## Ministries InquiryAttorney General’s Department3-5 National CircuitBarton ACT 2600

Dear Inquiry

Please find attached a submission.

I would be happy to provide further details and can be contacted through: jadebeagle@outlook.com.

Yours sincerely

J Austen

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## 1. Introduction

This is a submission to the inquiry into undisclosed appointments of Prime Minister Morrison to administer several Departments.

It draws on information in the public domain and assumes the factual basis set out in the Solicitor General’s opinion.[[1]](#footnote-1)

Section 2 provides recommendations.

Section 3 outlines the basis of those recommendations.

Section 4 sets out some conclusions.

Further details will be at the jadebeagle.com. Comments and corrections are welcome.

## 2. Recommendations

The inquiry should have regard to:

1. the paradox in the Solicitor General’s opinion – adherence to the Constitution’s express terms could undermine its purpose of representative and responsible government;
2. appointments of a (Prime) Minister to administer multiple Departments does not undermine responsible government;
3. of itself, non-disclosure of the appointments of Mr Morrison did not directly undermine responsible government;
4. nonetheless, uncertainty about Ministerial powers – which non-disclosure of appointments contributes to – creates conditions in which serious threats to the system of government can emerge;
5. other aspects of such uncertainty, which pre-existed the appointments in question, continue today and should be rigorously addressed by Parliament and the Government.

## 3. Basis of recommendations

### 3.a Solicitor General opinion – paradox

A principal purpose of the Constitution is to establish a system of representative and responsible government.[[2]](#footnote-2)

Responsible government is understood as meaning the (Executive) Government and Ministers are potentially controlled by, and account to, Parliament.

Among the Constitutional mechanisms of control are: a Minister must be a member of Parliament; the ability of Parliament to legislate to constrain Ministers.

By convention Ministers – and their proxies in the ‘other House’ – must answer Parliamentary questions.[[3]](#footnote-3)

The Solicitor General’s opinion was to the effect:

* the appointments conformed with Constitutional requirements and were valid;
* non-disclosure of the appointments undermined responsible government.

The result is paradoxical: conformance with the Constitution can undermine its purpose.

The Constitutional purpose of representative and responsible government has significant implications. One is: legislation cannot unduly burden its implied freedom of political communication.

If legislation is unable to undermine that implication, it would seem behaviour of the Executive cannot undermine that Constitutional purpose while being considered lawful.

Without further explanation, the paradox in the Solicitor General’s opinion has the potential to reduce Government and Parliamentary appreciation of the importance of responsible government.

### 3b. Appointments to multiple Departments

More than one person can be appointed to administer, at any given time, a Department.[[4]](#footnote-4)

It seems a person can be appointed to administer, at any given time, several Departments.[[5]](#footnote-5)

Neither circumstance appears to weaken responsible government.

### 3c. Non- disclosure of appointments

Among the salient facts are: the appointments were of the holder of office of Prime Minister; at least the first appointment was part of responses to the pandemic.[[6]](#footnote-6)

With these facts, the appointments of themselves were unlikely to undermine responsible government:

1. Constitutional mechanisms for Parliament to control the Government were unaffected;
2. Parliament’s oversight of the Government was not impeded. At all times, the identity of a Minister administering each Department was known;
3. there are very strong perceptions of Prime Ministerial responsibility for every Ministry – evidenced for example by being questioned in Parliament about other Ministries;
4. the identity of a person who holds power will become known, at the latest, immediately there is any attempt to exercise that power.

While-ever the appointments were undisclosed, Mr Morrison’s potential legal powers were greater than others assumed. That situation does not lend itself to abuse of authority.[[7]](#footnote-7)

### 3d. Uncertainty about Ministerial powers

Abuse of authority, and undermining representative and responsible government, is far more likely to occur if the power of a person in a position of apparent authority is less – not more – than others assume.

In such cases, the person seen to be in authority can ‘bluff’ or coerce others into actions they would not undertake if they knew the true situation. Those adversely affected may find it difficult to ‘call’ such bluffs. At the extreme, bluffing can be a threat to the system of government.

Public uncertainty about Ministerial powers may lead to false assumptions Ministers and those in positions of apparent authority are allowed to do things for which they lack power.

Failure to disclose Government powers, such as through failure to disclose Ministerial appointments, contributes to such uncertainty.

The wide publicity given to Mr Morrison’s undisclosed appointments gives rise to possibilities such as members of Commonwealth or State Parliaments, or officials, bluffing the more credulous in the community the hold secret Ministerial positions or powers.

While non-disclosure of Mr Morrison’s appointments might not have had direct adverse effects on representative and responsible government, it contributes to an environment in which threats to the system of government emerge.

### 3e. Other aspects of uncertainty

Bluffing about Government powers was occurring prior to the undisclosed appointments.

