The Hon Vickie Chapman MP, Attorney General. Controversy over the

port proposal on Kangaroo Island, South Australia

Statement of Constitutional Principles.

20 February 2022

Purpose of Statement. To provide information to the public on the constitutional principles applicable to the Attorney General's actions in relation to the Kangaroo Island port, conflict of interest, misleading the House of Assembly and Motion of no confidence.

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Background facts

Because of their fundamental nature, constitutional principles and rules are meant to operate which ever political party happens to be in power or in opposition. Compliance with them should not depend on whether it will advantage or disadvantage any particular political actors or parties. Nor should their application be seen as the mere subject matter of party-political conflict.

On 9 August 2021, the Attorney General the Hon Vickie Chapman MP as Minister for Planning and Local Government blocked a proposal for a deep-water port facility at Smith Bay on Kangaroo Island in South Australia. It had been recommended by the State Planning Commission. The proposal was not taken to Cabinet. The Attorney General had a long family history on the Island. She decided on her own advice that she did not have a conflict of interest so did not declare the interests she had nor disqualify herself from making the decision.

The proposed port facility was to be used to transport plantation timber from the island. After being invited by government, the proponents had been working for five years and spent $ 7 million to get the project ready for approval. It was to be a $40 million investment in a multi-purpose port that would ensure the continuing existence of a plantation forestry industry with significant long term economic benefits to Kangaroo Island and the State.

The House of Assembly in the SA Parliament, set up a Select Committee to examine issues relating to this matter and engaged prominent Adelaide law firm, LK Law, to brief Dr Rachael Gray QC as Counsel Assisting. This was a unique process for South Australia, at least in recent times, made possible because the Opposition Labor Party had the support of Independent Members (including former Liberals).

On 18 November 2021 the *Final Report of the Select Committee on the Conduct of the Hon Vickie Chapman MP regarding the Kangaroo Island Port Application* was tabled in and noted by the House of Assembly (South Australia, Hansard, House of Assembly at 8421). Pursuant to Standing Orders the Report was published. The Select Committee had accepted the extensive submissions made to it by Counsel Assisting and rejected those of the Attorney General made by Ms Frances Nelson QC. The Report was supported by a majority of three of its members (two Labor and one Independent).

The Select Committee (at 14-16) found that the Attorney General had a perceived conflict of interest because of her friendship with the Mayor of Kangaroo Island Michael Pengilly; had a meeting with him and the proponent company in which she suggested the port be located elsewhere; knew that the proposed truck routes passed Mr Pengilly's house and made decisions that were inevitably in favour of Pengilly's position all of which led to the perception of conflict by a reasonable person. The Committee also found that the Attorney General holds a pecuniary interest in land adjacent to a forest contracted to the proponent company and that an actual conflict of interest exists because the Smith Bay port impacted on the Attorney General's interests.

The two Liberal Members filed a very short dissenting statement which complained about the behaviour of one of the Labor Members on the Committee Tom Koutsantonis MP making adverse comments about the Attorney General during the Committee hearings, and endorsed Ms Nelson's submissions. They concluded that the Attorney General as a senior, experienced and respected legal practitioner had brought an open mind to the matter and dealt with it rigorously, properly and honestly (at 30). We note that this is not the test for whether a conflict of interest exists.

On 18 November 2021 the House of Assembly carried a motion of no confidence in Ms Chapman continuing in her role as Deputy Premier, Attorney General and Minister for Planning and Local Government and as a member of the Executive Council, for deliberately and intentionally misleading the House of Assembly and breaching the Ministerial Code of Conduct (South Australia, Hansard, House of Assembly, at 8446-8465).

On 30 November 2021 the House of Assembly carried a motion whereby it:

- agreed with the recommendations in the Select Committee's Report and found the Attorney General guilty of contempt for deliberately misleading the Parliament in relation to three separate statements that were false and known to be false by the Attorney General at the time those statements were made and were intended to mislead the House;
- resolved to suspend the Attorney General from the service of the House for six days;
- found the Attorney General acted in a position of conflict of interest, both actual and perceived based on the Committee's factual findings and was guilty of contempt;

- found that the Attorney General breached the Ministerial Code of Conduct, based on the Committee's factual findings; and
- considered the breach of the Code of Conduct involved conduct of sufficient severity to amount to contempt. (South Australia, Hansard, House of Assembly, at 8505 - 8521).

