

Responsible Government: Ministerial responsibility and motions of ‘censure’/‘no confidence’

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Introduction

Although the New South Wales Legislative Council has made little use of motions of censure or no confidence, since the mid 1990s there have been several attempts to censure a minister. Most of these motions either were amended or failed to pass. In March 2001 though, the Legislative Council passed a resolution censuring the then Minister for Police, ‘for his interference in Committee proceedings and his statement that the inquiry (into Cabramatta Policing) should be terminated.’¹ In April 2001 the Legislative Council passed a resolution ‘condemning’ the then Minister for Land and Water Conservation in relation to the decision to wind up the operations of the Hawkesbury Nepean Catchment Management Trust.² Neither of these ministers were members of the Legislative Council, both being members of the lower House. On 8 May 2002 the Legislative Council debated a motion of ‘no confidence’ in relation to the new Minister for Police, who was a member of the Legislative Council, for allegedly misleading the House. The motion was not passed.³

Carriage of a no confidence motion against a government in a lower House is traditionally regarded as necessitating resignation of the government. Motions of censure or no confidence against an individual minister may have significant political fall out and could be potentially damaging for both the minister and the government. However, there is a dearth of authority on the implications of a

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¹ *Minutes of Proceedings*, 8/3/01, p. 886.

² *Minutes of Proceedings*, 11/4/01, p. 953.

³ *Minutes of Proceedings*, 8/5/02, p. 149.

successful motion of censure or no confidence in a minister. The purpose of this paper is to open up discussion of this issue. The discussion is placed within the context of the recent re-affirmation of the importance of responsible government by the High Court of Australia. The paper concludes by posing a number of questions for further consideration.

The Traditional Convention of Liability to Resign Upon a Vote of ‘Censure’/‘Co Confidence’

New South Wales has had a form of responsible government since 1856.⁴ The importance of the concept of responsible government has been recognised and its meaning tentatively explored in a series of decisions of the High Court.⁵ More recently, in *Egan v Willis* responsible government was described in the following terms:

A system of responsible government traditionally has been considered to encompass ‘the means by which Parliament brings the Executive to account’ so that ‘the Executive’s primary responsibility in its prosecution of government is owed to Parliament’. The point was made by Mill, writing in 1861, who spoke of the task of the legislature ‘to watch and control the government: to throw the light of publicity on its acts’. It has been said of the contemporary position in Australia that, whilst ‘the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people’ and that ‘to secure accountability of government activity is the very essence of responsible government’.⁶

The courts have also pointed out that responsible government depends on a combination of law, convention and political practice:

Responsible government . . . is a concept based upon a combination of law, convention, and political practice. The way in which that concept manifests itself is not immutable. The nature and extent of the responsibility which is involved in responsible government depends as much upon convention, political and administrative practice, and the climate of public opinion, as upon rules of law. A newer term, accountability, has entered into political discourse. Its meaning, also, is protean.⁷

⁴ *Clayton v Heffron* (1960) 105 CLR 214 at 251. See also *Egan v Willis* (1996) 40 NSWLR 650 and *Egan v Willis* [1998] HCA 71 for a detailed account of the means by which the principles of responsible government have been incorporated into NSW political and constitutional arrangements. See also *Victorian Stevedoring and General Contracting Committee Pty Ltd and Meakes v Dingan* (1931) 46 CLR 73 at 114.

⁵ *Amalgamated Society of Engineers v Adelaide Steamship Committee Ltd* (1920) 28 CLR 129 at 147. See also *New South Wales v the Commonwealth* (1975) 135 CLR 337 at 365.

⁶ *Egan v Willis* [1998] HCA 71 at pars 42–3 per Gaudron, Gummow and Hayne JJ.

⁷ *Egan v Willis* (1996) 40 NSWLR 650 at 660.

A constitutional convention has been defined as ‘a binding rule, a rule of behaviour accepted as obligatory by those concerned in the working of the constitution’, or alternatively as ‘the rules that the political actors ought to feel obliged by, if they have considered the precedents and reasons correctly.’⁸ By way of example, the convention that the executive government is drawn from members of the political party (or parties) who support one of their members as Premier and which has the confidence of the lower House of Parliament, is a fundamental tenet of responsible government, but is not spelt out in the Constitution.⁹

Inherent in the concept of responsible government, and specifically of individual ministerial responsibility, is the need for ministers to have the confidence of the Parliament.

