Submission No 7

INQUIRY INTO MINISTERIAL PROPRIETY IN NEW SOUTH WALES

Organisation: The Accountability Round Table

Date received: 31/10/2013

SUBMISSION TO THE NSW LEGISLATIVE COUNCIL SELECT COMMITTEE INQUIRY INTO MINISTERIAL PROPRIETY IN NSW

BY

THE ACCOUNTABILITY ROUND TABLE

October 2013

Introduction

> The Accountability Round Table ("ART") was founded in 2007. Its membership consists of retired MPs including Ministers (Liberal and ALP) as well as lawyers, academics, journalists and authors. Membership of ART is shown on its website at http:/www.accountability.

The objects of ART are to generate public debate about, and improve standards of, accountability, honesty, probity, transparency, democratic practice and anti-corruption measures in all Parliaments and Governments in Australia. ART therefore has a particular interest in the inquiry into ministerial propriety conducted by the Select Committee on Ministerial Propriety in New South Wales.

This submission deals sequentially with each of the individual heads of the Select Committee's terms of reference.

Ministerial responsibility to Parliament, including the doctrine of individual Ministerial responsibility

To the extent that the present ***Code*** addresses this subject at all, it does so merely by inference. This will not win public respect or confidence and significantly diminishes the initiative.

With the exception of the opening words of the ***Code***, and the introduction which follows, the ***Code*** is entirely prescriptive. Yet it is vital that its specific provisions be read against more general propositions which put the specific in its proper context. In other words, the ***Code*** cannot do all it should unless it supplements its specific provisions with a carefully articulated framework against which the proper application of its prescriptive content can be fully understood.

The Code opens with the observation that "[i]t is essential for the maintenance of public confidence in the integrity of the Executive Government of the State that

Ministers of the Crown exhibit, and be seen to exhibit, the highest standards of probity in the exercise of their offices, and that they pursue, and be seen to pursue, the best interests of the people of New South Wales to the exclusion of any other interest." The ***Code*** shortly afterwards adds that one of the two principles which, accordingly, "must guide ministerial conduct in office", is that "Ministers will perform their duties in the best interests of the people of New South Wales."

Statements of this kind should necessarily be included in any ministerial code worthy of respect. However, such a code ought to give considerably more emphasis to them. They are otherwise in danger of being passed over, if not dismissed, as motherhood statements of limited, if any, practical relevance.

Responsible government is grounded in the notion that the Executive Government is collectively responsible – or, in other words, answerable - to Parliament and the electorate. Ministers are, by virtue of their office as such, members of the executive branch of government. Ministers are therefore collectively responsible (or answerable) to Parliament as the legislative branch, as well as to the electorate as a whole.

They are each individually responsible as well. Each Minister holds office on trust for all the people who are subject to the laws made by the Parliament of which the Minister is a member. It is the duty of that Parliament to ensure that not only the Executive Government, but each individual Minister, fulfils all the obligations the fulfilment of which is necessary if that trust is to be honoured. A failure to discharge those obligations or to honour that trust should be followed as of course by the resignation or dismissal of the errant Minister.

This submission does not suggest that Ministers be subject to the duties and responsibilities imposed upon trustees by the principles familiar to equity lawyers. The concept of trust is nevertheless appropriate because it provides a perspective, or a platform, through which and from which Ministers should invariably evaluate the impact of their decisions. Ministers constantly exercise discretionary power the exercise of which, when it is within the political sphere, is for that reason not subject to judicial supervision. The courts do not and must not enter the political domain. But because many of the wide discretionary powers exercised by Ministers are otherwise unconstrained, their exercise must be informed by considerations which exclude purely personal, and purely partisan, advantage: which, in other words, include the wider interests of the community viewed in the round. Governments on assuming office frequently and properly proclaim their determination to retain the trust of the people. With like frequency they emphasise that they will govern for all, rather than merely for those who voted for them. In short, they echo the sentiments of the ***Code*** when it refers to "the highest standards of probity" and "the best interests of the people of New South Wales to the exclusion of any other interest."

