MINISTERIAL RESPONSIBILITY

Introduction

This paper aims to outline a range of issues associated with the concept of ministerial responsibility. It also provides a list of references related to these issues which were raised in the evidence received by the Committee or are seen as important in the literature on the subject. The references are listed in full in the bibliography attached to this paper. There is no attempt to interpret or endorse particular views as this was done in the Committee's First Report, Dissenting Report and debate in Parliament when the first report was tabled.

The concept of ministerial responsibility is regarded as an important component of our political system. But what does it mean and what does it involve? The Longman Cheshire Dictionary of Australian Politics provides the following definition:

> A principle central to the *Westminster system* of responsible government, namely that individual ministers are answerable to parliament for the handling of their portfolios, for the activities of public servants in their departments, and for their personal behaviour as it affects their public standing. If criticisms arise, one of four courses is followed: (i) the minister resigns, either voluntarily or at the request of the Prime Minister or Premier; (ii) the minister offers to resign, an offer that may or may not be accepted by the Prime Minister or Premier; (ii) the minister succeeds in riding out the storm; (iv) the Prime Minister or Premier dismisses the minister.

Yet is it possible be definitive when considering this concept?

Ministerial responsibility has been variously described as a changing concept, convention or doctrine; flexible; ambiguous; as uncertain as it is dynamic; meaning different things to different people at different times on different issues; not susceptible to objective assessment; of a subjective and political nature; a matter of convention rather than law.

History of Ministerial Responsibility

The development of the concept of ministerial responsibility appears to have been influenced by the record of British governments between 1832 - 1867 and the political changes brought about by the reforms to the franchise in 1867 and 1884. Professor Reid noted that the expression "ministerial responsibility" did not begin to appear in text books in Britain until the 1860s and 1870s.

Reid referred to the writings of A.V. Dicey who defined ministerial responsibility as meaning 'two utterly different things'. Firstly, "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" ... "the cabinet are responsible to parliament as a body for the general conduct of affairs". Secondly, "it means, when used in the strict sense the legal responsibility of every minister in every act of the crown in which he takes part".

Reid notes that Dicey's two vague conventions have maintained a persistent influence under the labels "collective ministerial responsibility" and "individual ministerial responsibility".

The development of party organisation and discipline towards the end of the nineteenth century significantly impacted upon the concept of ministerial responsibility.

Professor Finn has written on the development in the nineteenth century of the distinctive characteristics of responsible government in Australia including principles of ministerial responsibility.

Westminster system

Ministerial responsibility is seen as a principle central to the westminster system of responsible government. Whilst it is often stated that Australia has a westminster system, the Australian system departs from that model in fundamental ways.

Uhr has noted that Report of the Royal Commission into Australian Government Administration (Coombs 1976) was the first great public articulation of the limitations of 'the westminster system' as the basic organising category for Australian government. It held that 'westminster' was no longer relevant as the appropriate standard for describing and evaluating Australian political practices. In addition to federalism and bicameralism where both houses were elected, two other key reasons were the truncation of ministerial responsibility through ministers being held not liable before parliament for all administrative malpractices and policy failings of officials and the corresponding growth in the responsibility borne by officials with an increased burden of open, public accountability placed on them.

Thompson uses the expression the 'washminster' mutation, noting the "separation of powers between the Australian state and federal governments, between lower and upper houses and between the chief executive and the parliament all of which are exactly (more or less) specified in a written constitution".

Elements of the classic westminster model have been carried over into Australian practice. However the Australian political system is developing its own characteristics. Reid and Forrest offer the view that "in terms of the Australian experience there is no reason to suppose that the concept of ministerial responsibility has any prescriptive significance. It is not a legal or conventional imperative, but rather an integral part of the political rhetoric which derives its significance from the electoral process and not from any apparent British antecedents".