It is the distinguishing characteristic of parliamentary Government that it requires the powers belonging to the Crown to be exercised through Ministers, who are held responsible for the manner in which they are used, who are expected to be members of the Houses of Parliament... and who are considered entitled to hold their offices only while they possess the confidence of Parliament, and more especially the House of Common . . .

The exercise of their high authority is . . . placed under the check of a strict responsibility and control, and its possession is made to depend on the confidence placed by the Representatives of the People in the Minister to whom it is committed . . .¹⁰

One of the conventions which developed in order to give meaning to the concept of responsible government and individual ministerial responsibility was the liability of a minister to resign upon losing the confidence of the House of Commons. The convention was stated most clearly by A.V. Dicey:

It means in ordinary parlance the responsibility of ministers to Parliament or the liability of ministers to lose their offices if they cannot retain the confidence of the House of Commons.¹¹

The development of this convention in the mid-nineteenth century and the question of its more contemporary application have been examined and discussed in detail by a number of eminent authorities¹² and it is not the purpose of this paper to go over

⁸ G. Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability*, Clarendon Press, Oxford, 1984, p. 7, 12.

⁹ *Egan v Willis* (1996) 40 NSWLR 650 at 660.

¹⁰ Earl Grey, ‘Parliamentary Government, 1858’, quoted in D Woodhouse, *Ministers and Parliament: Accountability in Theory and Practice*, Clarendon Press, Oxford, 1994, pp. 5–6.

¹¹ A V Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edn, Macmillan, 1959, p. 325.

¹² See for example: S. Finer, ‘The Individual Responsibility of Ministers’, *Public Administration* XXIV (1956), pp. 384–5; D. Woodhouse, *Ministers and Parliament: Accountability in Theory and Practice*, Clarendon Press, Oxford, 1994; G. Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability*, Clarendon Press, Oxford, 1984; G. Marshall (ed.), *Ministerial*

that ground. It should also be noted that the House of Commons has recently adopted a statement on ministerial responsibility.¹³

Studies of Ministerial Resignations in Australia

In 1990 Barbara Page published a monograph which examined ministerial resignations at the national level in Australia from 1976–1989.¹⁴ Her study covered 8 resignations and 28 calls for resignations. She found that resignations only took place in relation to an act or policy of a minister acting in his/her ministerial capacity or an act of a minister in a private capacity, and never for an act of the minister's department. She found that the critical factors determining whether or not ministers resigned were: the stance of the Prime Minister; media reaction; and the gravity of the case in terms of the minister's personal responsibility. Whilst concluding that the role of the parliament was important in holding ministers to account, Ms Page points out none of the resignations studied resulted from a parliamentary vote of 'censure'/'no confidence'. Reference was made to 41 motions of 'censure', of which all but one were defeated on the floor of the parliament.¹⁵

In 1999 Elaine Thompson and Greg Tillotson published an analysis of ministerial resignations at the national level from 1990 together with ministerial resignations in NSW from 1941. According to Thompson and Tillotson, ministerial resignations occur in three circumstances:

1. When a minister cannot support government policy: that is, cannot stand by cabinet solidarity;
2. Smoking gun type 1: when a minister is caught out having done something unethical either personally or financially;
3. *Smoking gun type 2*: when a minister is demonstrably directly responsible for a major error, is found out and misleads parliament. Even here prime ministers and ministers attempt to tough it out and sometimes succeed.¹⁶

Thompson and Tillotson suggest that the main role of parliament, if it is sitting, is to add 'political vitality' to the issue in circumstances where a minister might be attempting to tough out the issue. On the other hand, though, they attribute the resignations of Premier Greiner and Minister Moore in 1992 to 'there being a

Responsibility, Oxford University Press, 1989.

¹³ *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 22nd edn, 1997, pp. 63–4.

¹⁴ B. Page, *Ministerial resignation and individual responsibility in Australia, 1976–1989*, Monograph, 1990.

¹⁵ *Ibid.*, p. 13.

¹⁶ E. Thompson & G. Tillotson, 'Caught in the Act: The Smoking Gun View of Ministerial Responsibility', *Australian Journal of Public Administration*, 58(1), March 1999, p. 48.

minority government, giving the Legislative Assembly the capacity to censure ministers and refer matters concerning the premier to the ICAC.¹⁷

The Experience with Motions of Censure in Australia: the House of Representatives

Motions of censure and no confidence are commonplace in the House of Representatives, although because of government majorities, there has only ever been one successful vote of no confidence.¹⁸ The view of such motions, as described in *House of Representatives Practice*, is that they are ‘inconclusive’ and that further action (that is, to demand a resignation) is in the hands of the Prime Minister.

