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THE SUGGESTED EFFECT OF A SOUTH AUSTRALIAN PARLIAMENTARY VOTE OF NO CONFIDENCE IN A MINISTER: IS IT UNCERTAIN?

I Address by Geoffrey Lindell

A *Introduction*

As a proud graduate of the Adelaide Law School, I feel very honoured to be selected to contribute this address to the special issue of the *Adelaide Law Review* which celebrates its 140th anniversary.[1] It is pleasing to have been associated with a Law School which has had, and continues to have, an excellent national and international reputation. The foundations of my own career were provided by such fine academics who taught at this Law School, being the late Emeritus Professors Alex Castles, Daniel O'Connell, Colin Howard, and Professor Horst Lucke who I am glad to say is still with us, to name the most outstanding scholars and teachers who taught me.

The subject of this address illustrates a lifelong interest and a lifetime of research into how the principles of the British Westminster parliament and government operate in relation to the parliaments and governments of the Australian Commonwealth. It is much influenced by Alex Castles and, in particular, his teaching of

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1 The subject of this address was originally presented as part of the Adelaide Law School's Law 140: Eminent Speakers Series.

British and Australian State Constitutional Law or, as it was known then, Constitutional Law I, in first year. The question to be addressed concerns the effect of a South Australian parliamentary vote of no confidence in a Minister and whether it is uncertain. It is acknowledged that the collective responsibility of the government to the South Australian House of Assembly requires all Ministers in a government to resign if the government loses the confidence of the House. I am going to argue that the individual responsibility of a single Minister to the same House requires a Minister to do likewise even when that lack of confidence is confined to that Minister without extending to the rest of the ministry. I will also deal with whether that individual responsibility is affected when the House or its committees decide to refer the Minister's personal wrongdoing to the South Australian Ombudsman for investigation and report.

The idea for the subject was prompted by the publication of a detailed 'Statement of Constitutional Principles 20 February 2022 with Addendum 17 January 2023' written by the Hon Chris Sumner and me ('*Statement of Constitutional Principles*').[2] It was first published in the *History Council of South Australia Newsletter* on 2 March 2023 and is now republished in this special edition of the *Adelaide Law Review* with the kind permission of the editors of the *History Council of South Australia Newsletter.* This address does not summarise or repeat the text of the *Statement of Constitutional Principles*, but instead emphasises the main argument advanced in it, in a shortened form and structure, more appropriate for the oral delivery of the talk by the author which took place as part of the Adelaide Law School's 'Law 140: Eminent Speakers Series'. At this stage I wish to pay tribute to the co-author of the *Statement of Constitutional Principles* as a distinguished former reforming South Australian Attorney-General and long serving Member of the Legislative Council. He is therefore well qualified to write about the conventions followed by the South Australian Parliament.

It is desirable at the outset to explain what will not be covered in this address. I am not going to discuss whether the issues I am going to cover have now become judicially reviewable or deal with the controversial scope of the reserve powers of the Governor. The situations I am about to deal with are intended to be hypothetical although they are admittedly prompted by the facts in what can be described as the 'Kangaroo Island Affair'. That affair involved the rejection of a proposal for a deep-water port facility at Smith Bay on Kangaroo Island in August 2021 by the then Deputy Premier and Attorney-General, the Hon Vickie Chapman as Minister

2 CJ Sumner and Geoffrey Lindell, 'Statement of Constitutional Principles 20 February 2022 with Addendum 17 January 2023' (2 March 2023) *History Council of South Australia Newsletter*. Hereinafter, all reference is made to the version of the *Statement* republished at the conclusion of this article ('*Statement of Constitutional Principles*'). For previous writing on the subject of the *Statement of Constitutional Principles*, see: David Blunt, 'Responsible Government: Ministerial Responsibility and Motions of "Censure"/"No Confidence"' (2004) 19(1) *Australasian Parliamentary Review* 71; Geoffrey Lindell, 'The Effect of a Parliamentary Vote of No Confidence in a Minister: An Unresolved Question?' (1998) 1(1) *Constitutional Law and Policy Review* 6 ('The Effect of a Parliamentary Vote of No Confidence').

for Planning and Local Government when it was alleged she had a conflict of interest in taking that action.[3] Insofar as there is any resemblance with that affair, I do not intend to suggest expressly or by implication that the Minister involved actually did have a conflict of interest or had misled the Parliament. That said I am aware of parliamentary findings to that effect and the contrary finding of the Ombudsman which denied the existence of the conflict of interest.[4]

The approach adopted in this address speaks to four hypothetical situations stated in an abstract form. The address will then end with a brief word about which of those situations most closely resemble the Kangaroo Island Affair and the lessons to be learnt for the future. Readers interested in knowing how the principles developed with reference to the hypothetical situations applied to the Kangaroo Island Affair will need to read the *Statement of Constitutional Principles* mentioned earlier.

