

CHAPTER 16

RELATIONS WITH THE EXECUTIVE

Under the *Constitution Act 1902*, legislative power in New South Wales rests with the Legislature of New South Wales, which consists of the Governor and the two Houses of Parliament, the Legislative Council and the Legislative Assembly. In turn, executive power rests formally with the Executive Council, which consists of the Governor and ministers. The Governor, as representative of the Queen, is the formal repository of power, which is exercised on the advice of the Premier and the Cabinet. The Premier and ministers are appointed by the Governor, and hold office by virtue of their ability to command the support of a majority of members of the Assembly.

Relations between the Parliament and the executive in New South Wales are governed according to the system of 'responsible government'. However, the reality of responsible government in New South Wales is that the executive has come to dominate the lower House through the mechanism of strict party control. This is a feature of the Westminster system, where government is formed by convention in the lower House of Parliament, and where the government of the day generally commands an absolute majority. As a result, the Council has a crucial role in scrutinising the actions of the executive and holding it to account.¹

RELATIONS BETWEEN THE COUNCIL AND THE GOVERNOR

The Governor is the representative of the Queen in New South Wales under section 7 of the *Australia Acts 1986*.

The Governor is appointed by Her Majesty the Queen under section 9A of the *Constitution Act 1902*. However, read in conjunction with section 7 of the *Australia Acts 1986*, the appointment is made by Her Majesty with the advice of the Premier.

Relations between the Governor and the Parliament are set out under the *Constitution Act 1902*. Specifically, the Governor may:

¹ See *Egan v Willis* (1998) 195 CLR 424 at 453 per Gaudron, Gummow and Hayne JJ.

- convene a joint sitting of the Council and the Assembly under sections 5B and 22D;²
- appoint the date for referenda under sections 5B and 7B. The Governor has only once been called upon to appoint the date of a referendum under the terms of section 5B of the *Constitution Act 1902* dealing with disagreement between the two Houses. In 1959, the Heffron Ministry introduced the Constitution Amendment (Legislative Council Abolition) Bill. After an ongoing deadlock between the Council and Assembly, which was eventually resolved in the Supreme Court, the Governor set the date for a referendum on the matter on 29 April 1961. The referendum was defeated, with 57.6 per cent of the vote favouring retention of the Council;³
- fix the time and place for holding a session of the Council and the Assembly under section 10;
- prorogue the Council and Assembly under section 10. For example, the Lieutenant Governor prorogued the Parliament on 19 May 2006 for the purposes of events marking the sesquicentenary of responsible government in New South Wales;⁴
- issue the writs for a general election under section 11A;
- administer the pledge of loyalty to members under section 12;
- make regulations with respect to the pecuniary interests of members under section 14A;
- approve standing orders under section 15;
- receive the resignation of members of the Council under section 22J;⁵
- summon the Assembly under section 23;
- dissolve the Assembly under section 24B;
- recommend money bills under section 46.

The Governor also has a range of powers under the *Constitution Act 1902* relating to the appointment and operation of the executive. In addition, the Governor has the express power to remove a judge from office under section 53 on an address from both Houses of Parliament in the same session. This is discussed in more detail in Chapter 20 (Relations with the Judiciary).

2 See, for example, the joint sitting convened by His Excellency the Lieutenant-Governor on 28 September 2006 for the purposes of the election of a person to fill a vacant seat in the Legislative Council, *LC Minutes* (27/9/2006) 235, (28/9/2006) 246.

3 Twomey A, *The Constitution of New South Wales*, The Federation Press, Sydney, 2004, pp 372-373.

4 *LC Minutes* (22/5/2006) 2.

5 For example, on 22 September 2006 the Lieutenant-Governor wrote to the President of the Council indicating that he had received a letter from the Hon Patricia Forsythe tendering her resignation as a member of the Council, *LC Minutes* (26/9/2006) 216.