No motion of want of confidence in, or censure of, an individual Minister (other than the occasion mentioned in respect of the Prime Minister in 1975) has been successful in the House. The solidarity of the Ministry and the government party or parties will normally ensure that a minister under attack will survive a censure motion in the House. The effect of carrying such a motion against a Minister may be inconclusive as far as the House is concerned, as any further action would be in the hands of the Prime Minister, but parliamentary pressure has caused the resignation or dismissal of Ministers on a number of occasions.

If a motion of want of confidence in, or censure of, a minister were successful and its grounds were directly related to government policy, the question of the Minister or the Government continuing to hold office would be one for the Prime Minister to decide. If the grounds related to the Minister’s administration of his or her department or fitness or otherwise to hold ministerial office, the Government would not necessarily accept full responsibility for the matter, leaving the question of resignation to the particular Minister or to the Prime Minister to appease the House and satisfy its sense of justice.¹⁹

The question of the possible effect of vote of censure or no confidence in a minister during a minority government is not specifically addressed.

The Experience with Motions of Censure in Australia: the Senate

The question of how ministers would be responsible to the Senate was the subject of considerable, ultimately unresolved, debate at the constitutional conventions in the 1890s.²⁰

¹⁷ Ibid, p. 56.

¹⁸ This vote of no confidence in the Prime Minister occurred on 11 November 1975, following the dismissal of the Whitlam Government, and the matter was not taken further as the House was dissolved by proclamation of the Governor-General.

¹⁹ *House of Representatives Practice*, 3rd edn, 1997, p. 326.

²⁰ See for example Reid & Forrest, op cit., pp. 303–39.

The first successful motion of ‘censure’ of a minister by the Senate occurred in 1973. This censure, of the Attorney General, Senator Murphy, prompted an attack by the Prime Minister, the Rt Hon Gough Whitlam, who moved a motion, adopted by the House of Representatives, expressing confidence in the Attorney General. In moving the motion, the Prime Minister stated that:

This House [the House of Representatives], and this House alone, determines who shall govern Australia . . . It is only through this House and through the elections for this House that the will of the people as to their government and members of that government can be expressed. No vote, no resolution in any place other than this House, has any effect whatsoever as to the fate of governments or to the fate of Ministers...²¹

Between 1973 and 2000 there were 28 successful ‘censure’ motions carried by the Senate, directed at Senate ministers, House ministers, the Prime Minister or the Government.²²

All such motions in the Senate are now expressed in terms of ‘censure’ rather than ‘want of confidence’. While two early ‘censure’ motions also called for relevant resignations, the government took no action in relation to those calls. In fact, *Oggers’ Senate Practice* appears to acquiesce with the view taken by Governments that such votes of ‘censure’ require no response, although it does emphasize the practical political impact of such votes. By way of example, reference is made to a recent example where the Senate passed a resolution in relation to a Senate minister and a parliamentary secretary who subsequently resigned, while House of Representatives ministers in the same position ‘escaped unscathed’.

Although a resolution of the Senate censuring the government or a minister can have no direct constitutional or legal consequences, as an expression of the Senate’s disapproval of the actions or policies of particular ministers, or of the government as a whole, censure resolutions may have a significant political impact and for this reason they have frequently been moved and carried in the Senate.²³

The Experience with Motions of Censure in Australia: NSW Legislative Assembly and Queensland

An analysis of motions of censure/no confidence in all Australian states and territories is beyond the scope of this article. However, some brief observations are made below concerning recent experience in the NSW Legislative Assembly and Queensland.²⁴

²¹ *House of Representatives Debates*, 10/4/73, p. 1221.

²² *Oggers’ Senate Practice*, 10th edn, pp. 478–80.

²³ *Ibid*, p. 475.

²⁴ See R. Mulgan, ‘On Ministerial Resignations (and the Lack Therof)’, *Australian Journal of Public Administration*, 61(1), 2002, pp. 121–7 for commentary on ministerial resignations in the context of calls for the resignation of the former Chief Minister of the Australian Capital Territory.

