

## CHAPTER TWO

### MINISTERIAL RESPONSIBILITY

#### Considering Ministerial Responsibility

2.1 The concept of ministerial responsibility, the perception of how and in what circumstances it should operate, and the understanding of who should apply sanctions for its breach vary across a range of commentators, journalists, academics, politicians and public servants. There is a need to ensure as far as possible that the rhetoric regularly used to discuss these issues does not prejudice rational consideration of them.

#### How Does a Minister Err

2.2 In contemporary Australia there are three broad categories into which matters raising the issue of whether a minister has failed in his or her responsibilities and should be sanctioned can be put.

2.3 The first is where the minister has personally misbehaved such as where he or she has deliberately misled Parliament or has conducted himself or herself morally in a way the community finds intolerable.

2.4 The second is where the minister has personally driven his or her department along some disastrous course or over time has allowed it to persist in pursuing one when he or she knew or should have known it was doing so.

2.5 The third is where the minister's department has done something or failed to do something in contravention of its duty. For example where the people charged with carrying out the work of the department do it badly or omit to do it at all and ill consequences follow. The minister has no actual involvement in the matter. Any liability he or she has for it's conduct is vicarious.

### Sanctions for breach

2.6 Often the sanction for a breach of ministerial responsibility is regarded as being effective only where a minister resigns or is otherwise forced from office. Colloquially put, only where a 'scalp' is gained is the enforcement of ministerial responsibility seen to be operating effectively. If a minister does not resign and battles through a particular crisis without losing office the concept is seen as being in decline or 'dead'.

2.7 This view that the only effective sanction for a minister's failure to meet his or her responsibility is their compelled resignation or removal from office fails to recognise the operation of the concept at other levels. There are other sanctions which a minister may suffer for failing in his or her duty. For example there is demotion or lack of promotion or loss of the respect of his or her peers.

### The Minister, The Leader, Parliament

2.8 The sanctions available to a leader dealing with a minister who has erred are different from those available to Parliament. A leader can have a minister dismissed. Parliament cannot. Parliament can subject him or her to questioning and to censure motions and can prevent him or her being effective in the legislative chamber. It can bring him or her to account but not to dismissal.

### Resignation

2.9 Where a minister has erred in some way, the retention or otherwise of his or her ministerial office depends upon the political leader. Chapter II of the Australian Constitution is specific and provides that the Governor General alone may appoint members who are to hold office during his or her pleasure. He or she will usually act on the advice of the Prime Minister and accordingly the fate of ministers depends upon the decision of their leader. The Constitution gives neither Parliament nor the Judicature any power to appoint or dismiss ministers.

2.10 Chapter II of the Constitution reflects the position in the States and Territories of Australia. The Governor-General and the State Governors have almost invariably acted on the recommendation of the Prime Minister or the Premier in appointing and dismissing Ministers of State. There are no established criteria that Ministers must meet other than that they be Members of Parliament. Other than that they can be appointed or dismissed at will. Accordingly leaders are decisive in the outcome for a minister who has erred while holding office.

### Is Dismissal Capricious?

2.11 Whether a minister who has erred is to be asked to resign or be dismissed is a political issue and is one for the leader to resolve. While some may perceive this to be a cynical approach to the operation of ministerial responsibility, it is a recognition of the reality of what in fact happens in Australia at both federal and state levels.

2.12 Although a minister's fate may rest with the leader it does not follow that he or she will be dealt with capriciously. A decision which is political is not by necessity an unprincipled one. There must be some trigger. It is likely that a minister has performed some act or omitted to perform some duty which has aroused media or parliamentary scrutiny.

2.13 Once triggered, the political leader will need to balance a range of considerations in reaching a decision on the minister's future. Initially, the Minister must have erred in some way. A perception of the gravity of the minister's failing will be an important consideration. How a minister is performing and the minister's overall competence would be considered. The leader will be aware of the importance of the minister's perceived indiscretion on party stability and the consequences for the government's electoral survival. The leader must assess the effect the failing will have on the electorate.

2.14 It is probable that having attained the position he or she has, a leader will possess very sound political antennae with a heightened sensitivity to issues affecting an electorate and the contemporary standards of behaviour acceptable to the community.

2.15 The end result is that the leader must reach a decision balancing a value judgement about the gravity of the minister's failing and a pragmatic judgement as to what is best for the government's future.

2.16 Even though the leader is often required to make these decisions it should be noted that there are some matters which almost always compel a minister to resign.

2.17 Studies of resignations (and non-resignations) in the Australian context have identified a range of actions which trigger consideration by the leader of a minister's future. Some of these actions consistently result in a minister's resignation or removal from office, whilst others have a variable result and still others have not resulted in any loss of the ministerial commission.

2.18 Serious lapses in personal behaviour and conduct, and in particular deliberately or recklessly misleading parliament usually result in resignation. Even with misleading parliament there are variations in outcome. If a minister unintentionally provides incorrect information to parliament and takes the earliest opportunity to correct the record, it would be unusual for the incident to be taken as an offence worthy of resignation.