Professor Twomey referred to a type of bluff – Commonwealth Ministers pretending to have power to spend public monies on whatever they like – as entailing ‘Constitutional risk’.[[8]](#footnote-8)

She claimed such spending is based on assessments of the unlikelihood of legal challenge, implying some behaviour to be deliberately and knowingly illegal.

Professor Twomey said the practice involves democratic decay. It is hard to disagree.

Wilful bluffing about spending powers might - like illegal pork-barrelling – be regarded as a type of crime that lacks victims other than taxpayers. Nonetheless, any crime by those in a position of public trust that goes unpunished will derogate from the system of government.[[9]](#footnote-9)

Probably more concerning than Commonwealth Ministers bluffing about spending powers are responses of Governments, including by unelected officials, to the pandemic – especially those undertaken with supposed authority of the States. Some of these entailed bluffs severely impacting businesses and the lives of individuals.[[10]](#footnote-10)

Those responses were made under the guise of ‘emergency’. They have not been properly examined, and relevant accountability processes have been frustrated. First, by withholding information needed for Parliaments and electorates to judge the merit of responses. Second, by reluctance to challenge responses through legal processes. Third, by misrepresentation of meetings between the Prime Minister and Premiers as a form of Government – cabinet – with decision making powers. Fourth, by failure to instigate a promised Royal Commission into issues arising from responses to the pandemic.[[11]](#footnote-11)

Such frustration of accountability processes is highly likely to undermine public confidence in the operation and integrity of Australia’s system of government.

More generally, the potential for bluffing under the cover of ‘emergency’ is increasing. Examples arise from the Commonwealth’s national emergency declaration legislation.

The wording of the legislation allows the Prime Minister to effectively declare a national emergency on the basis of his or her perceptions of the impact of threat of harm to just an individual.[[12]](#footnote-12)

The legislation is not needed for the Commonwealth Government to address bona fide national emergencies such as those threatening the Constitution or Commonwealth laws.[[13]](#footnote-13)

Hence the legislation has other purposes. Among these is providing *‘a strong, clear message to the Australian community’* the Prime Minister regards a situation as an emergency. The intent is for declaration of an emergency to have a significant influence on what the public believes the Government – and Prime Minister - is able to do.[[14]](#footnote-14)

At present such beliefs are likely shaped by responses - Commonwealth and State, by Ministers and officials, lawful or not - to the pandemic. The beliefs also are likely influenced by fears stoked over the last few years by (some) political participants and mass media about ‘disasters’, ‘crises’ and ‘emergencies’. It is apparent some see - and want - declarations of a national emergency as a political tool.

Like the Health legislation which supposedly triggered the idea for the Prime Minister to acquire other Ministries, the national emergency legislation includes provisions preventing disallowance of the declaration by the Senate. Extraordinarily, it was passed unanimously by the Senate days after a Senate Committee delivered a report – its first in eighty-eight years – condemning just such provisions. [[15]](#footnote-15)

In effect the legislation – in the mind of the public – gives the Prime Minister powers that are not constrained by Parliament whenever he or she feels inclined to use the words ‘national emergency’.

There are other, growing, ways in which certainty about the use of power is seriously compromised. These include unnecessary secrecy regarding national cabinet, the use of anti-terrorism legislation, some prosecutions and trials.[[16]](#footnote-16)

In such an environment, anything that further increases uncertainty about powers of those in positions of public trust – or apparent authority - particularly the Prime Minister, should be regarded as infringing fundamental aspects of the Constitution.

## 4. Conclusions

Of itself, non-disclosure of Prime Minister Morrison’s appointments to other Ministries is not a major issue.

However, it must increase uncertainty about powers able to be exercised by those apparently in positions of authority and public trust.

There is significant uncertainty about that at present, which facilitates abuse of power – and the undermining of representative, responsible and federal government – as demonstrated by Commonwealth spending, responses to the pandemic and ‘powers needed to deal with emergencies’.

Unlawful Commonwealth spending might be regarded by some as largely victimless.

Similarly, some might regard the undisclosed Ministerial appointments as victimless.

Nonetheless, both are associated with a pattern observable since at least the turn of the century in which representative and responsible government is being devalued and undermined – especially by fearmongering, Constitutional risk and insistence on secrecy to reduce opposition to Government arrogation of power.

At least the first undisclosed appointments of Mr Morrison were in response to the pandemic. They might be contrasted with other, more dubious, responses to the pandemic that appear to involve significant abuses of power and were certainly not victimless.

The absence of proper explanation of and public inquiry into those other responses is disturbing. Among the reasons is they – like acquiescence to Ministers and officials threatening to use ill-defined, improperly justified ‘emergency’ powers outside effective Parliamentary control - pose a serious enduring threat to representative and responsible government in Australia. Instead of allowing - even facilitating - such problems, Parliamentarians should meet their principal responsibilities.