NSW Legislative Assembly

During the first half of the twentieth century there were a number of occasions when censure motions were used as ‘forms of set-piece battle’.²⁵ The frequency of the use of such motions decreased steadily from 13 during the period 1911–20 to one during the period 1962–65.²⁶

The Legislative Assembly appears to draw a distinction between motions of ‘censure’ and ‘no confidence’. Speaking to the motion of censure against Premier Greiner and Minister Moore, in relation to the Metherell affair in April 1992, John Hatton MP said that:

I want to draw a clear distinction between censure and no confidence: a censure motion is serious but it is not a no confidence motion. The distinction has been clear in this House over a long time and is established by parliamentary practice.²⁷

It is understood that this distinction was also assumed to apply in relation to other successful motions of censure in ministers during the 50th Parliament.²⁸

Queensland Legislative Assembly

On 20 August 1997 the Queensland Legislative Assembly passed a motion of ‘no confidence’ in the Attorney General, the Hon Denver Beanland MP. The Premier indicated that he would not be recommending the dismissal of the Attorney General to the Governor, and informed the House that advice from the Crown Solicitor indicated that, so long as the House had confidence in the Government, it was a matter for the Premier alone to determine the future of individual ministers. The Opposition subsequently raised matters of privilege in relation to the Attorney General’s failure to resign.²⁹

The matter was then considered by the Legislative Assembly’s Privileges Committee.³⁰ The Committee was divided in its response to the matters raised and in its analysis of the issues. The Government members found that the Attorney

²⁵ G.N. Hawker, *The Parliament of New South Wales 1856–1965*, Government Printer, 1971, p. 297.

²⁶ *Ibid.*

²⁷ *NSWPD* (Legislative Assembly), 28/4/1992, p. 2861.

²⁸ The then Leader of the Opposition, the Hon R. Carr MP, argued in the debate on the motion of censure of Premier Greiner in relation to the Metherell affair that ‘If a censure motion is carried, the Premier is bound by precedents now coming to the attention of observers of this place to step aside, to stand down. *NSWPD* (Legislative Assembly) 28/4/1992, p. 2847.

²⁹ For a discussion of this case see G. Lindell, ‘The effect of a parliamentary vote of no-confidence in a minister: An unresolved question’, *Constitutional Law and Policy Review* 1(1): 6–9, May 1998.

³⁰ Legislative Assembly of Queensland, Members’ Ethics and Parliamentary Privileges Committee, *Report on a Matter of Privilege: Alleged contempt by the Attorney-General for failing to resign his ministerial office following a vote of no confidence in him by the Legislative Assembly — matter referred to the Committee on 2 September 1997*, Report No. 15, April 1998.

General's decision not to resign following the vote of 'no confidence' did not constitute a breach of privilege or a contempt because such a resolution was not enforceable and the decision not to resign did not obstruct or impede the House in the performance of its functions.³¹ The Opposition members of the committee made a detailed statement of dissent in which they reaffirmed the existence and application of the convention that an individual minister without the confidence of a lower House must resign. They argued that the absence of a precedent in a lower House does not mean that the terms of the convention are unclear, and that 'the will of the Assembly through a no confidence motion should lead to the dismissal of the minister involved.' The Opposition members distinguish 'censure' and 'no confidence' motions. They also distinguished the effect of no confidence motions in upper and lower Houses.³²

Geoffrey Lindell has argued that the failure of the Premier to dismiss the Attorney-General may not have proved a genuine test of the convention of ministerial liability to resign upon a vote of 'censure'/'no confidence' as the independent member whose vote was critical on the issue only wished to criticize the Attorney-General, not require his resignation. Professor Lindell argues that the same principles that require the resignation of a government losing confidence of a lower House, also require the resignation of an individual minister losing the confidence of that House.

The same rationale which supports the conventional duty of a government to resign once it ceases to enjoy the confidence of the lower House of parliament can be seen as justifying a similar duty in the case of an individual Minister who loses the confidence of that House. The absence of a clear precedent to support its existence, if that be the case, should not be taken as a sufficient reason to deny its existence or operation since its existence may have been assumed as an ultimate sanction which did not need to be made explicit.³³

He emphasizes that the small likelihood of the withdrawal of parliamentary confidence in a minister is not inconsistent with a view that attaches importance to the convention, which has been seen to be important in minority government situations in Australian states. Professor Lindell places emphasis upon statements by constitutional writers which assume that, rare as it may be, the loss of parliamentary confidence required the resignation of a minister.³⁴

³¹ Ibid, p. 15.

³² Ibid, pp. I-xviii.

³³ G. Lindell, 'The effect of a parliamentary vote of no-confidence in a minister: An unresolved question?', *CLPR* 1 (1), May 1998, p. 9.

³⁴ Ibid, pp. 7 & 8.