Addresses to the Governor

The Council formally communicates with the Governor or the Queen by way of an address. The most common form of address today is an Address-in-Reply, which is adopted and presented to the Governor following the speech of the Governor on the opening of a session of Parliament. On the President reporting to the House the speech of the Governor, a motion for an Address-in-Reply may be made forthwith or at a future date, and must be seconded (SOs 7, 8 and 9).

Another form of address to the Governor or the Queen is an address for papers. Under standing order 53, papers concerning the Royal Prerogative, dispatches or correspondence to or from the Governor or the administration of justice may be requested by way of an address to the Governor. There are many precedents between 1856 and the early 1900s of addresses to the Governor for papers in relation to a great number of issues ranging from mundane public bills to Australasian federation. Most were complied with.⁶

The procedure fell into abeyance throughout most of the 20th century, with only three addresses being agreed to and one failing in the House, but was activated again in 2002. In recent years there has been disagreement between the government and opposition concerning what matters fall within the administration of justice.⁷

Addresses may also be used in relation to general matters. In the past, these have often included messages of congratulation, welcome or condolence to the Crown, in some instances conveyed through the Governor.⁸

The President must report the Governor's answer to an address as soon as practicable after receipt (SOs 121 and 122). In modern times, a message is most commonly received in relation to the administration of the State or the assent to bills and the proclamation and commencement of Acts. A message may be taken into consideration at once, or a future day fixed for its consideration (SO 122).

Addresses to the Governor concerning the administration of justice are discussed in detail in Chapter 20 (Relations with the Judiciary).

MINISTERIAL RESPONSIBILITY TO PARLIAMENT

Section 35E of the *Constitution Act 1902* provides for the appointment of the Premier and ministers of the Crown by the Governor from among the members of the Executive Council. In New South Wales, all ministers are members of Cabinet and, traditionally, the Premier is a member of the Assembly.

6 See the *Consolidated Index to the Minutes of Proceedings* (1856-1874) Vol 1, pp 24-27; (1874-1893) Vol 2, pp 11-12.

7 *LC Minutes* (19/3/2002) 69, (10/4/2002) 112.

8 See *Ibid* Vol 1, pp 18-24; Vol 2, pp 9-11.

The Premier and other ministers – the executive government – are responsible to Parliament, and through Parliament to the electorate.⁹

The most common procedure whereby ministers are called to account for their actions and those of their departments is through Question Time in the House each day. However, other means by which the Parliament may scrutinise the actions of the executive include the placing of questions on notice, orders for papers and the conduct of inquiries by parliamentary committees.

Two concepts fundamental to the responsibility of the executive to Parliament are the concepts of collective ministerial responsibility and individual ministerial responsibility.

The doctrine of collective ministerial responsibility

Collective ministerial responsibility means the collective responsibility of the Cabinet to Parliament and the public for the administration of government.¹⁰ Its key requirement is that ministers must stand by decisions taken collectively by the Cabinet, regardless of whether they privately support the decision or not.¹¹

As previously noted, under the Westminster system, government is formed in the lower House of Parliament, meaning that ministers and the government must therefore retain the confidence of the lower House.¹² However, this has led to some suggestions that the executive is only directly accountable to the Assembly.

In *Egan v Willis*, the High Court rejected such a suggestion, adopting instead a much broader notion of ministerial responsibility, under which ministers are responsible to the House to which they belong and not just to the lower House. The High Court reasoned as follows:

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.¹³

The accountability of the executive to the Council through ministers in the House raises the issue as to what would happen if the government formed in the Assembly chose not to appoint any ministers in the Council.

9 *Egan v Chadwick* (1999) 46 NSWLR 563 at 570 per Spigelman CJ.

10 See *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 364.

11 See *Egan v Chadwick* (1999) 46 NSWLR 563 at 571-572 per Spigelman CJ.

12 See s 24B of the *Constitution Act 1902*.

13 (1998) 195 CLR 424 at 453 per Gaudron, Gummow and Hayne JJ.

Since the advent of responsible government in New South Wales, there has always been a representative of the executive in the Council. Traditionally, a representative of the Government in the Council has held the position of Vice President of the Executive Council, permitting the House to claim at least one seat in Cabinet. In addition, the government of the day has normally maintained at least one minister, often two, in the Council, although in recent times it has significantly increased the number of ministers in the Council.

