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Friday, 15 June, 2007

Executive Officer
Public Accounts and Estimates Committee
Parliament House
Spring Street
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Email: mark.roberts@parliament.vic.gov.au

Dear Sir/Madam,

Re: Ministerial Responsibility Submission

The International Commission of Jurists in Victoria makes the following submissions in response to the invitation of the Public Accounts and Estimates Committee dated 1 May 2007. We seek an extension of

the deadline for submissions (on the basis of the shortness of the deadline and that it was only recently brought to our attention) in order to allow these submissions to be considered.

Ministerial responsibility or Individual ministerial responsibility is ususally understood (see e.g. Wikipedia) to be a constitutional convention in governments using the Westminster System that a cabinet minister bears the ultimate responsibility for the actions of their ministry or department. (This is distinct from responsible government). Thus, if waste, corruption, or any other misbehaviour is found to have occurred within a ministry, the minister is responsible even if the minister had no knowledge of the actions. A minister is ultimately responsible for all actions by a ministry. Even without knowledge of an infraction by subordinates the minister approved the hiring and continued employment of those civil servants. If misdeeds are found to have occurred in a ministry the minister is expected to resign. It is also possible for a minister to face criminal charges for malfeasance under their watch.

The principle is considered essential as it is seen to guarantee that an elected official is answerable for every single government decision. It is also important to motivate ministers to closely scrutinize the activities within their departments. One rule coming from this principle is that each cabinet member answers for their own ministry in Question Time.

In respect of our federal system, Lane (Australian Constitution, 1986 LBC pp 323, 325) says:

> "Sections 62-64 are interlocked, the one section leading to the other, and the sections as a whole building into the principle of responsible government: s 62 gives to – or foists on – the Executive, in the form of the Governor-General, Executive Councillors; s 63 is a bare definition section; s 64 authorises the Governor-General to appoint Ministers of State but, under s 64, these must come from the Executive Councillors and – and this is the rub – these Ministers-cum-Councillors, again under s 64, must sit in Parliament, presumably to be accountable there…
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> "Thus, s 64 and cf s 44 last para., caters for, but does not dictate, responsible government, ministerial responsibility or the cabinet system. While this prinicple in the Westminster system of government is not enshrined in the Constitution in so many words – it was too well known in the Imperial and colonial tradition – it is acknolwedged in constitutional law.
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> > 'Sections 62 and 64 of the Constitution introduced responsible government: on the one hand, leaving aside most exceptional circumstances, the Crown acts on the advice of its Ministers and, on the other hand, the Ministers are responsible to the Parliament for the actions of the Crown.'"

In the Victorian context Taylor (The Constitution of Victoria, 2006 Federation Press p 166) says:

> "Some recent developments tend towards an undue weakening of arrangments for accountability and must be resisted. Commentators have noticed an increasing tendancy for Ministers to attempt to shield themselves behind public servants when mistakes are made. Public servants owe no responsibiilty to Parliament; only Ministers do. Their duty to Parliament includes a duty to account for the actions of the public servants in the departmentes which they administer."

Taylor goes on to observe (pp.167-8) the undesirability of the recent trend of Ministers preventing public servants appearing before parliamentary committes and for the need for this to be solved by legislation and for the need in Victoria of a ministerial code of conduct. The ICJ (Vic) indorses these views.

The issue of ministerial responsibility and the need for reform has been highlighted by the role of the federal Department of Foreign Affairs and Trade and its Minister in relation to the "Iraq Wheat Scandal."

A number of failures have been reported in the handling of the matter by members of the Department.[1] Such failures included:

- the inadequate response to the request by UN Chief Customs Officer Felicity Johnston in 1999 for Australia to investigate allegations that AWB was paying kickbacks to Saddam Hussein;
- the failure to notice the dramatic escalation in trucking fees being paid to Alia – from US $12 per tonne in July 2000 to US$44.50 per tonne in November 2000 and US$55 per tonne in December 2002; this, when petrol in Iraq was 10 cents per gallon and the real cost of inland transportation as estimated by expert Charles Duelfer was less than $6;
- the failure to be briefed about or follow up intelligence reports concerning kickbacks;
- the failure to comment on or investigate the front page of the New York Times on 7 March 2001, headed "Iraq is running pay-off racket, UN aides say", which specifically mentioned wheat;
- the failure of Australian diplomats in Middle East to pick up common knowledge about the use of Alia to circumvent UN sanctions.

[1] See: ABC "Four Corners" Program 17 April 2006

The question is, faced with failures of this magnitude and importance to the country, what degree of responsibility should the federal Minister, Alexander Downer have taken and what should have been the consequences of taking of responsibility.

The central public defence of the Minister was that “I did not know” and “no one in my Department knew or ought to have known”. However, governmental ignorance on this scale is not excusable. We live in a constitutional system of ministerial responsibility. The idea that nobody is responsible for such a monumental disaster, so damaging to our international reputation, is unacceptable. On an issue of such profound significance, ignorance is no excuse. It begs the question as to whether the Minister and key members of his Department “should have known”.

In contrast to a tradition of ministerial responsibility, there appears to have developed a culture of a denial of responsibility by attempting to pass the blame to others. In this case blame was ascribed by the Minister to the UN, the AWB and Australia’s wheat competitors.

A culture of protection of Departmental staff also appears to have developed. For example, the Cole Commission challenged the Minister over the failure of his staff to read crucial intelligence reports sent to his office in 2000 that warned that a trucking company facilitating Australian wheat sales in Iraq was an agent for Saddam Hussein’s regime. The Minister was also challenged over his staff’s failure to pass on a warning from a US army officer about kickbacks to the regime because they thought the officer was not of sufficiently high ranking. Yet the Minister continued to express full confidence in his staff, in the face of these facts. He said they had “done a good job” and had “faithfully implemented government policy”, and he could not make “a single criticism of his department’s handling of the affairs”. “I think they fulfilled their duty. They are very professional people”.

The result was that there was no disciplinary or corrective action and no criticism which eminated from the Minister. Rather, poor and damaging conduct was publicly sanctioned by the Minister. This position no doubt suited the political interests of the government. To have accepted responsibility and apportioned blame to departmental officers may well have resulted in political recrimination at the ballot box. To avoid these consequences, accountability was sacrificed.

A further issue arises. The Cole Royal Commission was established by the Federal Government to examine and report upon the “Iraq Wheat Scandal”. However, the government and its ministers were able to strictly confine the extent of the investigation by the simple device of limiting the terms of reference of the Royal Commission. In this way the Commission was precluded from examining and reporting upon the conduct of the ministers concerned.

We draw upon the example of the "Iraq Wheat Scandal" because of the scale and importance of the issue to the country as a whole, and because of the manifest failure of a senior Minister in doing everything within his power and control to deny any responsibility for the matter, both personally and on behalf of his departmental officers. Other examples can readily be identified. The Coroner's report into the recent ACT fires criticised the government for failure to warn and failure to foresee. The only responsibility accepted was 'political responsibility' but this apparently stops short of full responsibility because no government minister resigned.

These cases serve to illustrate the virtual collapse of acceptable standards of Westminster Ministerial responsibility and public accountability in this country and the need for urgent reform.

The recommendations contained in the Australian Study of Parliament Group report of November 2006 make a significant contribution and are to be commended. They are supported by the Victorian ICJ.

Sincerely,

Glenn McGowan
Chair
ICJ (Vic)