Consequent upon Finding 11 of the Select Committee and pursuant to section 14 (1) of the *Ombudsman Act 1972,* the following matters were referred to the Ombudsman by the Select Committee: any matter relevant to whether the Attorney General had a conflict of interest in determining the application; any breach of the Ministerial Code of Conduct; and the role that any other public officer undertook relevant to the Attorney General's decision including the role and responsibility of the Premier, Chief Executives and other public officers including Crown Law Officers.

The Attorney General has resigned as Deputy Premier and Minister for Planning and Local Government but has not resigned as Attorney General and the Premier has refused to advise the Governor to dismiss her from that position. While the Attorney General still holds the office of Attorney General, all the functions and powers of the office have been conferred on the newly appointed Minister for Planning and Local Government, the Hon J B Teague MP. (South Australian Government Gazette: Supplementary, No 75, 23 November 2021 (at 4119-4121). Notification of resignation as Deputy Premier and Minister for Planning and Local Government at 4120: Transfer of functions by virtue of Administrative Arrangements (Conferral of Ministerial Functions and Powers) Proclamation 2021 issued pursuant to s 6 *Administrative Arrangements Act* 1994 at 4121).

The Attorney General and her Liberal colleagues with the full support of the Premier rejected the findings of the Select Committee and voted against the motions passed by the House of Assembly. This does not alter the status of the Committee's findings which were arrived at after a thorough inquiry and the Attorney General was given a full opportunity to put her case. Neither does it alter the same status of the resolutions which were passed by the House of Assembly after the conclusion of a full debate. Parliament (in this case the House of Assembly) as the democratically elected legislative arm of government has an important role in holding the government of the day (the executive arm) to account. There were legitimate issues of concern to be investigated viz, the Attorney General's conflict of interest and the impact this had on the company proposing the port and the public interest in a forestry industry on Kangaroo Island and in SA generally. The House was doing no more than fulfilling its proper constitutional role by establishing the Select Committee and acting on its recommendations made after a full inquiry.

We argue in this Statement that the facts described above give rise to two breaches of well-established constitutional conventions essential to responsible government and a proper functioning democracy. First, that ministers must resign if they no longer have the confidence of the House of Assembly in which the Government is formed (the practice in the Legislative Council or Upper House is not relevant). Second, ministers must resign if they have deliberately misled the House.

The reference of certain matters to the Ombudsman does not alter this situation.

Constitutional law, convention and practice

The constitutional law of South Australia can be found in the *Constitution Act 1934,* other legislation and constitutional conventions developed over centuries of practice in the UK and elsewhere. These are a consolidation of the values and ethical norms of civil society that enable democracy to flourish. It is known as the Westminster system of responsible government.

Not all of the constitution is contained in written legislation. Much of it depends on conventions developed in a practical way over the centuries.

Constitutional conventions have been defined as " - binding rule(s) of behaviour accepted as obligatory by those concerned in the working of the constitution" or alternatively as the "rules that the political actors ought to feel obliged by, if they have considered the precedents and reasons correctly" in David Blunt "Responsible Government: Ministerial responsibility –motions of censure /'no-confidence'" (2004) 19 *Australasian Parliamentary Review* 71 at p 73 quoting with approval G Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* 1984 p 7,12.

Such rules operate in Australia which is in this respect similar to the United Kingdom and Canada except for the absence of a British written constitution

United Kingdom: As described in the recent UK case of *Miller v The Prime Minister* [2019 UKSC 41] at 39 -40 (for this case the Supreme Court comprised a Full Bench of 12 judges, the decision was unanimous):

"Although the United Kingdom does not have a single document entitled "The Constitution", it nevertheless possesses a Constitution, established over the course of our history by common law, statutes, conventions and practice. Since it has not been codified, it has developed pragmatically, and remains sufficiently flexible to be capable of further development. Nevertheless, it includes numerous principles of law, which are enforceable by the courts in the same way as other legal principles. In giving them effect, the courts have the responsibility of upholding the values and principles of our constitution and making them effective. …. The legal principles of the constitution are not confined to statutory rules but include constitutional principles developed by the common law."