A decision by the executive government not to appoint a minister in the Council would necessitate a change to the current standing orders of the Council, which provide that the House may not meet unless a minister is present (SO 34). The Council has been very reticent to meet without a representative of the executive government present. Twomey writes:

The advantages to a government of declining to appoint Ministers in the Legislative Council include the protection of government documents, such as legal advice, from publication by the Legislative Council. The main disadvantage, however, would be the difficulty in securing the passage of legislation through the Legislative Council without ministerial representation. The consequence of this difficulty is that a government is unlikely to decline to appoint Ministers in the Legislative Council.¹⁴

However, *Odgers* comments that a change to exclude ministers from the Senate might well strengthen the Senate's role as the House of review, as distinct from the electoral college role of the lower House in determining the government.¹⁵ The removal of ministers from the upper House has also been discussed as 'desirable' but 'impractical' in Western Australia.¹⁶

The doctrine of individual ministerial responsibility

Individual ministerial responsibility means that individual ministers are responsible to the House of which they are members for the administration of their department and agencies.¹⁷ As such, ministers may be examined by the House of which they are members in relation to their actions or failure to act.

Censure and no confidence motions in the Council

The Council may pass a motion of censure or no confidence in a minister. A censure motion is typically used to severely criticise ministers and/or governments, while a no confidence motion is used to call for the resignation of a minister or for the dissolution of a government.

14 Twomey, above n 3, p 30.

15 Evans H (ed), *Odgers' Australian Senate Practice*, 11th edn, Department of the Senate, Canberra, 2004, pp 454-455.

16 See the *Report of the Royal Commission into Commercial Activities of Government and Other Matters*, 1992, Part II, para 5.3.6. See also the Western Australian Commission on Government, Report No 2, 1995, pp 163-164.

17 See *Solicitor-General v Wylde* (1946) 46 SR (NSW) 83 at 94 per Jordan CJ.

In the House of Commons, motions which express a lack of confidence in the Government have sometimes been called 'votes of censure',¹⁸ but it appears that such motions are currently referred to as 'confidence motions'.¹⁹

In the Senate, 'censure' motions are used rather than 'no confidence' motions:

Almost all [censure] motions have been expressed in terms of censuring either individual ministers or the government. There have been no motions proposing want of confidence in the government and very few expressing want of confidence in particular ministers ... No motion of want of confidence in a minister has been proposed since 1979 and the practice now is to frame such motions in terms of censure.²⁰

Censure motions and motions of no confidence have been considered infrequently in the Council:

- On 28 April 1992, the Council debated a motion to censure the Government in relation to the appointment of Dr Terry Metherell to the Senior Executive Service. The motion was negated on division.²¹
- On 26 October 1995, the Council debated a motion to censure the Leader of the Government in the House, the Hon Michael Egan, for failing to comply with a resolution of the House to table specified documents in relation to the closure of veterinary laboratories. However, the resolution was amended for the House to 'express its displeasure' with the Leader of the Government, while stating that the House was fully entitled to scrutinise and demand accountability in all aspects of executive government behaviour.²²
- On 1 May 1996, the Council censured Mr Egan as the Leader of the Government in the House for failing to comply with a resolution of the House to table specified documents in relation to the Lake Cowal gold mine project.²³ This is believed to be the first occasion on which the Council passed a motion censuring a minister.
- On 22 October 1996, the Council debated a motion to censure a Council Minister, the Attorney General and Minister for Industrial Relations, the Hon Jeff Shaw, for his failure to proclaim the commencement of section 322(3) and Schedule 5.4 of the *Industrial Relations Act 1996*. However, the motion was subsequently amended for the House to express its concern at the failure of the Minister to proclaim the instruments and to order that the Minister table a list of all legislation in relation to his portfolio

18 McKay W (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 23rd edn, LexisNexis, UK, 2004, p 280.

19 *Ibid*, p 329.