B *Role and Place of Conventions and Responsible Government in Constitutional Law Operating in South Australia*

The constitutional law of South Australia can be found in the *Constitution Act 1934* (SA) (‘*Constitution Act*’), other legislation and constitutional conventions developed over centuries of practice in the United Kingdom (‘UK’) and elsewhere.[5] South Australia has enjoyed a system of representative government known as responsible government since 1856.[6] Its existence is partially recognised in:

- section 66 of the *Constitution Act* which requires Ministers to be Members of the South Australian Parliament within three months of their appointment; and
- section 28A of the *Constitution Act* as regards the early dissolution exception to the adoption of a fixed term of Parliament.

What was said of the position in New South Wales by the New South Wales Court of Appeal in *Egan v Willis* is equally applicable to the position in South Australia.[7] It was said in that case that ‘responsible government … is a concept based upon a combination of law, convention, and political practice’.[8] Conventions in the ordinary sense of that word can refer to a custom or customary practice.[9] In the constitutional

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3 See Wayne Lines, *Investigation of a Referral by the Select Committee on the Conduct of the Hon Vickie Chapman MP* (Final Report, 2 May 2022) 12–33.

4 The affair is described in detail in pt II of the *Statement of Constitutional Principles*.

5 See Sumner and Lindell, *Statement of Constitutional Principles* (n 2) pt IV.

6 The history of its introduction in the State is recounted in Boyle Travers Finniss, *The Constitutional History of South Australia: During Twenty-One Years from the Foundation of the Settlement in 1836 to the Inauguration of Responsible Government in 1857* (WC Rigby, 1886) and Gordon D Combe, *Responsible Government in South Australia: From the Foundations to Playford* (Wakefield Press, rev ed, 2009) vol 1, chs 5–9.

7 (1996) 40 NSWLR 650.

8 Ibid 660 (Gleeson CJ).

9 *Australian Oxford Dictionary* (2nd ed, 2004) ‘convention’.

context, 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'.[10] Those rules when operating only as mere conventions are not traditionally thought to be legally binding in the sense of being enforceable in the courts or that a breach of them would entail direct legal consequences.

This is not the place to deal with the elusive and subtle distinction drawn by the courts between *recognising* the existence of conventions when interpreting the law — which was and is permissible — and the courts *enforcing* obedience to them which was not thought to be acceptable. Nor is it the place to deal with whether, as a result of implications drawn from the *Australian Constitution*, certain basic conventions which form part of responsible government are now recognised as being judicially enforceable.[11]

It suffices to state for the present purposes, that the position is well summarised in an equation suggested by the Canadian Supreme Court when a majority of that Court stated 'constitutional conventions plus constitutional law equal the total constitution of the country'.[12]

C *Hypothetical Situations*

This brings us to the first hypothetical situation which is relatively easy to resolve.

1 *Situation One: Collective Responsibility*

In situation one, the reader is asked to assume the existence of the following facts. The opposition party in the South Australian House of Assembly combines with the independents to pass a vote of no confidence in a minority government because of the alleged misconduct of a Minister who refuses to resign and the failure of the minority government to advise his dismissal. The question to be asked is whether that government should resign at least as a matter of convention as traditionally understood.

The answer it is suggested is relatively simple and not contested, namely, that the government should resign and can be dismissed by the Governor if it does not resign.

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10 Blunt (n 2) 73, quoting Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press, 1984) 7, 12.

11 For discussion of these issues, see: Geoffrey Lindell, 'Responsible Government and the Australian Constitution: Conventions Transformed into Law?' (Law and Policy Paper No 24, Centre for International and Public Law, 2004); Geoffrey Lindell, 'Judicial Review and the Dismissal of an Elected Government in 1975: Then and Now?' (2014) 38(2) *Australian Bar Review* 118, 128–38.