Why Doesn't the Literature on Ministerial Resignations Deal with the Effect of a Vote of 'Censure'/'No Confidence'

It is possible to draw a number of conclusions from a study of the literature on ministerial resignations. Firstly, ministers very rarely resign for failings on the part of the administrative units under their authority. Secondly, the circumstances in which ministers do resign, appear to fall within one of the following categories, in order of ranking from the most likely causes of resignation to the least likely:

1. Where the minister cannot support government policy (collective responsibility)
2. Where the minister has been involved in unethical conduct or some sort of scandal
3. Where the minister misleads parliament
4. Where the minister is directly responsible for a major error (ie where there is direct personal culpability evident).

Leaving aside category one, which is concerned with collective responsibility, even where these circumstances are present, it is not uncommon, particularly in Australia, for governments to seek to 'tough out' the crisis. According to the commentators on ministerial resignations, the major factors that influence whether or a not a minister resigns in relation to matters arising under categories 2, 3 or 4, are:

- The level of support the minister has from the Prime Minister/Premier/Chief Minister
- The level of support the minister has within their own party
- Media comment on the matter
- The strength of the case against the minister (the nature of the 'smoking gun' found).

Much of the commentary on ministerial resignations has focused on broader aspects of ministerial responsibility and the circumstances in which ministers should resign, particularly the question of the vicarious liability (or absence of such liability) of ministers for the errors of government officials and agencies. With the exception of Professor Lindell's article, referred to above, the question of the effect of a parliamentary vote of 'censure'/'no confidence' has been largely ignored. There are a number of possible explanations for this.

Firstly, the very small number of examples of successful parliamentary votes of 'censure'/'no confidence' in an individual minister may have led commentators to take the view that such votes are not a relevant consideration. The rise of disciplined parliamentary political parties in the twentieth century has meant that it is usually only in a situation where a government does not have an absolute majority on the floor of the parliament that a successful vote of 'censure'/'no confidence' is possible.

The dominance by the executive of the House of Commons, together with the strictness of party discipline, ensures that, unless there is a minority government or a government with a very small majority, there is no possibility of the Opposition ever forcing the resignation of the government, or even getting close in a vote of no confidence.³⁵

Furthermore, in the rare instances where these circumstances are present, it is not uncommon for a minister to resign in anticipation of a vote of ‘censure’/ ‘no confidence’.³⁶

Secondly, as noted above, it has become commonplace in recent years for commentators on politics and public administration generally to take a skeptical view of the significance of concepts such as responsible government, and of the contemporary role of parliament.

Does the convention still exist?

It is not possible to give a dogmatic answer to the question of whether the convention of ministerial liability to resign following a vote of ‘censure’/ ‘no confidence’ still exists and applies today. The weight of opinion, including existing parliamentary authorities, appears to be that a parliamentary vote of ‘censure’ in an individual minister has no legal or constitutional effect, although it may have a considerable political impact.

On the other hand, there are some commentators, such as Professor Lindell, who argue that the question of the effect of a vote of ‘no confidence’ in an individual minister has not been resolved. Furthermore, even those commentators who are skeptical about the existence of a set of precedents for the convention, recognize that the opportunities for a successful vote of ‘censure’/ ‘no confidence’ will be more likely to arise and the implications will be more severe in a minority government situation.

Although the application of the convention has not been directly considered by the courts, the High Court of Australia has described the need for ministers to ‘possess the confidence of Parliament’ as a ‘constitutional rule’:

Ministers, nominally the selection of the Crown, are in fact the choice of the Parliament, and pre-eminently that branch of Parliament that chiefly controls the finances. To Parliament, Ministers are responsible: the strict theory of the Constitution that Ministers are servants only of the Crown gives way in actual practice to the acknowledged fact that they are really the executants of the parliamentary will, and must account to Parliament, and look for their authority to Parliament — authority express or tacit, arising from the confidence it gives to the

³⁵ D. Woodhouse, *op cit.*, p. 24.

³⁶ For example, the resignation of the Hon. Nick Greiner MP as Premier in 1992, rather than face a vote of ‘no confidence’ in his government in the Legislative Assembly.

administration. The theory that the Crown chooses its Ministers is overshadowed by the constitutional rule that it chooses only such as possess the confidence of Parliament . . .³⁷

On the face of it, this statement seems to imply to judicial recognition of the existence of the convention of ministerial liability to resign upon a parliamentary vote of 'no confidence'. However, some commentators have suggested that statements such as these have had little real connection with the 'subjective and political approach to the question of responsibility which characterized Australian political practice.'³⁸

Is This Issue Capable of Legal Resolution?

The appropriateness or otherwise of a minister resigning in a particular set of circumstances will always remain a political issue and one on which opinions will differ.