1. *Solicitor General’s Opinion – SG No 12 of 2022:* at <https://www.ministriesinquiry.gov.au/publications/solicitor-generals-opinion-sg-no-12-2022> [↑](#footnote-ref-1)
2. For example, Gagelar J: *‘…freedom of communication to and between electors, and between electors and elected legislative and executive representatives, on matters of government and politics is an "indispensable incident" of the system of representative and responsible government prescribed by the Constitution’* Farm Transparency International Ltd v New South Wales [2022]HCA 23 at <https://www.hcourt.gov.au/cases/case_s83-2021> [↑](#footnote-ref-2)
3. Proxies in the other house – for example a Senator representing a Minister who sits in the House of Representatives. [↑](#footnote-ref-3)
4. Re Patterson; Ex parte Taylor [2001] HCA 51 [↑](#footnote-ref-4)
5. For example, at present there are six Ministers administering the Prime Minister’s Department at least two of whom also administer other Departments. See: <https://www.pmc.gov.au/who-we-are/ministers> [↑](#footnote-ref-5)
6. <https://www.abc.net.au/news/2022-08-24/scott-morrison-secret-ministries-what-next/101363602> [↑](#footnote-ref-6)
7. Potential, because it can be argued the powers need to be disclosed to be legally effective. [↑](#footnote-ref-7)
8. Anne Twomey (2021), *“Constitutional Risk” Disrespect for the Rule of Law and Democratic Decay*, Canadian Journal of Comparative and Contemporary Law 7, at <https://www.cjccl.ca/wp-content/uploads/2021/05/10-Twomey.pdf> [↑](#footnote-ref-8)
9. Crime – the NSW Independent Commission Against Corruption recently published a paper on ‘pork-barrelling – use of public monies to ‘buy votes’. It said pork barrelling is illegal if done with the dominant intention of buying votes. It can involve the crime of misconduct in public office if it (such illegality) is done knowingly or with reckless indifference to legality: Report on investigation into pork barrelling in NSW at <https://www.icac.nsw.gov.au/investigations/past-investigations/2022/investigation-into-pork-barrelling--operation-jersey->

 [↑](#footnote-ref-9)
10. Many of the responses to the pandemic were made under emergency legislation which only allowed actions reasonably necessary to prevent damage to public health. Among responses which do not readily appear so necessary were extension of border closures until school holidays, prohibition of sitting in public parks and surfing: *Covid observations update July 2020* at <https://www.thejadebeagle.com/covid---july-2020.html>; *Anti-Covid Regulatory Processes* at <https://www.thejadebeagle.com/acrpa.html> [↑](#footnote-ref-10)
11. Outlined in: *Tipfire A – Pandemic Royal Commission* at <https://www.thejadebeagle.com/tip-fire-a.html> [↑](#footnote-ref-11)
12. While the legislation empowers the Governor General to declare a national emergency, that is done on the advice of the Prime Minister. Elsewhere it is held the Governor General must act on the Prime Minister’s advice. The legislation allows the calling of an emergency on the emergence of threat of significant harm. Section 10 defines nationally significant harm:

***‘….***means harm that: (a)  has a significant national impact because of its scale or consequences; and (b)  is any of the following: (i)  harm to the life or health (including mental health) of an individual or group of individuals;(ii)  harm to the life or health of animals or plants; (iii)  damage to property, including infrastructure; (iv)  harm to the environment; (v)  disruption to an essential service.’

*National Emergency Declaration Act 2020* at [https://www.legislation.gov.au/Details/C2020A00128National emergency legislation](https://www.legislation.gov.au/Details/C2020A00128National%20emergency%20legislation) [↑](#footnote-ref-12)
13. Constitution s.61 and see: Twomey, *The Prerogative and the Courts in Australia*, Journal of Commonwealth Law Vol. 3 2021 at <https://www.journalofcommonwealthlaw.org/article/24261-the-prerogative-and-the-courts-in-australia> [↑](#footnote-ref-13)
14. Minister’s second reading speech at <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F11b18738-de56-4d82-82f6-2c10fddd6b2b%2F0008%22> [↑](#footnote-ref-14)
15. Health legislation: <https://www.theaustralian.com.au/commentary/emergency-powers-secret-ministries-avoid-scrutiny-of-parliament/news-story/5c8580593ff6319994d9625a3b0f8a99>

Acquire other Ministries: Simon Benson Geoff Chambers, *Plagued*, Pantera Press 2022 at p.89. Extraordinarily: *Emergency Achieved* at <https://www.thejadebeagle.com/emergency-achieved.html>

The emergency legislation does require a Senate Committee to begin a review of each declaration within a year of the declaration being made: Section 14A at <https://www.legislation.gov.au/Details/C2020A00128>. There is no time limit on a review report being provided to the Senate, and there is no legal consequence of such a report being made – for example, it does not lead to any right for the Senate to ‘disallow’ a declaration or action taken under it. [↑](#footnote-ref-15)
16. Secret trials e.g., <https://www.lawcouncil.asn.au/media/news/secret-trials-need-reform>; <https://www.nswccl.org.au/witness_k_and_bernard_collaery>

 [↑](#footnote-ref-16)