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Previous Parliamentary Reports

Previous parliamentary and related work which has commented upon ministerial responsibility and its operation in an Australian context include the Coombs Royal Commission into Australian Government Administration which as early as 1976 stated -

> In recent times the vitality of some of the traditional conceptions of ministerial responsibility has been called into question, and there is little evidence that a minister's responsibility is now seen as requiring him to bear the blame for all the faults and shortcomings of his public service subordinates, regardless of his own involvement, or to tender his resignation in every case where fault is found. The evidence tends to suggest rather that while ministers continue to be held accountable to Parliament in the sense of being obliged to answer to it when Parliament so demands, and to indicate corrective action if that is called for, they themselves are not held culpable - and in consequence bound to resign or suffer dismissal - unless the action which stands condemned was theirs, or taken on their direction, or was action with which they ought obviously to have been concerned. (RCAGA report, 59-60)

A research paper was prepared by Professor Emy for the Royal Commission which studied the problems of accountability in a westminster system of government. He addressed the concept of ministerial responsibility and its surrounding conventions, including those involving the relationships between the public service and elected institutions (the Executive and Parliament), and more generally the conventions relating to the political control of the service.

The Senate Select Committee on Off-Shore Petroleum Resources commented on ministerial responsibility in 1971 with submissions on the subject having been provided by Professors Geoffrey Sawer, Jack Richardson, Zelman Cowen and Gordon Reid.

The Senate Standing Committee on Constitutional and Legal Affairs in its 1978 report on Freedom of Information commented on ministerial responsibility and the impact of the proposed Freedom of Information legislation.

Collective ministerial responsibility

Collective ministerial responsibility traditionally holds that a ministry is collectively responsible to parliament, and through it to the people, for all its actions, programs and policies. It implies that the ministry will observe the convention of cabinet secrecy, and that ministers should fully support cabinet decisions and if they disagree with a decision should resign. It now extends beyond cabinet to encompass all ministers. There is an expectation that ministers collectively resign or the government asks for a dissolution if defeated on a confidence motion.

Practice in Australia has modified this traditional approach. Cabinets do leak and the media constantly reports different personal attitudes held by ministers to issues being discussed by cabinet, but who publicly support the cabinet consensus.

Collective responsibility is still effective. Prime Ministers use it as an instrument of discipline. Ministers do defend collective decisions. When it comes to an election voters consider the collective performance of the government over the previous years.

Collective responsibility has been described as a political necessity and a rule of political prudence for ministries who want to stay in office.

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Individual ministerial responsibility and ministerial resignation

Individual ministerial responsibility holds that ministers are individually responsible to Parliament and through it to the people for their own actions and those of their departmental officials. Traditionally, this means for every public act of a public servant. Whether and in what circumstances a minister should resign under this doctrine is the subject of contention, particularly when an act by the minister's department is involved.

Emphasis is sometimes placed upon resignation as being paramount to the operation of ministerial responsibility. The media, in particular, often consider the concept only in terms of resignation. Ministerial responsibility is perceived in terms of crime and punishment, with removal from office the only punishment. The opposite view is that there is an undue focus on resignation which is the ultimate, not the only sanction. The problem lies in confusing responsibility with resignation.

Acceptance of responsibility can occur without recourse to resignation. It may be the ultimate penalty but there are other intermediate punishments which can be levied on ministers. Loss of reputation, embarrassment and demotion, non-progression or relief of office at later ministerial reshuffles all have punitive effects on individual ministers. The ministry as a whole may suffer electorally if too many ministers transgress.

Former Prime Ministers Whitlam, Fraser and Hawke have variously indicated that whilst there may be too great a focus on resignation, it remains an important aspect of ministerial responsibility.

Actions leading to loss of ministry

Issues relating to whether it is possible to categorise ministerial actions which lead to resignation or dismissal and who makes the decision on a minister's fate and in what circumstances have been considered. A number of researchers including Page, Marshall and Sutherland have provided through case studies in Australia, Britain and Canada a listing of actions which have invariably resulted in a Minister's resignation and those which have not. Browning has also listed Australian examples of ministerial

resignations based on individual or collective ministerial responsibility and accountability to Parliament.