2.19 A minister has certain collective responsibilities to the government and cabinet over policy issues. Disagreement with or inability to support government policy usually leads to resignation. Collective responsibility will be covered in greater detail in the Committee's later report on the subject.

2.20 There are two further categories of conduct which raise the issue of whether or not ministers have met their responsibility. Firstly, there are ill advised actions taken by a department in accordance with ministerial directions or with actual ministerial involvement. It would be usual for major failures arising from these actions to lead to resignation. Often these actions involve policy considerations. Secondly, there is a vicarious liability for departmental actions which the minister ought to have known about and should have acted upon. Generally, these involve issues of maladministration and have not resulted in resignations in the Australian, British or Canadian situation. However they have led to Parliament testing the minister on the issue and having him or her account for what has happened.

2.21 Given the ability a leader has to see ministers dismissed, it might appear at first impression that when they err their fate is determined with scant regard to principle. That impression may arise partly through confusing judicial and political processes for resolving issues.

2.22 The judicial process involves applying existing and specific laws to a set of facts to reach a decision in accordance with natural justice. The political one involves making an assessment of a variety of influences and pressures and acting according to what they allow.

2.23 . These political influences and pressures on leaders will usually include ethical ones, including their own sense of morality and community standards. Leaders are subject to real constraints, including peer pressure, oversighting by Parliament, scrutiny by the press, party discipline and consciousness of the next election.

2.24 Rules of natural justice do not apply to leaders' decisions to have minister's dismissed. But though their decisions are not determined by a set of legal principles and procedures as would those of a judge they are nonetheless subject to powerful influences prompting them towards proper conduct.

2.25 In deciding how to deal with a minister who has erred a leader has the following influences working on him or her:

- \* his or her own moral values
- \* political ethics
- \* parliamentary pressure
- \* peer pressure
- \* party sentiment
- \* community standards
- \* community reaction
- \* media reaction
- \* precedent.

#### Codification of ministerial responsibility

2.26 During the round table discussions there was considerable debate for and against codification of ministerial responsibilities. To make a list of actions and omissions which are to constitute breaches of ministerial responsibility would create a code too inflexible and too inefficient to meet political realities. Community standards are dynamic and ethics subject to continuing reinterpretation. Yet these are two major factors determining how a leader will deal with an erring minister.

2.27 In evidence to the Committee, Sir Rupert Hamer said:

"I do believe that there may be some value in trying to establish some sort of codification, however general it is. You do not have to specify what is acceptable or unacceptable; you simply, as courts have always tried to do, try to assess, in the light of contemporary views, what is acceptable and what is not acceptable". (Hansard 20.7.93, pp.67-68, see also pp. 6-7, 43).

2.28 While a code of specific and binding rules would not allow enough flexibility in determining what should happen in any particular case where a minister has erred, the Committee believes that there should be a form of guidelines against

which a minister's exercise of responsibility can be assessed. Precedent has provided general criteria against which the issue of whether a minister should resign or be dismissed can be tested. These criteria operate, in effect, as de facto guidelines to assist those dealing with particular cases in assessing what is acceptable and what is not.

### Departmental/Administrative Accountability

2.29 When appointed, ministers become responsible for their departments. This means they are responsible for the policy and overall administration of those departments. Parliament can call a particular minister or the ministry generally to account. Question time is the most regular and amongst the most effective ways this is done. There is considerable debate about the effectiveness of the process by which Parliament calls the Ministry or any individual member of it to account.

2.30 Propositions put in the debate range from those which advocate that a minister be held responsible for all actions of his or her department and be subject to sanctions where they fall short, to those which say he or she should never suffer any consequence no matter what its failures.

2.31 A minister's responsibility for administrative and policy actions can be discussed in three areas: the level at which it is undertaken, the processes by which it is undertaken and the effectiveness of these processes.

2.32 The consequences for a minister's breach of his or her responsibility may be resignation or dismissal, but are not confined to these. Though Parliament cannot dismiss ministers it can make them account for their stewardship, for example in question time or through a censure motion or in estimates committees.

2.33 Where grave problems have arisen from the policy decision of a minister or where his or her department implements a grossly flawed program at his or her

specific direction then the issue of whether he or she will resign or be dismissed becomes a major one.

2.34 But there are no contemporary precedents for the resignation or dismissal of a minister where the failing in issue arose within the department itself and he or she had at most a vicarious liability for it. This practice is at variance to the 'traditional' concept of ministerial responsibility. The complexities of modern public administration render it not viable for a minister to be compelled to resign for departmental actions for which he or she had at most a vicarious liability.

2.35 There are situations where the question of whether a minister should resign or be dismissed is an open one. For example if a minister was well aware or should have been well aware that his or her department was maladministered or seriously affected by systemic failure and seeks to do nothing about it, then the leader is faced with an issue of whether the minister should be allowed to continue in office.