12 *Re Resolution to amend the Constitution* [1981] 1 SCR 753, 883–4 (Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ) ('*Re Resolution to amend the Constitution*').

There are at least three essential rules or conventions which apply under the British system of responsible government in South Australia:[13]

(1) Ministers must be Members of the parliament as required by law as well as convention;
(2) Ministers must enjoy the support of a majority of Members in the House of Assembly in order to hold office; and
(3) the Governor must usually act on the advice of those Ministers which is also frequently required by law as well as convention.

In other words, and in short, Ministers must be responsible to Parliament.

The democratic explanation for this is not hard to find. The authority of the government and its Ministers to govern on behalf of the citizens that have elected them and the other Members of Parliament derives from the support that they enjoy in the House of Assembly. It is in this way that our governments gain their authority from the people. It is also one of the important ways in which the parliament asserts its authority and it is supposed to assure the accountability of government to the parliament.[14]

Whatever might be said of *individual* ministerial responsibility, there is no doubt whatsoever about the acceptance of the *collective* responsibility of Ministers to Parliament. A government can only govern if it obtains and retains the confidence of the House of Assembly, whether or not the majority is comprised of Members of the governing party in their own right or those Members governing with the support of independents. Confidence in this context simply means support for the appointment of Ministers and their continuance in office.

The loss of that confidence can be manifested by a defeat of the government on 'votes of confidence' or 'votes of no confidence'.[15] It can either be manifested *explicitly* or *implicitly* as where a lower house of parliament refuses to grant supply.[16]

[13] But, as has been stated in what must be regarded as the non-essential aspects of the way the principles developed in Westminster, 'the conventional ordering of government in South Australia, as elsewhere, has necessarily always derived some of its character from local conditions, from its evolving political traditions, and from provisions of the State *Constitution Act* which may be quite distinct and different from the position under the British constitution': Alex C Castles and Michael C Harris, *Lawmakers and Wayward Whigs: Government and Law in South Australia: 1836–1986* (Wakefield Press, 1987) 274.

[14] See Sumner and Lindell, *Statement of Constitutional Principles* (n 2) pt IV.

[15] Philip Norton, 'Government Defeats in the House of Commons: Myth and Reality' [1978] (Spring) *Public Law* 360, 362–5.

[16] Ibid 364–5. An Australian illustration of a refusal of supply being treated as a vote of no confidence is when the Fadden Government resigned in 1941 after the House of Representatives passed a motion that the first item in the federal budget be reduced by one pound, where such a resolution was described as 'one of the traditional forms of no confidence …': Geoffrey Sawer, *Australian Federal Politics and Law: 1929–1949*

Retention of the confidence of the relevant house of parliament is a critical aspect of the Westminster system of responsible government. This is so even if the passage of confidence votes is rarely passed or has to be passed in order to lead to a change of government once the requisite confidence is lost or not obtained after a government is defeated following the holding of general elections.[17]

It should be emphasised that the responsibility dealt with here is owed to only the lower house despite the powers of upper houses, such as the South Australian Legislative Council, to reject supply.[18] The consequences of the loss of confidence in the lower house are resignation, followed by a change of government, and sometimes, an early election or withdrawal of supply and likely dismissal by the State Governor if a government does not resign.

2 *Situation Two: Ministerial or Individual Responsibility*

It is now necessary to turn to the second situation which requires the reader to assume the existence of the following facts which give rise to the critical issue addressed in this address. The opposition party and the independents in the South Australian House of Assembly combine to pass a motion of no confidence in a Minister in a minority government. This occurred following findings made by a House of Assembly Select Committee that the Minister in question:

- was guilty of a conflict of interest in respect of a decision made by him in his ministerial capacity; and
- had misled the Parliament in answering questions in the House of Assembly which, although they had arisen out of the conflict of interest, did not turn on whether the Minister was guilty of such a conflict.

The question to be asked in these circumstances is whether the Minister should resign (or be dismissed if they do not resign).

(Melbourne University Press, 1963) 129. The withdrawal of confidence was shown by the defeat of the Government on other questions: see DR Elder (ed), *House of Representatives Practice* (Department of the House of Representatives, 7th ed, 2018) 320–3.