However, some commentators have suggested that it may be possible for the debate as to the existence or otherwise of a convention, such as the convention of ministerial liability to resign upon a parliamentary vote of 'censure' or 'no confidence', to be settled legally.

As conventions are not legal rules, it may be difficult for the courts to provide precise, binding legal implications from a convention.

Care must be observed in the use of the notion of 'responsible government' in legal reasoning. It is a political epithet rather than a definition which specifies the precise content of constitutional requirements. As with the notion of 'representative government', it is possible to accept the words as a general description of a feature of constitutional arrangements in Australia without necessarily being able to derive from that feature precise implications which are binding in law.³⁹

However, the existence of a convention may be given recognition by the courts.⁴⁰

In one way a court decision may decisively change the situation since politicians' doubts about what ought to be done may stem not from uncertainty about whether duty-imposing conventions are morally binding but from disagreement as to whether a particular convention does or does not exist. Since opposed politicians are rarely likely to convince each other on this point an advisory jurisdiction, selectively used, seems a useful device in any political system where important

³⁷ *The Commonwealth v Colonial Combing, Spinning and Weaving Committee Ltd* (1920) 31 CLR 421 at 449–150.

³⁸ G. Reid & M. Forrest, *Australia's Commonwealth Parliament 1901–1988: ten perspectives*, Melbourne University Press, 1989, p. 338.

³⁹ *Egan v Willis*, par 152, per Kirby J.

⁴⁰ G Marshal, *Constitutional Conventions*, op cit, pp. 14–17.

constitutional rules are conventional and uncodified. The decision of a court may be accepted as decisively settling a political argument about the existence of a conventional rule.⁴¹

According to A.V. Dicey, although the convention of ministerial liability to resign upon a parliamentary vote of ‘censure’ or ‘no confidence’ is not a legal rule, breach of the convention could effectively result in the minister who fails to resign after losing the confidence of the House of Commons performing ‘acts of undoubted illegality’, which could ultimately be challenged in the courts.⁴² This would necessitate the courts examining the status of the minister and, conceivably, reviewing the application of the convention in the House in question. There does not appear to have been an instance, either in Australia, the United Kingdom or any other comparable Westminster parliamentary system, where the convention has been judicially considered in this way.

Professor Lindell has suggested that a number of options are available to a House should a minister not resign after a vote of no confidence.

Other possible options include the refusal of the parliament to deal with legislation initiated by the offending Minister or the refusal to appropriate funds needed by that Minister for the performance of government functions relevant to the minister’s portfolio, although the latter would in all probability amount to a vote of no confidence in the government.⁴³

It is possible that if a House took such action, or alternatively moved to suspend a minister, the action of the House may be the subject of legal challenge. If the courts found the matter to be justifiable, the determination of such a challenge might conceivably involve the courts reviewing the question of the existence of the convention.

Egan v Willis and Cahill

The High Court has recently reaffirmed the critical importance of responsible government in the matter of *Egan v Willis and Cahill*.⁴⁴ Any consideration of issues touching upon responsible government should now be viewed in the context of the strong view of responsible government as stated by the High Court.

⁴¹ G. Marshall, *Constitutional Conventions*, op cit., p. 17.

⁴² A.V. Dicey, op cit., p. 457, clxxx.

⁴³ G. Lindell, ‘The effect of a parliamentary vote of no-confidence in a minister’, op cit., p. 9.

⁴⁴ *Egan v Willis* [1998] HCA 71.

Background

Since the establishment of responsible government in 1856, the NSW Legislative Council has made numerous orders requiring the production of state papers. The vast majority of these orders have been complied with by the government of the day without demur. However, in 1995 and 1996 the Government sought to resist a number of orders for papers on the ground of an asserted lack of power on the part of the Council.

In the past, disputes have arisen in a number of Australian Parliaments between upper Houses and executive governments over the production of state papers. Until 1995/96 all such disputes had been resolved politically, with no resolution of the claims of the House of the government. The actions of the Legislative Council during this period were significant as they represent the first occasion on which an upper House has acted on assertions that the executive government is accountable to it by enforcing orders against the minister concerned.

The papers ordered to be produced covered a number of subjects, including the Government's negotiations with Twentieth Century Fox over the former Sydney Showground site and the closure of Government Veterinary laboratories. The Legislative Council asserted that it possessed an inherent, common law power to make these orders for the production of state papers, and to take action to enforce them. (The House invoked common law powers because unlike other jurisdictions, NSW has never comprehensively legislated in relation to the powers and privileges of parliament.)