From these and other studies categories of action which have historically resulted in resignation have been described. In all cases there is personal responsibility or involvement by the minister. Broadly, these categories are:

Personal behaviour or conduct which is unacceptable to community standards such as private scandals compromising financial probity or personal morals. Unacceptable personal behaviour may range from deliberately misleading or lying to Parliament to being convicted of a criminal offence.

Secondly, the unwillingness of a minister to accept collective responsibility. This is discussed in a separate section.

Thirdly, an action performed by a department following a direct instruction given by the minister so that the minister is directly responsible.

Fourthly, when the minister knows of misconduct or maladministration within the department and fails to take action.

Whether these categories should be codified is discussed in a separate section.

Vicarious responsibility and resignation

The actions of a department for which the minister has vicarious responsibility only, fall into a category which is now widely accepted as not leading to a minister's resignation. Although the traditional concept of individual ministerial responsibility has a minister responsible for all actions of the department, it is not expected that a minister should resign for those actions of which he or she could not be aware or was not personally involved in.

The case histories for Australia, Britain and Canada show that in recent times no minister has resigned in this situation. An English case involving Sir Thomas Dugdale, known as the Crichel Down case, which was regarded at the time as an example of a minister resigning over the errors of public servants has since been reassessed. It is now suggested that whilst there were administrative shortcomings the primary failing was one of political misjudgment and personal involvement by the minister.

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To say that ministers do not resign in these circumstances is not to argue that ministers should not resign but simply to observe that the effective working of the principle of individual ministerial responsibility does not depend on resignations being the only sanction.

The view that due to the growth in the size and complexity of departmental administration a minister cannot be expected to be aware of every action of their department has been expressed by politicians, public servants and academics. Nevertheless a minister should take responsibility for all actions in the form of being accountabile and answerable to the Parliament.

Sutherland has written that rather than in resignation, the democratic significance of ministerial responsibility is in its provision for political leadership of administration.

The leader and resignation

It has been argued that the question of who makes the decision on a minister's fate is a political one for the leader. Wran described the normal procedure for ministers to resign as the Prime Minister or Premier telling the minister that their conduct or misconduct, their omission or commission of some act or offence, their negligence, their misjudgment is such that the government cannot carry them any longer.

This is not to say that leaders act unilaterally or capriciously. In reaching a decision there are competing influences affecting a leader's consideration. They are sensitive to public opinion and have finely developed political antennae. There must be culpability on the minister's part. The leader will consider questions including the party or government's survival, election timing, the minister's performance and perception of the severity of the alleged offence. A balance between a value versus a pragmatic judgment needs to be made.

Codification of ministerial responsibility

Sir Rupert Hamer suggested a form of codification of ministerial responsibilities. He suggested four categories in each of which a minister has a degree of personal involvement and accordingly could be expected to resign. They are:

- personal behaviour/unacceptable personal conduct,
- inability to accept collective responsibility of cabinet,
- the department follows a direct instruction given by the minister on policy or practice so that he or she takes on that responsibility, and
- the minister knows of misconduct within the department and fails to take action.

The question of vicarious responsibility for other acts of the department or maladministration was not included in the area of direct responsibility leading to resignation.

Against this suggestion was the view that to make a list of actions and omissions which would constitute breaches of ministerial responsibility would create a code too inflexible, too inefficient and too removed from the way things actually work to meet political realities.

Whilst a code of specific rules with predetermined outcomes would not allow enough flexibility in deciding the outcome in particular cases, the categories outlined by Hamer and the precedents for ministerial resignation described in the case studies referred to earlier indicate that a defacto set of guidelines already exist against which a minister's exercise of responsibility can be assessed.