[17] Unless there is some doubt about whether a government has obtained the support of a majority of Members of the House in which case the Premier is entitled to have the matter tested on the floor of the House. For instances of this happening in South Australia following elections in 1968 (Dunstan) and 2002 (Kerin), see Robert Martin, *Responsible Government in South Australia*: *Playford to Rann 1957–2007* (Wakefield Press, 2009) vol 2, 52, 161–2.

[18] The power to reject supply is not one of the exceptions to the equal powers possessed by both houses in relation to the enactment of money bills, see: *Constitution Act 1934* (SA) ss 10, 60–4 (‘*Constitution Act*’); Chris J Sumner, ‘Constitutional and Parliamentary Reform for South Australia’ in Clement Macintyre and John Williams (eds), *Peace, Order and Good Government: State Constitutional and Parliamentary Reform* (Wakefield Press, 2003) 22, 29–30.

In this connection it is important to distinguish a vote of *no confidence* from a mere vote of *censure* which falls short of requiring resignation (ie it is only, in effect, an expression of criticism). Again no attempt is made in this address to deal with the status of votes of no confidence in the Legislative Council as the upper house of the South Australian Parliament.

We have been told that in order to test the existence of a convention

> [w]e have to ask ourselves three questions: first, what are the precedents; secondly, didthe actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.[19]

The reason which supports the individual Minister's responsibility is not hard to find. It is that the role of Parliament is not only to pass laws, but also to scrutinise and hold to account the conduct of Ministers. This is so even though the notion of ministerial responsibility for the actions of their departments has become somewhat attenuated.[20] But what is in issue here is accountability for a Minister's *own* conduct and personal wrongdoing.

As was stated in the *Statement of Constitutional Principles*, 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 recognised as the duty of a government to resign in the same circumstances, but this does not negate the existence of the convention.[21]

The main difficulty here is absence of modern instances to support the resignation or dismissal of individual Ministers after the passage by the House of Assembly of an explicit vote of no confidence. Not surprisingly, this casts some doubt on whether such a convention *exists* as distinct from whether it *should* exist. One explanation is that the passage of such resolutions has become rare because of the emergence of strong party discipline and the small likelihood of that kind of resolution ever being passed when governing parties secure majorities in their own right.[22] Indeed the

19 Sir W Ivor Jennings, *The Law and the Constitution* (University of London Press, 5th ed, 1959) 136. The test was adopted by the Supreme Court of Canada in *Re Resolution to amend the Constitution* (n 12) 888 (Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ).

20 As was recognised regarding South Australia in Castles and Harris (n 13) 283–4.

21 See Sumner and Lindell, *Statement of Constitutional Principles* (n 2) pt V(A) n 30 and associated text where the authors cited in support of that statement Blunt (n 1) 71 and Lindell, 'The Effect of a Parliamentary Vote of No Confidence' (n 2) 6.

22 It has been suggested that the doctrine of individual responsibility of a Minister has been rendered ineffectual 'given the practical realities of party dominance in political affairs' for 'so long as a party retains its discipline and the majority in a lower house,

same explanation accounts for the rare occasions when votes of no confidence against governments are passed.

Another explanation is that the instances of ministerial misconduct resulting in resignation or dismissal would have made it unnecessary for the misconduct to be taken further so as to require the formalised passage of an explicit vote of no confidence.

These factors narrow the occasions where the issue is ever likely to arise. If, as has been acknowledged, there is an absence of modern instances where Ministers have resigned following a vote of no confidence, it is equally the case, that both authors of the *Statement of Constitutional Principles* were not aware of instances where a Minister did *not* resign despite the passage of such a vote properly so called as distinct from a mere vote of censure.[23] The distinction between the two kinds of votes was illustrated when the then South Australian Treasurer was censured by the House of Assembly over his handling of the State's electricity industry, which had allegedly left customers facing price rises of up to 100%. Two independents had voted with the opposition to censure the Treasurer on 3 May 2001, having previously indicated they would not support a vote of no confidence.[24]