On 2 May 1996, following repeated calls for compliance, the Legislative Council suspended the Treasurer and Leader of the Government for the remainder of the sitting for his failure to produce all the documents required. The Treasurer brought legal proceedings challenging the validity of the suspension (and his removal from the precincts).

Both the NSW Court of Appeal and the High Court upheld the validity of the Legislative Council's suspension resolution. The High Court held that the Legislative Council possesses such inherent powers as are 'reasonably necessary' for the proper exercise of its functions. To apply that principle, the Court first found it necessary to identify the functions of the Council. These were found to be: firstly, a law making function as a legislative body; and secondly, to review executive conduct in accordance with the principle of responsible government. The Court effectively found that responsible government included the principle that a minister in the upper House is liable to scrutiny by that House in relation to the conduct of the executive government. The power to require the production of state papers was reasonably necessary for the performance of the two functions of the House, and the House may impose a sanction on a minister for the purpose of enforcing such an order (but not so as to punish the minister).

Further legal proceedings followed in relation to orders for papers in 1998–99 over the extent of the Council’s powers to require the production of documents in respect of which the Government claims public interest immunity or legal professional privilege. Again, the Court of Appeal found that it was reasonably necessary for the Legislative Council to have the power to make orders for the production of such papers. The only limitation upon the power was held to be in relation to Cabinet documents.

What the High Court said about Responsible Government and Upper Houses

As well as affirming the centrality of responsible government in general terms, the High Court also affirmed the integral role of upper Houses as a constituent part of the Parliament in the system of responsible government.

It is true, of course, that governments are made and broken in the lower House of Parliament — in New South Wales, the Legislative Assembly. But that does not mean that the Legislative Council has no power to seek information from the government or the Minister who represents the government in the Legislative Council. It is part of the legislature of New South Wales. If it is to carry out one of the primary functions of a legislative chamber under the Westminster system, it must be entitled to seek information concerning the administration of public affairs and finances. The Legislative Council is not, as Queen Elizabeth the First thought the House of Commons was, a chamber that merely says ‘Aye or No’ to bills presented to it. It is an essential part of a legislature which operates under a system of responsible government.⁴⁵

The court suggested that the make up of upper Houses, in which the executive government does not have a majority, means that responsible government may be more meaningful in upper Houses than lower Houses.

One consequence of these structural differences is that the government of the day may not command the sure support of a majority in the Legislative Council. The ‘balance of power’ may rest with members who are independent of any of the major political parties. The administration of which the appellant is a member did not, at the material time, enjoy the support of a majority in the Legislative Council. The submissions for the appellant suggested that this circumstance strengthened his position in the case. However, as will appear, that is not necessarily so. Rather, it may have provided the occasion for the exercise by the Legislative Council of its function with respect to the superintendence of the conduct of the executive branch of government, at least in its association with the legislative function of that House.⁴⁶

The court also pointed out that ministers who are members of upper Houses do not thereby absolve themselves of responsibility and that they are liable to scrutiny by

⁴⁵ Ibid, pars 94–107 per McHugh J.

⁴⁶ *Egan v Willis* [1998] HCA 71 at par 10 per Gaudron, Gummow and Hayne JJ.

the upper House. Further, there is a role for upper Houses in the ‘superintendence’ of the executive; the limits of which ‘superintendence’ are not yet defined.

One aspect of responsible government is that Ministers may be members of either House of a bicameral legislature and liable to the scrutiny of that chamber in respect of the conduct of the executive branch of government. Another aspect of responsible government, perhaps the best known, is that the ministry must command the support of the lower House of a bicameral legislature upon confidence motions. The circumstance that Ministers are not members of a chamber in which the fate of administration is determined in this way does not have the consequence that the first aspect of responsible government mentioned above does not apply to them. Nor is it a determinative consideration that the political party or parties, from members of which the administration has been formed, ‘controls’ the lower but not the upper chamber. Rather, there may be much to be said for the view that it is such a state of affairs which assists the attainment of the object of responsible government of which Mill spoke in 1861 . . .

The consideration that the government of the day must retain the confidence of the lower House and that it is there that governments are made and unmade does not deny what follows from the assumption in 1856 by the Legislative Council of a measure of superintendence of the conduct of the executive government by the production to it of State papers.

It is not necessary to consider for the purposes of this appeal the limits involved in that superintendence.⁴⁷

It should also be noted that the court, in affirming the power of the NSW Legislative Council to require the tabling of state papers, stated that the upper House not only had the power to hold the executive to account, but also to take action to address (but not to punish) obstruction where it occurs.