The purpose of this quotation is not to argue that the same approach as was taken by the UK Supreme Court on the role of the courts would necessarily be followed in Australia but to confirm in clear undisputed terms the nature of conventions i.e., they can be regarded as part of our constitution even though not expressed in a written constitution or legislation.

Canada: Similar views have been expressed by the Supreme Court of Canada in *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753 at 884 per Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ:

"That is why it is perfectly appropriate to say that to violate a convention is to do something which is unconstitutional although it entails no direct legal consequence. But the words "constitutional" and "unconstitutional" may also be used in a strict legal sense, for instance with respect to a statute which is found ultra vires or unconstitutional. The foregoing may perhaps be summarized in an equation: constitutional conventions plus constitutional law equal the total constitution of the country."

One such unwritten convention which is clearly also applicable in South Australia is that the Governor must act on the advice of the Premier who commands the confidence of the House of Assembly. This convention is central to the operation of democratic government. Without it a Governor could assume autocratic powers.

Responsible Government

South Australia has enjoyed a system of representative government known as responsible government since 1856. Its existence is partially recognised in section 66 of the *Constitution Act* 1934 which requires ministers to be members of the South Australian Parliament. What was said of the position in NSW by the Supreme Court of NSW Court of Appeal in *Egan v Willis* (1996) 40 NSWLR 650 at 660 is equally applicable to the position in South Australia. It was said in that case that: *"Responsible government… is a concept based upon a combination of law, convention, and political practice".*

The same combination establishes the framework for democratic government from which all else emanates. The Parliament elected by the people is supreme within the limits of area and subject matter prescribed by the Australian Constitution. The people of SA elect their representatives to two houses of parliament in free and fair elections. The government of the day is formed because it can command the support of a majority of those elected to the House of Assembly. The authority of the government and its ministers to govern on behalf of the citizens that have elected them derives from this support in the House of Assembly. In this way our governments gain their authority from the people.

It is a system of responsible government. Those accorded the privilege of governing are responsible and accountable to the Parliament. There are many ways in which Parliament asserts its authority over and ensures the accountability of government to it.

Sir Robert Menzies, Australia's longest serving Prime Minister, was a great respecter of parliamentary democracy and the Westminster tradition. In 1967 he argued that the people's democratic control over the executive through a parliament of elected representatives negated the need for a bill of rights (Galligan, B (1992). Parliamentary Responsible Government and the Protection of Rights. Papers on Parliament No.18. Parliament of Australia.):

"With us, a Minister is not just a nominee of the head of the government. He is and must be a Member of Parliament, elected as such, and answerable to Members of Parliament at every sitting. He is appointed by a Prime Minister similarly elected and open to regular question."

Technically Menzies is not correct. Ministers are appointed by the Governor- General on the Prime Minister's advice but this does not affect his argument that they are answerable to Parliament.

In an article he wrote in the Sydney Daily Telegraph of 18 February 1968 (cited by Prime Minister the Hon E G Whitlam QC, MP in his Chifley Memorial Lecture delivered on 14 August 1975) Menzies said:

"In Australia we practise the system of ' responsible government'. Indeed it has been judicially declared that it is embodied in our Constitution by necessary implication. In that system Ministers sit in and are responsible to Parliament; but Cabinet may be displaced by a vote of the House of Representatives (not - Sir Robert's emphasis - the Senate) and therefore holds office at the will of the House of Representatives.. ".

Applicable Constitutional Conventions

There are two fundamental principles which have the status of constitutional conventions that are relevant to the present case.

Firstly, confidence of the House. There is a clear and undisputed convention that a government is formed in the House of Assembly (or lower House of the Parliament) and hence must retain the confidence of that House and should resign if that confidence is lost. Not to do so strikes at the very heart of responsible and democratic government.

In South Australia as a matter of principle and practice this collective responsibility of government to the House of Assembly also applies to individual ministers losing the confidence of the lower House. The authorities and examples of Ministerial resignations given in this Statement confirm this position.