20 *Odgers*, 11th edn, p 458.

21 *LC Minutes* (28/4/1992) 116-118.

22 *LC Minutes* (26/10/1995) 280-283.

23 *LC Minutes* (1/5/1996) 102-106.

responsibilities that had not been proclaimed within 90 calendar days of assent.²⁴

- On 8 March 2001, the Council passed a resolution censuring an Assembly Minister, the Minister for Police, the Hon Carl Scully, 'for his interference in Committee proceedings and his statement that an inquiry into Cabramatta Policing should be terminated'.²⁵ This is believed to be the first occasion on which the Council passed a motion censuring a minister in the Assembly.
- On 11 April 2001, the Council passed a resolution 'condemning' an Assembly Minister, the Minister for Land and Water Conservation, the Hon Richard Amery, in relation to the decision to wind up the operations of the Hawkesbury Nepean Catchment Management Trust without any consultation or notice to trustees.²⁶
- On 25 February 2004, the Council passed a resolution censuring a Council Minister, the Minister for Transport Services, the Hon Michael Costa, for his perceived failure to deliver safe and effective transport solutions for the people of New South Wales, and for the 'Government's apparent belief that it is not accountable to the people of New South Wales through this House of Parliament'.²⁷

Motions of censure or no confidence in a minister or government have also been moved and not carried in the Council. On 8 May 2002, the Council debated a motion of 'no confidence' in the Minister for Police for allegedly misleading the House in relation to the circumstances concerning the departure of the Commissioner of Police, and calling on the Minister to resign in accordance with the Westminster convention. The motion was resolved in the negative.²⁸ Similar motions to censure the Government over the appointment of Dr Terry Metherell to the Senior Executive Service²⁹ and to censure the Minister for Consumer Affairs for misleading the House in relation to the existence of hospital waiting lists³⁰ failed.

Censure or 'no confidence' motions initiated by private members in the Council do not take precedence over other items on the Notice Paper.³¹ However, in order to avoid the requirement for a notice of a motion to be given at a previous sitting of the House, since 1999 a number of non-government members have given notice

24 *LC Minutes* (22/10/1996) 380.

25 *LC Minutes* (8/3/2001) 884-886.

26 *LC Minutes* (11/4/2001) 952-954.

27 *LC Minutes* (25/2/2004) 544-547.

28 *LC Minutes* (8/5/2002) 147-150.

29 *LC Minutes* (28/4/1992) 117-118.

30 *LC Minutes* (29/10/1987) 1218.

31 The House of Representatives standing order 48 provides a motion of censure or no confidence in the Government which is accepted as such by a minister takes precedence over all other business until disposed of. See Harris IC (ed), *House of Representatives Practice*, 5th edn, Department of the House of Representatives, Canberra, 2005, p 316.

at the beginning of each session that, contingent on any minister failing to table documents in accordance with an order of the House, standing and sessional orders be suspended to allow a motion to be moved forthwith for the censure of the minister. To date, the contingent notice has not been used.

Time limits applying to other private members' business motions apply to censure and no confidence motions. These time limits are shown in Appendix 11.

The convention of liability to resign on a vote of censure or no confidence

The convention of ministerial responsibility and the need for ministers to retain the confidence of the Parliament raises the issue of whether there is any expectation on ministers, or at least ministers in the Council, to resign on a motion of censure or no confidence being passed in the Council.

Traditionally, the doctrine of individual ministerial responsibility has required the resignation of a minister for major errors or failures committed within government departments or agencies, regardless of whether a minister had any personal knowledge or involvement.

The High Court has recognised the 'constitutional rule' that individual ministers must 'possess the confidence of Parliament':

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 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 the Parliament ...³²

More recently, in the *Egan* cases, the High Court specifically found that ministers in the Council can be compelled to produce State papers to the House, and that it is lawful for the House to suspend ministers for failure to comply.³³ This is examined in greater detail in Chapter 17 (Documents). Ministers are also accountable to the Council for their policies and actions by, amongst other things, answering questions and appearing before Council committees on an order of the House.

