

143 Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008) 490. This position is taken from that of former Clerk of the Queensland Parliament, Neil Laurie: Laurie (n 142).

144 Lindell (n 136).

145 Laurie (n 142) 179.

146 Evans, *Odgers' Australian Senate Practice* (n 6) 78.

147 Harry Evans, 'The Parliamentary Power of Inquiry: Any Limitations?' (2002) 17(2) *Australasian Parliamentary Review* 131, 134.

acts as both interpreter and executor. As such, as a separate question from the outer scope of constitutional power, the Parliament should act as a responsible constitutional actor when determining when they *should* exercise the power. As Sir Anthony Mason once explained in the context of the Parliament's power to demand Cabinet documents:

> It is for the courts to determine the existence and the scope of the powers and privileges of a House of Parliament. In making this determination, it is appropriate that the courts, in deciding whether a House has a particular power, should proceed on the footing that the House will exercise the power responsibly, with all due regard to considerations which argue against an exercise of the power in the context of ministerial responsibility.[148]

Sir Anthony Mason reminds us that as constitutional actors, parliaments have the capacity to be informed not just by legal limits, but by constitutional principle in the exercise of powers.

VII CONCLUSION

The 2018 High Court term gave us a number of important doctrinal developments in relation to the Court's Chapter III and parliamentary disqualification jurisprudence. Exploring the inter-institutional impact of these developments gives us a more complete understanding of the workings of our constitutional system. By drawing attention away from the Court as a sole constitutional interpreter and actor, it reveals how the High Court's jurisprudence is informed by, and influences the role that is, and should be, played by parliaments in the constitutional system. Studying the 2018 parliamentary term in this way reveals four key observations about Parliament's constitutional role in the functioning of the system.

First, we observe how interpretative choices made by the Court will affect the constitutional responsibilities of different parliaments to respond to doctrinal developments. Judicial interpretative choices may entirely close off the Parliament's capacity to respond, or return the power to the Parliament to renegotiate the constitutional position determined by the Court. Further, we can observe that the Court may or may not be moved by submissions from government litigants as to the impact of its decisions on their ability to practically respond to doctrinal developments. In some cases, the Court has been inclined to respond to such submissions, resulting in a constructive collaboration across the branches as they negotiate constitutional parameters and practical realities. In other cases, such as *Burns* in the 2018 term, the Court has rejected the relevance of such practical concerns, leaving it then exclusively to the governments to negotiate the judicially determined constitutional parameters.

Second, we see in *Falzon* that when legislating in areas engaging constitutional limits, Parliament may emerge as a potential co-actor in determining whether

148 Sir Anthony Mason, 'The Parliament, the Executive and the Solicitor-General' in Gabrielle Appleby, Patrick Keyzer and John Williams (eds), *Public Sentinels: A Comparative Study of Australian Solicitors-General* (Ashgate, 2014) 49, 64.

policy measures are proportionate or necessary responses to a pressing legitimate governmental objective. In this arena, the Court appears at least open to the development of doctrine that exercises some restraint where Parliament has engaged in an extensive and rigorous investigation and deliberation as to these questions. While maintaining the Court's oversight responsibilities, this development may incentivise parliaments to undertake their own proportionality-style analysis, which may ultimately lead to a more informed cross-institutional response to determining issues of necessity and proportionality.

Third, in *Alley*, we see the Parliament emerging as the now singular focus of final responsibility for the prioritisation of constitutional principles, with the ability to legislate, or initiate constitutional change, in response to judicial decisions. In response to the section 44 cases, we see a similar position advocated, although not yet adopted. In such instances, institutionally, Parliament has greater flexibility to find an innovative response to balancing constitutional principles. Advocates for reform, however, will have to pivot their arguments to be more explicitly value based, to respond to the different institutional mandate of the Parliament (as compared to the Court).

Finally, the 2018 term offers us a glimpse of the respective roles of the Court and Parliament in determining the scope and exercise of parliamentary privilege. While it remains, ultimately but rarely, the Court's responsibility to espouse the existence of a privilege, most often the Court will leave even this space to Parliament. This leaves Parliament to determine the scope of its own powers, as well as responsibility for determining whether those powers should be exercised. In this respect, parliamentary practice should be informed by a deep understanding of its constitutional role as both a legislator and an accountability mechanism.