It is true that the duty of individual Ministers to resign when a vote of no-confidence has been passed against them is perhaps not as explicitly or well recognized as the duty of a government to resign in the same circumstances but this does not negate the existence of the convention: see e.g. David Blunt, "Responsible Government: Ministerial responsibility – motions of censure /'no-confidence'" (2004) 19 Australasian Parliamentary Review 71 and Geoffrey Lindell, "effect of a parliamentary vote of no-confidence in a minister: An unresolved question (1998) 1 Constitutional Law & Policy Review 6.

In the United Kingdom the convention requiring a Minister to resign upon losing the confidence of the House of Commons is a long standing one. It was described by Professor AV Dicey (1835-1922) who was regarded as the leading constitutional scholar of his day as follows:

"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" (A V Dicey, *Introduction to the Study of the Law of the Constitution,* 10th edn. Macmillan, 1959, p 325)

The Australian Constitutional Commission in 1988 echoed these views *(*1988, Vol 1 para 2.177):

> *"Part and parcel of the notion of parliamentary government is 'responsible government' whereby ministers are individually and collectively responsible to the Parliament and can retain office only while they have the 'confidence' of the lower House, that is, the House of Representatives in the case of the Commonwealth and the Legislative Assembly or the House of Assembly in the case of the States"*

Whatever the position in other jurisdictions the most authoritative commentator on the South Australian constitution is the late Bradley Selway QC former Crown Solicitor, Solicitor General and Federal Court judge (Bradley Selway, *The Constitution of South Australia* 1997 at 39.) He is clear:

"By convention, a minister who suffers a vote of no confidence in the House of Assembly should resign. (A vote of no confidence in the Legislative Council is insufficient to create an obligation to resign, even if the Minister is a member of that House.)"

In 2003, even while noting that accountability had been much reduced in practice, Selway cites this reference to confirm his view that "*a Minister would probably be expected to resign if there was a vote of 'no confidence' in that Minister at least in the lower house"* (McIntyre and Williams eds, *Peace Order and Good Government* (2003) 166-167).

These authorities make clear that ministers as individuals as well as collectively owe their responsibility to the lower Houses of Parliament.

In recent times at least in South Australia there have been no examples of the convention not being followed until the present case. There have been no examples of a Minister losing a vote of confidence in the House of Assembly let alone not resigning because of it. This may be due partially to the small likelihood of the withdrawal of parliamentary confidence in a Minister except in minority government situation which although not unknown before then have only begun to recur more frequently in about the last two decades. That said, the examples of Ministerial resignations in South Australia given below suggest, either that the Minister took a principled approach, or in some cases there was a recognition that a motion of no confidence would be passed if a resignation was not forthcoming.

In South Australia because Ministers have resigned for various wrongdoings including misleading the House and having a conflict of interest, the Premier of the day has not hitherto been faced with a situation of what to do if a Minister refused to resign. Unlike in relation to the precedents established by the ministerial resignations referred to below, there are no precedents for what a Premier would do if a Minister refused to resign. Based on the general principles asserted in this Statement, the Premier should advise the Governor to dismiss the minister on the basis of the lack of confidence. It is acknowledged that if a Premier refused to do this then that is where the matter would rest so far as the role of the Governor is concerned.

There is a very strong convention that the Governor must act on the advice of the Premier and so would have no independent role to play in the case of a Minister losing confidence of the House. By their very nature (that they develop pragmatically and retain flexibility) not all conventions are given equal weight. The convention that the Governor acts on the advice of the Premier takes precedence over the convention that a Minister should resign for lack of confidence.

What the Attorney General and the Premier have done in this case has no recent precedent. No doubt this situation is because the strict Party discipline that previously existed meant that the passage of motions of no confidence in ministers were rare or even non-existent. If the trend of greater numbers of Independents being elected at both the State and Federal level continues then the situation now faced is likely to occur more often. It is important that the relevant principles grounded in the idea of responsible government including the personal responsibility of Ministers be affirmed.

It is difficult to see why the logic of accountability that lies behind the *collective* responsibility of Ministers to the lower House does not also apply to their *individual* responsibility to the same House of the legislature. The current circumstances point to maintaining the convention in this form.

In the current social and political environment where there is increasing concern about integrity in government, it is desirable to reaffirm the principles of democracy inherent in responsible government, to ensure accountability of individual ministers as well as governments by reaffirming high standards of integrity and by emphasising the accountability of executive government to the Parliament as described by the High Court in *Egan v Willis* [1998] HCA 71 including Kirby J at paras 151-155 (cited in Blunt at 86). The underlying policy reasons for maintaining the convention of individual responsibility is compelling.