But perhaps the strongest argument in favour of the duty of a Minister to resign or be dismissed for lacking or losing the confidence of the House of Assembly rests on an inference involving the application of *inductive* reasoning applied in a normative sense arguing in effect from the particular to the general. In other words, if there are instances of Ministers resigning because they have lost the confidence of the House of Assembly either expressly or impliedly then it should be logically possible to infer that those instances should be seen as mere examples of a wider rule that requires Ministers to resign *whenever* and, in all cases, where they lose that same confidence. The inference can be drawn if there is a common thread running through all those instances which here is a lack of confidence and the need for accountability to Parliament. The two particular instances relied on here are: (1) the loss of confidence in the ministry as a whole (ie *collective* responsibility

the possibility that an individual Minister will be censured [and under a duty to resign] … is remote indeed!': Castles and Harris (n 13) 283. The term 'censure' was here used in the sense of meaning more than mere criticism of a Minister, as explained in the following footnote (see below n 23). However, while this factor helps to explain why the issue has rarely arisen in modern times, the doctrine of individual responsibility may nevertheless still apply and fails to anticipate the resurgence of minority governments especially at the state level of government.

23 As was arguably the case with the State Attorney-General who refused to resign despite the passage of a vote of no confidence in the Queensland Legislative Assembly in 1997. In the author's view it was not really such a vote because of the admission by the independent (who combined with the opposition to pass the vote) that she did not intend the Attorney-General to resign: see especially Lindell, 'The Effect of a Parliamentary Vote of No Confidence' (n 2) 6, 9.

24 'Treasurer Censured', *The Australian* (Canberra, 4 May 2001) 6.

of Ministers); and (2) instances where an individual Minister resigned for specific examples of personal wrongdoing.

(a) Collective Responsibility of Ministers

If the ministry as a whole must resign or be dismissed when it ceases to enjoy the confidence of the House, why should the same not apply when an individual Minister also ceases to enjoy the same confidence? After all the same rationale seems applicable to the need for Ministers to be held to account for the performance of their duties.

In the UK, the convention requiring a Minister to resign upon losing the confidence of the House of Commons is a long standing one. The convention was described by Professor Albert Venn Dicey, 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.’[25]

Indeed, it has been stated by more modern respected English constitutional scholars that ‘[h]istorically … the principle of individual ministerial responsibility preceded the doctrine of collective responsibility’.[26]

Closer to home, the Constitutional Commission echoed these views in 1988 when it stated:

> Part and parcel of the notion of parliamentary government is ‘responsible government’, whereby the ministers are individually and collectively answerable 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 House of Assembly in the case of the States.[27]

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25 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 325.

26 Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law* (Penguin Books, 7th ed, 1994) 197. In his famous lectures, Professor Frederic William Maitland had occasion to refer to

> the principle of common responsibility to parliament, by which is meant that the ministry, if defeated, will resign in a body. This principle was not fully admitted until the last century was far advanced. We may find one minister resigning because he cannot get on with parliament, while his colleagues retain office; quarrelling with him is not quarrelling with them, nor are they in honour bound to support his cause.

FW Maitland, *The Constitutional History of England: A Course of Lectures Delivered*, ed HAL Fisher (Cambridge University Press, 1908) 396.

27 Constitutional Commission, *Final Report of the Constitutional Commission* (Report, 30 June 1988) 84 [2.177].

(b) Instances where Individual Ministers Resigned for Specific Examples of Misconduct or Wrongdoing

As was amply demonstrated and documented in the *Statement of Constitutional Principles* and from my co-author's own knowledge drawn from his extensive parliamentary experience, it is accepted, at least in South Australia, that Ministers found guilty of misconduct (such as, for example, seriously and intentionally misleading the Parliament or having a conflict of interest) have resigned without the need for a formal or explicit vote of no confidence. In these kinds of cases the Minister's personal wrongdoing rises to such a level as to warrant the withdrawal of the support of the House for the continuance in office of the Minister.[28] It is for that reason that it is argued that those kinds of examples amount in effect to *implicit* votes of no confidence — comparable to the refusal of the lower house to grant supply and the defeat of the government on other questions — being tantamount to a withdrawal of confidence in the Ministry as a whole.[29]

It follows that I disagree with the contrary view that a Minister is responsible only to the Premier.[30] To accept such an argument would hardly make for the effective accountability of the executive to Parliament.

Far reaching changes have already had to be made to administrative law and the creation of other extra-parliamentary institutions such as the Ombudsman and Independent Commissions Against Corruption, in order to deal with the sad but continuing decline in the accountability of Ministers to Parliament. A failure to recognise that a Minister should resign or be dismissed when the Minister loses the confidence of the House would reduce even further the relevance of Parliament in holding Ministers to account.