These propositions ought not to be mere puffery. They ought to evoke in those to whom they are directed more than mere cynicism. They ought to be part of the hard

reality of practical governance. They ought to be the subject of discussion and analysis in any ministerial code of conduct. In essence, the message must be that Ministers have a duty of trust to act, day by day and in everything that they do, in accordance with them. The present ***Code*** fails to give that message the attention it deserves.

ART acknowledges that the exposition of the applicable principles is not easy. There will always be grey areas, where the best possible answer to an ethical dilemma may be that which will gain most ready acceptance when the background circumstances are openly revealed to the electorate ("the pub test"). But there are at least two aspects to the responsibility of Ministers to Parliament which are clear. Firstly, there is a widespread belief that Ministers must resign if they are guilty of either wrongdoing in their official capacity or wrongdoing of a personal kind such that their behaviour brings discredit to their office, or demonstrates that they are unfit to hold a position of public trust. Secondly, they must account to Parliament for their administration of their portfolios and of any legislation for which they are the responsible minister; and they must, by their accounting, place Parliament in a position to make informed judgments about all aspects of that administration.

Woodhouse clarified these perceptions and argued that a hierarchy of actions and sanctions apply to individual ministerial responsibility, as summarised in the following table. [1]

Levels of responsibility of ministers

Level	Features
Redirectory responsibility	▪ Ministers 'redirect' questions from MPs as appropriate. ▪ Ministers retain a direct responsibility, i.e. MPs can insist on a ministerial answer. **Disadvantages** ▪ If answers to redirected questions are provided in writing, they are not public unless published. ▪ Written answers may be addressed only to individual Member concerned.
Reporting/ Informatory responsibility	▪ Ministers report to Parliament what has happened in his/her responsible areas. ▪ It is a mechanism for the indirect accountability to Parliament for the daily administration. **Disadvantages** ▪ Reporting responsibility is not suitable if the question is referred to a departmental public servant.

[1] Woodhouse, Diana (1994). *MINISTERS AND PARLIAMENT. Accountability in Theory and Practice.* Oxford: Clarendon: pp. 28-38.

Levels of responsibility of ministers

Level	Features
Explanatory responsibility	▪ Ministers have to explain for his/her own and his/her department's actions. ▪ It is unacceptable for a minister to accept responsibility without any explanation. **Disadvantages** ▪ Explanatory responsibility is not suitable if the question is referred to a departmental public servant.
Amendatory responsibility	▪ Minister has to make amends for his or his departmental mistakes. ▪ Forms can be: an apology to Parliament; corrective actions; financial compensation; 'naming & blaming"; transferring to other duties. **Disadvantages** ▪ Accountability may be limited by terms of reference of the inquiry, the timing and the extent of the publication of the report. Thus, ministers can delay full disclosure of the facts until public interest has subsided. **Solution**: The establishment of UK "Next Steps" agencies allows greater public accountability to deal with mismanagement and maladministration.
Sacrificial responsibility	▪ Ministers have to resign. They have to submit to the judgment of Parliament and if the failure is serious, they should accept personal responsibility by resignation. ▪ Debate: Under what circumstances is a minister obliged or does he feel himself obliged to resign? What is the rationale if the minister has to resign, but the officials involved still remained in office? Is it the failure of his department or his own mistake? ▪ Is resignation for personal fault or private discretion or for departmental fault? When there is departmental mal-administration of which the minister is unaware, he is still responsible but is limited to explanatory or amendatory accountability and there is no require for resignation.

Source: adapted from Woodhouse (1994).

The clear message is that each member of the Executive has a high responsibility to provide to Parliament all the information Parliament needs to enable it fully to appreciate how effectively the responsibilities of the executive branch of government are being discharged.

Accordingly, Ministers have a duty never knowingly to mislead Parliament. They must, on the contrary, furnish the legislature with accurate information, and correct at the earliest opportunity any errors in information previously given. There will of course be exceptions when information is too sensitive for public dissemination. The limits of these exceptions should be put squarely in the public domain as well as in the Code. And they must be observed in practice.