Secondly, obligation not to mislead Parliament. Ministers must not deliberately mislead or provide false information to the Parliament and should resign if found to have done so. This convention can operate independently of and in the absence of a motion of no confidence. Whatever questions can be raised in relation to the consequence of a motion of no confidence there are none in relation to the convention of resignation for deliberate and serious misleading of Parliament.

A core ethical value for the maintenance of civil society is that citizens should strive to be truthful. In our elected Parliaments there can be no more important a duty than this. Citizens cannot ensure that an elected Parliament and its Ministers are responsible to it unless they can rely on the accuracy of what they say. If there is no consequence (i.e., resignation) for failing in this duty then democracy and civil society are demeaned.

Once a precedent is established that Ministers are free to deliberately mislead Parliament without consequence, then responsible government and democracy are undermined.

Historically the precedents and practice are clear. The Select Committee (at 4) cites the authoritative text from the UK Parliament - Erskine May: Parliamentary Practice (2019) "Members deliberately misleading the House" (para 15.27).

Sir Robert Menzies, on misleading Parliament, said (Bramston, T (2019). *Robert Menzies, the art of politics*. 178. Scribe, London, Melbourne.):

"A government must respect the opposition by never lying to it or deliberately misleading it". "Under those circumstances, you will get the business of the House through".

This historically long-standing principle and convention has more recently (1993) been recognised in the Ministerial Code of Conduct. Cabinet has approved the Code to provide guidance to Ministers *"in order to uphold the highest standards and avoid conflicts of interest"* (para 1.2). Amongst the general requirement to act honestly, diligently and with propriety, Ministers must ensure they do not deliberately mislead the public or Parliament on any matter of significance arising from their functions (para 2.4).

The duty in question is not only owed to the Premier and Cabinet under the Ministerial Code of Conduct, but it is more importantly a duty that is owed to the Parliament and

thereby to the public. The Code in this regard merely supplements the Parliamentary duty, a breach of which can constitute contempt of the Parliament. It is therefore a duty that is not absolved by the failure of the Premier to enforce compliance by requiring the resignation of the Minister (para 1.4).

The convention that Members should not mislead Parliament has always been clear, accepted and acted on and treated with utmost seriousness in South Australia and accords with the usual criteria for the existence of a convention.

On 19 October 2001 Liberal Premier John Olsen resigned after Dean Clayton QC found he gave, misleading, inaccurate and dishonest evidence to the 1998 Cramond inquiry into his handling of a government mobile communications system contract involving Motorola.

He resigned before a motion of no confidence was moved perhaps motivated by the possibility that Independents might support it. (*Report of the Second Software Centre Inquiry* (Clayton Report) tabled on 23 October 2001 (South Australia, Parliamentary Debates, House of Assembly at 2425. Questions at p 2426 ff).

On 6 July 1998 Graham Ingerson MP resigned as Deputy Premier and from his Ministry of Racing portfolio pending a Privileges Committee investigation and report on whether he had misled the House regarding a telephone call to a senior Liberal Party figure on the future of the SA Thoroughbred Racing Authority chief executive, Mr Merv Hill. On 21 July 1998 the Privileges Committee found statements in Parliament to have been deliberately misleading and not a matter of little consequence (South Australia, Hansard, House of Assembly at 1449 – 1461).

An ensuing motion of no confidence moved by the Leader of the Opposition the Hon M D Rann on 22 July 1998 (South Australia, Hansard, House of Assembly at 1493 – 1501) was defeated on the casting vote of the Speaker. Despite this, some two weeks later, Mr Ingerson resigned from his remaining portfolios as Minister for Tourism, Industry and Trade.

There have been three other relevant resignations.

Resignation for conflict of interest. On 4 October 2001 Liberal Member and Minister for Tourism Joan Hall resigned when the Auditor General's report into the Hindmarsh Stadium upgrade accused her of having a conflict of interest, because of her role as Ambassador for Soccer. In her Ministerial Statement (South Australia, Hansard, House of Assembly, 4 October 2001 at 2382-2384) she said she resigned because the government did not have a majority in its own right and she would not put the government at risk with a vote of no confidence in the hands the Independents (at 2384).