Role of Parliament

Ministers are responsible to the Prime Minister for their own and their department's actions. This responsibility is manifested in their accountability to parliament and is expressed in terms of answerability to parliamentary procedures. Ministers are expected to be accountable to parliament for administrative problems of the department. These may range from implementation of policy or departmental action directly involving the minister to vicarious responsibility for actions the minister could not be expected to know anything about. Ministers should acknowledge and give a full account of the error that has occurred and indicate the measures being undertaken to remedy the problem. Such measures should not only remedy the particular deficiency, but also the system so that the particular fault does not recur.

Parliamentary procedures provide a range of opportunities to test ministers, including question time, censure motions, grievance debates, matters of public importance, urgency motions and committee activity. The parliamentary process can expose a minister and enable the electorate, ministerial colleagues and the Prime Minister or one or more of them to make judgments about the efficiency, competence and honesty of the minister under scrutiny. This process is integral to ministerial accountability. Wran described the power of parliament as the greatest single element in bringing ministers to account.

Butler and Page have written that this accountability to parliament in the sense of being answerable to it is the great quality of ministerial responsibility. It obliges ministers to take precautions, to delve into their departments for information, to check their facts, to explain their department's actions and to find remedies in the case of demonstrated error. Not only must ministers take this obligation seriously, but parliament expects them to do so. To the extent that this obligation to account to parliament is taken seriously, the concept of ministerial responsibility provides a control over Australian executive government.

The strengths and weaknesses of parliamentary processes and the effectiveness of certain aspects of it were canvassed in evidence given to the Committee. For example Macklin and Singleton questioned whether the censure motion has been devalued through overuse. Yeend and Gleeson suggested that the public service may be becoming overburdened with accountability mechanisms thereby reducing their effectiveness.

The issues of whether the formal processes of parliament are used by an opposition to gain media attention by embarrassing a government through attacking a minister or whether they are used to raise issues, gain information and focus attention on a government's performance were raised. Reid and Forrest have suggested that an opposition call for a minister to resign is an attempt to convince the electorate that through the minister's shortcomings a government has offended against 'accepted standards' or 'conventions' of political behaviour.

The possible use of parliamentary procedures to render untenable the chamber role of a minister accused of some wrongdoing and who does not resign has been raised. Such a use of procedures could be counter-productive to the process of bringing a minister to account. Where the effectiveness of parliamentary scrutiny is regarded in terms of putting pressure on a minister in the chamber to ensure subsequent behaviour is up to the level it ought to be and the minister is divorced from that process by being unable to operate in the chamber, then that scrutiny would be greatly weakened.

The effectiveness of a parliament in scrutinising a government and bringing ministers to account is related to the political configuration of the parliament. Upper Houses with non-government majorities are regarded as much more active in their review role and in calling ministers to account. This can also be the case in lower Houses with a minority government, as has recently been seen in NSW. The effect of the unicameral system in Queensland without review mechanisms was the subject of comment in the Fitzgerald Royal Commission.

Accountability

Accountability is in itself a much discussed and written about term. There is often overlap in the usage of the terms responsibility, accountability and answerability as shown in the previous section.

Ministers are regarded as responsible to the Prime Minister and accountable to parliament. Whilst, public servants are responsible to the minister, there has been considerable debate as to whether they should be accountable either directly to parliament or through their minister to parliament. The Management Advisory Board has distinguished between ministerial and public service responsibility by reference to their different levels of parliamentary accountability, whilst acknowledging that public servants are answerable to parliament. This view has been seen as diminishing the role of parliament and downgrading the level of accountability of public servants who have been given more responsibility for their actions. They should be expected to take a greater degree of direct accountability to the parliament.

Traditionally the responsibility for policy matters rested with the minister and administrative matters with public servants. The division between policy and administrative matters is now much less relevant as they have converged in recent years.

The importance of the relationship between the minister and the departmental head in terms of the responsibility each has for policy and administration has been considered.