2.36 Regular movement of ministers, either due to resignation or other reasons, produces its own problems. There is a need for stability and longevity in a ministerial office in order for a minister to master the portfolio and to be able to effectively discharge their ministerial responsibilities in relation to administration.

2.37 Whilst there are benefits for efficient administration in the stability of a ministry, this does not exonerate a minister from any of their responsibilities nor affect their need to resign or be removed from office should the circumstances warrant such action.

2.38 The level of responsibility by the minister has been challenged in recent years, at the federal level, as a result of the implementation of significant reforms to the Australian Public Service. There is recognition that the complexity and sheer scale of administrative tasks, combined with devolution of managerial responsibilities and other aspects of public service reform, means that ministers cannot be directly responsible for all the actions of their departments. It has been argued that this



process has gone further and that ministers are reluctant to accept responsibility for their departments by adopting an 'arms-length' attitude to their relationship. Associated with public service reform is the view that public servants are accountable to parliament only through their minister, although this is complemented by answering for certain actions directly to parliamentary committees.

2.39 The question of diminished responsibility and 'arms-length' relationship was raised in respect to the growth in numbers of Government Business Enterprises and the establishment of many other commercially competitive bodies. A major aspect of this trend to corporatisation is the removal of accountability and responsibility by a minister in relation to the activities of these bodies which they had before they were corporatised. The Committee notes the difficulties involved in this area but these are not relevant to its terms of reference.

#### Parliament and Ministerial Accountability

2.40 Parliament has numerous procedures available to it through which it can have ministers account for their stewardship. Questions without and on notice, the raising of matters of public importance and urgency motions, censure motions, grievance and adjournment debates and the work of committees all provide opportunities for relevant matters to be pursued. All these are of great importance in having a minister explain his or her own acts and omissions and those of his or her department.

2.41 The parliamentary system has been described as the greatest single element in bringing ministers to account for their actions and omissions. The strengths of a system which enable a minister to be tested rigorously cannot be underestimated. A minister whose performance is shown to be as unsatisfactory, who is the subject of constant questioning and criticism which he or she cannot satisfactorily answer and who is unwilling to accept responsibility for departmental actions for which people reasonably think he or she should, may come to be seen as

a political liability by the political leader and removed from office or may suffer the indirect penalty of demotion or non-promotion.

2.42 Traditionally ministers were regarded as responsible for policy and his or her department for general administration and policy implementation. This demarcation is not as clear cut as once it was. The complexities of government make drawing a clear line between the two difficult, with administration processes often involving policy issues. This was exemplified by what happened in the satellite tendering process. What was perceived at a critical point in time as process was later seen as policy.

2.43 The importance of Parliament in having public administrators give account of their performance can be seen in the work of its committees.

2.44 The impact of the parliamentary procedures in bringing ministers and public servants to account, relies upon the effectiveness of the operation of the procedures. Conflicting opinions exist in respect to the effectiveness of some parliamentary procedures, for example the nature of information sought and the workload imposed by parliament or its committees on sections of the public service can be counter productive to accountability and overuse of procedures such as censure motions can devalue their effectiveness.

2.45 The political make up of a particular House of Parliament will influence the way it makes a minister account for his or her acts or omissions. This is well illustrated by comparing the manner in which a house where the government party is in control deals with a minister who is alleged to have erred with that in which it is not.

#### Operation of the Private Office

2.46 The issue of ministerial responsibility includes the matter of a minister's responsibility for staff in his or her private office. The staff in such an office play a vital role, among other things in advising the minister in his or her conduct of affairs and

in representing his or her interests at appropriate forums. Their role is largely a political one and they do not usurp the functions of the relevant department.

2.47 Whilst a minister is directly responsible for the employment of personal staff, his or her responsibility for their activities could usefully be compared to that which he or she has for departmental officers. If an action was at the specific direction of the minister or undertaken with the minister's knowledge, the level of culpability would be greater than that applying to an action undertaken without the minister's knowledge. In any event in all cases the minister can be called on by Parliament to give an account of his or her conduct.

#### Concluding comments

2.48 The operation of ministerial responsibility is too often seen solely in terms of a minister's resignation or dismissal for his or her failure to adhere to it. Whilst it is accepted as a component of ministerial responsibility that a minister might be expected to lose office in certain, reasonably well-understood circumstances, attention ought to be paid to other dimensions of the concept. He or she has the responsibility for departmental policy and activity. He or she can be called on by Parliament to give an account of how he or she has met these. He or she may be tested on a range of issues, including what remedial action he or she has taken when the administration of a department has been found wanting. The parliamentary process may well expose significant ministerial deficiencies. However it is not open to parliament to determine whether the minister will be dismissed or demoted or shifted in such cases. That rests with the political leader in the short term and ultimately with the voters.