Resignation for mismanagement. On 4 October 2001 Liberal Member Graham Ingerson resigned as Cabinet Secretary. This followed an adverse report from the Auditor General into the Hindmarsh Stadium and Mr Ingerson's dealings with Treasury, Crown Law, Services

SA and the Public Works Committee. Mr Ingerson was criticised for pursuing cost increases in the stadium upgrade without proper or adequate due diligence (South Australia, Hansard, House of Assembly at 2387; Personal statement at 2394 – 2396).

Resignation after critical findings by a court. On 4 August 1988 Dr John Cornwall MLC the Minister of Health and Community Services in the Bannon Labor Government resigned following adverse findings by the District Court in a defamation case (Questions asked: South Australia, Hansard, House of Assembly, 4 August 1988 (at 23 ff) and Legislative Council, 4 August 1988 (at 6 ff).

An award of damages for defamation and costs was made by the District Court against Dr Cornwall for statements made about a medical practitioner at a press conference during the carrying out of his official duties.

The Government agreed to indemnify Dr Cornwall. The Premier, J C Bannon, said that he had not forced Dr Cornwall to resign (South Australia, Hansard, 4 August 1988 at 25). Nevertheless, it was apparent to CJ Sumner, the Attorney General at the time, that Dr Cornwall had lost the support of his Cabinet colleagues because of the nature of the Court's criticism.

Selway acknowledges that a Minister would be expected to resign if the Minister was knowingly involved in a significant administrative error by an agency for which the Minister was responsible; and if the Minister was knowingly involved in a misrepresentation to the Parliament (McIntyre and Williams eds, *Peace Order and Good Government* (2003) at 167; Bradley Selway, *The Constitution of South Australia* (1997) at 60).

Each of these Ministers acted with constitutional propriety and in the best traditions of the Westminster system. These are compelling examples of the existence and strength of constitutional conventions in SA relating to Ministers resigning and particularly so in the cases of misleading the Parliament.

As a Member of the Legislative Council and a Minister between 1975 and 1994 C J Sumner considered that these resignations reflected a well- established convention of individual Ministerial responsibility that was generally accepted by other Members of both Houses.

Strong convention against deliberately misleading Parliament in SA. Relevance of the Upper House.

It has already been mentioned that votes of no-confidence in a Minister passed by the Legislative Council have not the same significance as those passed by the House of Assembly. The British notion of responsible government envisages that a government and its Ministers are responsible to the lower House of Parliament.

As High Court Justice, Sir Owen Dixon, stated:
"The principles of responsible government impose upon the administration a responsibility to Parliament, or rather to the House which deals with finance, for what the administration has done" (*New South Wales v Bardolph* (1935) 52 CLR 455 at p 509.)

Nevertheless, the extent to which SA's parliamentarians acknowledge the seriousness of a Minister deliberately misleading Parliament were emphasised in the Legislative Council in 1992. The debate related to allegations that the Minister of Tourism, the Hon Barbara Wiese MLC, had misled Parliament.

The debate followed the tabling by the Attorney General (the Hon C J Sumner MLC) of a Report prepared by Mr Terry Worthington QC on his inquiry into allegations of conflict of interest against the Minister as well as the *Attorney- General's Report for Cabinet on the Principles Relating to Conflict of Interest.* (South Australia, Hansard, Legislative Council, 25 August at 1992 (at 172).

The current Treasurer, the Hon R.I Lucas MLC, was the Leader of the Opposition and because of his longevity as a Member of the Legislative Council and oft times the holder of Ministerial office in Liberal Governments he represents an important and continuous thread from the past to the present.

On 26 August 1992 (South Australia, Hansard, Legislative Council at 195-199) Mr Lucas moved that the Council concludes that the Minister for Tourism has mislead the Legislative Council and declares that it has no confidence in her and calls upon her to resign as Minister but, if she will not do so, calls on the Premier to dismiss the Minister from office. As a result of an amendment moved by the Hon M J Elliott MLC for the Australian Democrats a simple motion of censure for misleading the Council was passed (South Australia, Hansard, Legislative Council at 206 - 208).