These findings by the High Court seem to imply judicial recognition of the existence of the convention of ministerial liability to resign on 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

32 *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Company Ltd* (1920) 31 CLR 421 at 449-450.

33 The Hon Michael Egan was suspended from the House on two occasions for failure to table documents ordered by the House, *LC Minutes* (2/5/1996) 114-118, (27/11/1998) 970.

approach to the question of responsibility which characterised Australian political practice'.³⁴

In Australia, including New South Wales, it is evident that the link between departmental actions and ministerial resignations is a very tenuous one, if it exists at all. In most instances, resignations only occur in instances of personal failings by a minister.

In 1990, Barbara Page published a monograph that examined ministerial resignations at the national level in Australia from 1976-1989. Her study covered eight 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. Whilst concluding that the role of the Parliament was important in holding ministers to account, Ms Page pointed out that none of the resignations studied resulted from a parliamentary vote of censure or no confidence.³⁵

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

- when a minister cannot support government policy;
- when a minister is caught out having done something unethical either personally or financially;
- 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.³⁶

More recently still, Twomey has observed:

[I]n many cases Ministers now actively seek to transfer any responsibility for mistakes to public servants and attempt to shield themselves from responsibilities by claiming not to have been informed. This, of course, does not absolve the Minister of responsibility for the actions of his or her departments or agencies. Such an attempt to shift responsibility is not only contrary to tradition but undermines the system of responsible government imposed by the *Constitution Act*. It is the elected Minister who is responsible to the Parliament, not the unelected public servants. Attempts to shift or avoid responsibility could be described as 'unconstitutional' in the broader sense of this term. However the courts cannot enforce the

34 Reid G and Forrest M, *Australia's Commonwealth Parliament 1901-1988: Ten perspectives*, Melbourne University Press, 1989, p 338.

35 Page B, 'Ministerial resignation and individual responsibility in Australia, 1976-1989', Monograph, 1990, p 13.

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

principle of responsible government. It is up to the Parliament and the electors to do so.³⁷

That said, there are some commentators, such as Geoffrey 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 sceptical about the existence of a set of precedents for the convention recognise that the opportunities for a successful vote of censure or no confidence will be more likely to arise and the implications will be more severe in a minority government situation.³⁸

While the weight of opinion, including existing parliamentary authorities, appears to be that a parliamentary vote of 'censure' of an individual minister has no legal or constitutional effect, it may however have a considerable political impact. For instance, in October 1992, the Police Minister, the Hon Ted Pickering, resigned after being found to have deliberately misled the House during Question Time.³⁹

In October 1996, the Senate passed a resolution calling on two ministers to explain their apparent conflicts of interest arising from their shareholdings. Both ministers subsequently resigned.⁴⁰

Failure of a minister to resign following the passing of a vote of no confidence raises the further issue whether Parliament can seek to enforce the convention of liability to resign on a vote of censure or no confidence. It has been suggested that a number of options are available to a House should a minister not resign following a resolution of no confidence:

[P]ossible 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.⁴¹

In the Council, the *Egan* cases were prompted by the Council moving to suspend the Treasurer and Leader of the Government, the Hon Michael Egan, following repeated motions (cited above) to censure him as the Leader of the Government in the Council for his failures to table specified documents in the House.

In the Senate there have been a number of instances where the censure of a minister for failing to table certain documents in compliance with an order of the Senate was followed by the giving of contingent notice of motion to allow certain penalties to be imposed on the minister, including preventing him from introducing bills. However, none of these contingent notices was moved.⁴²

37 Twomey, above n 3, pp 693-694.

38 Lindell G, 'The effect of a parliamentary vote of no-confidence in a minister: An unresolved question?', *Constitutional Law and Policy Review*, Vol 1, No 1, May 1998, p 9.

39 *LC Minutes* (27/10/1992) 369.

40 *Odgers*, 11th edn, pp 457-458.

41 Lindell, above n 38, p 9.

42 *Odgers*, 11th edn, p 459.