

## **Public Accounts and Estimates Committee**

### **Reference on Accountable Government**

#### **Submission**

#### **Introduction**

We are members of the Supreme Court, part of the third arm of government - the Courts. As such, it would be inappropriate for us to comment on the political issues raised and we do not do so. We also wish to emphasise that we do not make our submission in any official capacity but as individual citizens and from that perspective and not from the perspective of members of the third arm of government. It seems to us that that perspective should be addressed, if at all, by the courts themselves.

#### **The Reference**

This reference is of great significance. The accountability of government to those they govern is a matter of crucial importance in the modern world. The more a government is accountable, the closer it is to the Lincolnian ideal of a government of the people, by the people, for the people; an ideal far from reality in many countries, and one which even in democracies requires continual application of the high resolve of which Lincoln spoke at Gettysburg nearly 150 years ago.

The reference is also to be commended. In this context we note, in particular, the primary reference to consider the options for the “strengthening of Parliamentary and government accountability”. If the price of liberty is eternal vigilance, then the strength of each must be subject to regular scrutiny.

The issues referred to the Committee are fundamental to the operation of parliamentary democracy and responsible government in this State. Indeed, key elements of parliamentary and government accountability are principles that form part of the common law. We refer particularly to ministerial responsibility and the accountability of the

Executive to the Parliament.<sup>1</sup> These elements are at the core of any debate on government accountability. Ministers exercise great power and are obliged to exercise that power according to law. The criminal law provides reasonably clear definitions and procedures for holding ministers accountable for conduct in breach of the law. But accountability for other acts or omissions is determined by conventions developed at another time and now in a state of extreme uncertainty as a result of their inconsistent application in nations and states operating under the Westminster system. We suggest that the current state of uncertainty has the result that no one, including ministers themselves, can state when and in what circumstances ministers are to be held personally responsible for their failures or those of their departments or their personal staff. We suggest that this is a very serious defect in what we like to imagine is a mature and smoothly functioning democracy.

History is replete with examples of domineering leaders in democracies who have undermined institutions like the Courts, auditors general and other essential institutions which would otherwise have held such leaders to account. It would be foolish, indeed irresponsible, not to take whatever steps can be taken to strengthen the structural elements of accountability upon which our system relies when an opportunity arises, such as that presented by this reference.

The reference is relevant to those elements because in directing the Committee's attention the consideration of options for enhancing the accountability of the Executive Branch and the Parliament, it requires consideration of the principles of ministerial responsibility and ministerial accountability to the Parliament.

## **The Submission**

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<sup>1</sup> Recognised as part of the common law – *Egan v Willis* (1998) 195 CLR 424 and *Egan v Chadwick* [1999] 46 NSWLR 563 and the cases there cited. For Victoria, see also s 19 Constitution Act 1975

Some particular issues are listed in the reference. Detailed discussion of the matters listed will inevitably involve the discussion of current and past events which have given rise to significant party political debate. Because it would be inappropriate for us to enter into discussion of such matters, we will confine ourselves to identifying what appear to us to be two critical questions that we submit need to be addressed in this reference.

1. ***Definition of the convention of Ministerial Responsibility.*** We suggest that a threshold question arises in any consideration of the accountability of government; namely, the definition of the content of individual ministerial responsibility. Such definition will assist in clarifying the circumstances in which members of the Executive become accountable for matters and events within their portfolios and the manner of that accountability.

The content of ministerial responsibility has never been formally defined by any of the branches of government. As a result there has always been some uncertainty about

- what are the obligations of Ministers,
- the circumstances in which Ministers should be held culpable for events in their portfolios and ,
- the consequences where a Minister should be regarded as culpable for what has happened.

That uncertainty has increased as a result of relatively modern developments; the increase in the complexity of our society, the vast increase in the speed and volume of communications, the myriad of decisions that have to be made by governments, the growth of mega departments, outsourcing and PPPs, the growth in the number and authority of the personal staff of Ministers.

It is commonly said that it is no longer reasonable to hold a Minister culpable for every error made within his or her portfolio. Nor is it. Accepting that proposition, however, an unresolved question remains -

“Where is the line to be drawn? “

In addition, in recent times, Ministers have on occasions maintained that they should not be held culpable because they did not know of the particular problem. Such a defence, however, will on occasions raise further questions –

“Should the Minister have known? If so, what should be the consequences?”

We submit that the current state of uncertainty is undesirable for the community, the Parliament and for Ministers themselves. We urge the Committee, as its first task, to seek submission and comment directed to the definition of the content of individual ministerial responsibility.

**2. *How should alleged breaches of the convention be processed.*** The history of the convention of ministerial responsibility in Westminster systems reveals another important unresolved issue -

“How should allegations of breaches of the convention best be processed?”

Our court system bears out the value of an independent and transparent fact finding system. We suggest that the Committee seek submissions and comment on an appropriate and independent body within the Parliament to perform that task.

We suggest that these are critical questions to be addressed if the accountability of government and the Parliament are to be enhanced.

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