In speaking to his motion, Mr Lucas said that motions of no confidence are the most serious parliamentary procedure that a Parliamentary Chamber can adopt and that misleading a Parliament is the most serious charge that can be addressed against a Minister of the Crown. He asserted that there were a number of examples of where Minister Wiese had seriously misled Parliament and said (at 195);

"It is the view of the Liberal Party that, if there are any standards of accountability left in this Government, with this Premier and with this Minister, then she can no longer remain in the office. Either she takes the honourable course and resigns, or for once in his life the Premier should take the tough decision and dismiss her from office'.

The Hon C J Sumner MLC said that a motion of no confidence in the Legislative Council (the Upper House) has no effect as far as the Government is concerned as there is no convention that Ministers are required to resign following a motion of no confidence in the Upper House as it is a matter for the House of Assembly (South Australia, Hansard, Legislative Council at 199 -200). This position was not seriously disputed.

The Shadow Attorney General (and Attorney General of long standing in a number of Liberal Governments), the Hon K T Griffin MLC, probably expressed the correct approach when he said (South Australia, Hansard, Legislative Council at 205):

"It is perfectly proper for the Legislative Council – the House in which the Minister is a member – to debate the issue of its confidence in the Minister and to make a request to the Premier. If the Premier decides not to take notice if that request, that is a matter for him. However, this Council, being the place in which the Minister is a member, is perfectly entitled to debate the issue".

On the question of the consequences of misleading, the Hon K T Griffen also set out correctly the well- established position (at 206):

"Misleading the Parliament is a serious matter. If it is inadvertent then one would normally expect that a Minister, immediately on becoming aware of the fact that a misleading statement had been made, would make a statement to the Council and apologise for the inadvertent misleading of the Parliament. But if it is deliberate, an apology is not sufficient: resignation is the proper and honourable course".

Mr Griffin cited Erskine May the most authoritative work on parliamentary practice and procedure in the UK House of Commons that: *"The House may treat the making of a deliberately misleading statement as a contempt".* He referred to the notorious Profumo case in 1963 and concluded: *"That the consequences of contempt of the Parliament, …. is that the Minister should resign"* (at 206).

In the present case the House of Assembly has found that the Attorney General was in contempt of the House of Assembly.

The Hon L H Davis MLC also participated in the debate echoing the views expressed by Mr Lucas (South Australia, Hansard, 26 August 1992 at 203-205). The reference to Mr Davis is of significance because, although he is no longer in Parliament, he is at present the President of the Liberal Party of SA.

The matters raised in the debate on the Worthington Report were a powerful statement by the parliamentary actors at the time of the importance attached to Ministers not deliberately misleading Parliament.

The fact that the debate and proposed motion of no confidence took place in the Upper House where Governments are not formed or dismissed and could therefore have no binding practical effect on the status of the Minister does not detract from the important principles enunciated. What is also significant, however, is that the strong enunciation of basic principles provides some foundation for hoping that there may be bipartisan support for their application to the current Attorney- General.

It is worth noting that in the Federal Senate (or Upper House) a practice has developed of not generally moving motions of no confidence against Ministers but moving to censure them (Commonwealth of Australia (2016) J R Odgers (H Evans ed), *Australian Senate Practice*, 14th edition, Department of the Senate, Canberra at 635; (2019) Supplement to the 14th edition at 35).

Relationship between misleading parliament and vote of no-confidence

The above discussion focuses attention on the relationship between a parliamentary finding that a Minister has deliberately misled the House of Assembly on a serious matter and a vote of no – confidence in a Minister. A common thread which runs through both resolutions when the criticism of the Minister rises above the level of mere censure and seeks the resignation of the Minister, is that the House recommends that the Minister no longer remains in office because it regards him or her as unfit to do so.

The practical effect of each type of resolution is the same. In the case of deliberate misleading the resolution specifies the precise reason for thinking that the Minister is unfit to remain in office which amounts to an implicit vote of no confidence. In the other case, the unfitness for office is expressed by an explicit vote of no -confidence for any number of reasons including as in this case for deliberate misleading but which may for example also go to the Minister's misconduct, maladministration or incompetence. In SA at least examples of resignations for misleading the House outlined above can be treated as precedents in support of the convention which requires the Minister to resign for what were tantamount to votes of no -confidence.