Members of a Minister's private office staff must to be instructed or restricted from giving evidence before any committee of the Parliament, as sometimes argued by

Commonwealth Government ministers. Whilst a Minister is responsible for his or her staff and it is appropriate for the Minister to give evidence, there is no valid basis for restricting any parliamentary committee from receiving evidence from any source within the State's jurisdiction.

There is no justification for the argument sometimes put forward in the Commonwealth sphere. It is no more than a sham designed to shelter Ministers from unwanted revelations. A staff member might disclose to such a committee matters which might be very important to the committee's terms of reference, but damaging to the Minister. Contrary to the purported justification for the practice of distancing ministerial staff from committee inquiry, it may be more difficult to extract the information in question from a member of the Executive determined to maintain secrecy.

To place Ministers in a position of trust is not to disregard the obvious fact that they cannot be held responsible for every mistake made by those over whom they exercise ultimate authority. That is recognised in Oliver's analysis above. Government reaches into many areas of civic, and sometimes private, life. The inevitable consequence of this is twofold. First, those officials charged with the day to day discharge of executive responsibilities (generally, but not exclusively, members of the public service) will be far greater in number than the number which any Minister, or the executive as a whole, can personally direct or control. Secondly (and as a consequence of the above) the culpability of Ministers for mistakes or wrongdoing, including by those over whom they exercise ultimate authority, will not arise unless the action which stands condemned was theirs, or was taken at their direction; or unless the impugned action was action with which they ought obviously to have been concerned - as, for example, arising out of (i) a systemic fault in the administration of an entity with the administration of which the Minister concerned was entrusted, and (ii) where the fault arose or was not corrected in a timely way under that Minister's watch.

The fact that a Minister may not be personally culpable – or, in other words, not in breach of the public trust which adheres to his or her office – by no means diminishes the Minister's responsibility, and the collective responsibility of Cabinet, to provide to Parliament all the information needed to enable the legislature fully to assess the effectiveness with which the responsibilities of the executive are being discharged.

Measures to reduce potential conflicts of interest between a Minister's public duties, private interests and membership of a political party, particularly in relation to financial and commercial activities

The ***Code*** adequately addresses this topic. It is nevertheless appropriate to refer here to the degree of probity required when assessing decisions which will particularly favour members of the Minister's political party. Such decisions will not amount to a breach of trust if before they are made they are honestly assessed against, and

meet, the test of being in the best interests of the people of New South Wales. A minister must not determine a matter according to the interests of a political party, donor or other partisan consideration.

The Code should be amended to explicitly require that where a Minister has a personal interest which is or may be perceived to be in conflict with his ministerial responsibilities, the Minister should ask the Premier to assign the decision to a Minister who does not have such a real or perceived conflict of interest.

The operation and enforcement of the Lobbying of Government Officials Act 2011, and any associated codes of conduct, registers or administrative arrangements

The range of people and organisations required to register as lobbyists should be greatly extended to cover (for example) in-house lobbyists and organisations – such as trade unions and industry groups – that represent the interests of their members. Former Ministers and senior officials should also be required to register.

However, the more important point is that registration of lobbyists is merely an indirect means of regulating lobbying. There should be a requirement for ministers and lobbyist to maintain a public online record of all lobbying activities, updated daily, as described in detail in a submission to the ICAC Operation Halifax inquiry.[2]

The recommendations of the 2010 ICAC report *Investigation Into Corruption Risks Involved In Lobbying* should be implemented in full.

Whether the Code should be adopted as an applicable code for the purposes of s 9(1) (d) of the Independent Commission Against Corruption Act 1988.

The simple answer is yes. It is an incongruity beyond explication that MPs in relation to their ***Code of Conduct*** can be caught by ICAC while Ministers remain exempt.

[2] Ken Coghill & Julia Thornton (2010) Submission to Operation Halifax investigation into lobbying of public officials and public authorities in NSW and the related procedures and regulatory system.