Weller poses as crucial questions in this partnership - what do ministers know? What can we expect them to know? What should they know? This is particularly significant in complex technical areas rather than in the political context. Ministers are after all usually appointed on grounds of general expertise and political sensitivity rather than their vocational expertise. It is the departmental head that has the responsibility for ensuring that the minister is notified or has brought to his or her attention every

significant policy issue. The minister's personal advisers provide a political perspective on policy issues. The role of the minister's private office in providing advice is discussed in a separate section.

Devolved accountability of public servants

The public service reforms of the 1980s have had a significant impact upon its accountability. The reforms, which have been underpinned by greater devolution, accompanied by increased decentralisation and delegation have shifted responsibility and authority down the line. This movement of responsibility has led to differences of interpretation as to the result. On the one hand it is argued that the devolution of authority has led to the expansion of accountability mechanisms within the public service. The receiver of devolved powers and new delegations must be prepared to accept the new responsibilities and the accountability that goes with them. On the other hand these reforms are seen as leading to uncertainty over responsibility and who should stand accountable.

Whilst there is debate over the form and extent by which they must account to the legislature, public servants remain accountable to Parliament and answer to parliamentary committees e.g. estimates committees. In addition to the parliamentary scrutiny there is a range of external review mechanisms which form a part of the accountability process. These include the courts, Administrative Appeals Tribunal, investigative bodies such as the Auditor-General and Ombudsman and freedom of information legislation. The development of these mechanisms has been seen by Parker as an alternative to the traditional idea of ministerial responsibility. They are fundamentally inconsistent. Finn suggests that if the end result is accountability to the public through different means, there is no inconsistency. The question is not which is more efficient but which is more effective - which means of accountability provides greater reassurance to the community that the system of government is working.

The Management Advisory Board contends that accountability should be measured in terms of what outcomes can be achieved. Risk management techniques are encouraged and recognise that mistakes will be made -but should not be repeatedly

made. Public servants are expected to defend the judgments involved in risk assessment before ministers and, through them, parliamentary committees.

Sanctions which can be applied against public servants relate to loss of security of tenure, reduced career prospects and performance appraisal and the loss of pay bonuses affecting all senior officers.

Responsibility for and accountability of GBE's and similar bodies

An associated issue raised with the Committee concerned the growing numbers of Government Business Enterprises and other commercially competitive bodies. Their growth has raised the question of diminished ministerial responsibility through the 'arms-length' relationship of ministers with these bodies. A major concern has been the removal of a minister's accountability and responsibility in relation to the activities of these bodies which ministers possessed before they were corporatised.

This reduction in ministerial responsibility has led to concerns over the accountability of these bodies. The Management Advisory Board has suggested that pertinent individuals are accountable through an accountability chain applying in GBE's.

This increasingly complex area of responsibility and accountability has in recent years been the subject of examination and comment by the Western Australian Royal Commission into WA Inc and the South Australian inquiry into the State Bank of South Australia.

The Victorian Economic and Budget Review Committee's report on controls over commercial authority debt levels considered the role of parliament and the notion of ministerial responsibility in relation to commercial authorities.

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The Minister's Private Office

The role and staffing of a minister's private office has developed dramatically in recent years. This raises questions relating to the minister's responsibility for the actions of his or her staff.

The role of ministerial personal staff in advising the minister by giving a perspective outside the bureaucracy, representing the minister at various meetings and forums and operating as a link with the department has been considered. Their role is seen as largely a political one and they should not usurp the functions of the relevant department.

Fraser noted that ministerial staff provide an important support to the minister in carrying out those functions which cannot be delegated to departments without handing over responsibilities which should remain the minister's alone.

The effectiveness of the 'Canberra situation' where a minister operates from a private office in an executive enclave in Parliament House, physically separated from the department has been questioned. This does not occur in State administrations. Gleeson indicated that when you have a minister working alongside the department, a much better working relationship develops both between the minister and the department and between the department and the private office. On the other hand Hyslop has noted that most departmental heads preferred that the minister did not live in the department.

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