Consequences of failing to follow conventions

An important feature of conventions is the development and maintenance of precedents that support the existence of rules which the major actors feel bound to obey even though they are judicially unenforceable.

If a Premier declines to dismiss a Minister who refuses to resign for misleading the House and losing the confidence of the House this will not only breach conventional rules recognised in the past, but will also mean that those conventions may ultimately cease to have effect in the future. Such a development can only eat away at the fabric of responsible government in Australia.

While one example of a breach does not negate the existence of a convention, allowing a vote of no-confidence to be ignored without a Minister resigning merely because he or she retains the confidence of a Premier helps to accelerate a gradual drift away from the individual responsibility of a Minister to Parliament. What is left in its wake is only a responsibility owed to the Premier of a government that retains the confidence of the Parliament.

As a consequence, Parliament is left with only the disproportionate and drastic remedy of voting the whole Government out of office and possibly resulting in an early election.

This may be so even though there might be sound reasons why the majority does not seek a change of government or early elections and is surely not a sound recipe for stable and accountable government. The contemporary circumstance of more Independents reinforces this approach. If more governments are formed with the support of Independents, it is likely to be more common that the House will want to express no confidence in individual ministers without necessarily putting the whole of government at risk of dismissal and a premature election. The maintenance of individual responsibility provides a more flexible solution in this changing environment.

It has been acknowledged that by the changes made to administrative law and the creation of other extra-parliamentary institutions such as the Ombudsman and ICACs, remedies have been enacted to deal with the sad decline in the accountability of Ministers to the Parliament. Undermining the basic rules of convention discussed in this Statement of Principles would reduce even further the relevance of the Parliament in holding Ministers to account. All Australians need to understand that the more Parliament becomes powerless or even irrelevant then the less power do voters and citizens have to influence events through normal democratic processes.

The Attorney-General has already resigned her position as Deputy Premier and Minister for Planning and Local Government, as well as having ceased to perform her functions as Attorney-General.

Some might find the fact that the Premier has agreed to such an odd arrangement, which has left the Attorney General with a title but no powers or functions to perform, difficult to understand. The foregoing considerations explain why it is necessary for the Premier to seek her resignation as the Attorney-General to reaffirm her individual responsibility to the Parliament as well as to the Premier.

Conclusion

South Australia (along with other jurisdictions that operate under the Westminster system) has an established system of responsible government as part of its constitution and the conventions which are part of it should be adhered to.

These constitutional principles are precious and ensure that South Australians live in a proper functioning democracy. They should not be lightly cast aside.

The motion of no confidence and findings that the Attorney General was in contempt of Parliament for misleading it related to issues in the administration of the portfolios from which the Attorney General has resigned. This means that the relevant constitutional conventions discussed in this Statement have been substantially complied with.

But the Attorney General is the First Law Officer of the Crown with attendant responsibilities to uphold the law and our constitution. The House of Assembly no longer recognises her authority as a Minister of the Crown. She should accept that her duty under the constitution is to resign from her remaining position of Attorney General.

About the Authors

Christopher Sumner was a barrister and solicitor from 1967 to 2022. He was a Member of the Legislative Council in South Australia from 1975 to 1994 and the holder of numerous ministerial portfolios including Attorney General in the Corcoran, Bannon and Arnold Labor Governments. His AM award cited his service to the law including in establishing basic principles of justice for victims of crime as well as to multiculturalism. From 1995 to 2012 he was a Member/Deputy President of the National Native Title Tribunal involved in future act inquiries and mediations. He received the Italian Honour of Commendatore in 1989.

Geoffrey Lindell, has taught and published widely in the field of Australian constitutional law which was recognised by his AM award. He has also assisted in major reviews of the Australian Constitution by serving as a member of the Distribution of Powers Advisory Committee to the Constitutional Commission (1986 - 1987), and acted as a consultant to the Australian Constitutional Convention (1975 - 1985). He has also provided constitutional advice to governments and parliaments. He is currently an Emeritus Professor of law at the University of Adelaide His publications have most recently included, as author, Cowen and Zines's *Federal Jurisdiction in Australia (4th ed, Federation Press, 2016*.)