The appellant submitted that, in the context of New South Wales, ‘responsible government’ meant no more than that the Crown’s representative acted on the advice of the Ministers and that the Ministers enjoyed the confidence of the Lower House of Parliament. From these premises, the Court was urged to accept the notion that the Executive Government was not accountable to the Council and that a member of that Government sitting in the Council could not be obliged to hand over official documents on the basis that this was necessary to make the scrutiny of Government effective. I cannot agree with these submissions.

It reads too much into the statutory limits on the powers of the Council to suggest that it has no function in rendering the Executive Government accountable, through it, to the Parliament and thus to the electors of the State. This argument appears to be an attempt to put the Executive Government above Parliament, comprising as it does, two Houses. That attempt cannot succeed. The practice and Standing Orders of the Council allow for oral questioning of Ministers present in the chamber. They do so precisely to make the Council’s scrutiny of the Executive Government effective. There seems no reason in logic to limit such scrutiny to oral answers given by a Minister or to exclude the provision of written documents which are in the Minister’s possession or under his or her control and not otherwise legally

⁴⁷ Ibid, pars 37–47.

exempt from production. It is by such scrutiny that the system of government established by the [Constitution Act](#) and envisaged by the [Australian Constitution](#) permits effective public debate, facilitates the democratic choice of the members of the chambers and allows periodic judgment of the government by the electors. The suggestion that only the Lower House has the power to extract documentary information from the Executive Government is not only inconsistent with the Cabinet resolution to which the appellant originally adhered. It involves a view of the accountability of the Executive Government to Parliament, including the Council, which is alien to the system of government which the [Constitution Act](#) establishes and the [Australian Constitution](#) envisages.

The reason why the accountability of Ministers in the Council is not spelt out in terms in the [Constitution Act](#) itself, or in the Standing Orders, may be that it is so fundamental to the existence of a legislative chamber in our system of government, and necessary to the performance of that Chamber's functions as such, that it was accepted as axiomatic that, if a House of the Parliament insists and there is no lawful reason for resistance, a member, including a Minister, must obey the House's demand. Whether that is the explanation or not, the legal power of the Council to make such a demand upon the Executive Government cannot be doubted. Where the representative of the Executive Government is a member of the Council, the power of the latter to suspend that member in order to coerce him or her to comply with its demand can likewise not be doubted. To deny the Council such powers would be to destroy its effectiveness as a House of Parliament. The fact that the Executive Government is made or unmade in the Legislative Assembly, that appropriation bills must originate there and may sometimes be presented for the royal assent without the concurrence of the Council does not reduce the latter to a mere cipher or legislative charade. The Council is an elected chamber of a Parliament of a State of Australia. Its power to render the Executive Government in that State accountable, and to sanction obstruction where it occurs, is not only lawful. It is the very reason for constituting the Council as a House of Parliament. This ground of objection also fails.⁴⁸

Unresolved Issues

The High Court's reasoning in *Egan v Willis and Cahill* has been quoted at some length because of its significance in changing the context in which questions about responsible government need to be considered.

In this altered context, there appear to be a number of issues about the existence or otherwise of the convention of ministerial liability to resign upon a parliamentary vote of 'censure' or 'no confidence' requiring further consideration.

The High Court has rejected a narrow view of ministerial responsibility and has referred to ministerial responsibility in terms of 'superintendence' of the executive by the parliament, without defining the limits of that 'superintendence'. Does parliamentary 'superintendence' of the executive include an ability to require or

⁴⁸ Ibid, pars 151–5 per Kirby J.

expect the resignation of a minister who no longer possesses the confidence of a House? If so, how does this apply in relation to an upper House? What is the effect of the weight of relatively recent precedent, particularly with regard to the refusal of governments to act following votes of 'censure', and occasional calls for ministerial resignations, by the Senate?

Further questions also remain unresolved. Is Dicey correct in suggesting that the existence of the convention could become the subject of judicial consideration through a challenge to the lawfulness of a subsequent action of a minister who did not resign? What steps could a House of Parliament take in the face of a minister declining to resign following a vote of no confidence? Is it possible for the matter to come before the courts through a challenge to the lawfulness of a sanction imposed upon such a minister by a House of Parliament?

What has been the experience in those jurisdictions where there have been minority governments? How have these issues played out in those circumstances? What has been the nature of any legal advice provided to the key players in such circumstances?

This article will have served its purpose if further discussion and consideration of these issues is stimulated. ▲