Finally, it may also be questioned why the majority in the House (comprising the opposition and independents in such cases) should be forced to choose between two

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28 See Sumner and Lindell, *Statement of Constitutional Principles* (n 2) pt V(B).

29 See above n 16 and accompanying text.

30 See generally, *Ministerial Code of Conduct* (2002) ('*Code of Conduct*'). By way of part of the introduction to the *Code of Conduct*, paragraph 1.1 states: 'The Premier must take responsibility for his or her Ministers and deal with their conduct in a manner that retains the confidence of the public. The Premier and the Ministry will ultimately be judged by the public at a general election.' In relation to enforcement, paragraph 1.4 of the *Code of Conduct* states:

> If a Minister engages in conduct which prima facie constitutes a breach of this *Code*, or a Minister is charged with an offence, the Premier shall decide, in his or her discretion, the course of action that should be taken. A Minister may, among other things, be asked to apologize, be reprimanded or be asked to stand aside or resign.

The same can presumably be said of the Prime Minister in the case of the Commonwealth Parliament and the corresponding code of conduct applicable to those Ministers.

opposite extremes — on the one hand, allowing a Minister to continue in office even though the Minister has ceased to enjoy its confidence; and on the other, passing a vote of no confidence in the whole government for not insisting on the Minister's resignation or dismissal, thereby potentially triggering an early election of the Parliament under s 28A of the *Constitution Act*.[31]

In conclusion I adhere to the view expressed on this issue in the *Statement of Constitutional Principles*. Whatever the position in other jurisdictions, the most authoritative commentator on the *Constitution Act* is the late Bradley Selway QC, former Crown Solicitor, Solicitor-General and Federal Court judge. He clearly stated: 'By convention, a minister who suffers a vote of no confidence in the House of Assembly should resign.'[32]

3 *Situation Three: The First Complication Involving the South Australian Ombudsman*

It is now necessary to turn to the first complication in the situation last discussed,[33] which this time involves the South Australian Ombudsman. The facts which the reader is asked to assume are similar in that the opposition party and independents in the South Australian House of Assembly combined to pass a motion of no confidence in a Minister in a minority government. This followed findings made by a Select Committee of the House of Assembly that the Minister in question: (1) was guilty of a conflict of interest; and (2) had misled the Parliament in answering questions in the House of Assembly as before. These facts are different to Situation Two in that after the House passed a vote of no confidence it also passed a further motion referring to the Ombudsman for investigation the question of whether the Minister had been guilty of a conflict of interest. It is also different in that the Ombudsman subsequently found, after investigating the matter, that the Minister had *not* been guilty of holding such an interest without being required to make any findings about whether the same Minister had misled the Parliament.

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31 The latter option being the solution advanced by the author to minimise the scope of the contentious reserve powers of a Governor and thereby avoid the Governor having to dismiss the recalcitrant Minister: Lindell, 'The Effect of a Parliamentary Vote of No Confidence' (n 2) 8–9.

32 Bradley Selway, *The Constitution of South Australia* (Federation Press, 1997) 39. In 2003, while noting that ministerial accountability had been much reduced in practice, Selway cited 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': Brad Selway, 'The "Vision Splendid" of Ministerial Responsibility versus the "Round Eternal" of Government Administration' in Clement Macintyre and John Williams (eds), *Peace, Order and Good Government: State Constitutional and Parliamentary Reform* (Wakefield Press, 2003) 164, 166–7. See also Sumner and Lindell, *Statement of Constitutional Principles* (n 2) pt V(A) where the same conclusion was drawn.

33 See Situation Two described above at Part I(C)(2).

The circumstances of this situation raise the question of whether the Minister involved should have resigned or been dismissed if he did not resign, without waiting for, and in light of, the findings of the Ombudsman.

The reason for the complication is to be found in the *Ombudsman Act 1972* (SA) which makes it possible for the houses of the South Australian Parliament and their committees to refer to the Ombudsman, for investigation and report, any matter within his or her jurisdiction.[34] I should emphasise that in this situation the referral to, and contrary conclusion reached by, the Ombudsman was only in regard to one of the two critical findings of the Select Committee upon which the vote of no confidence was based (ie the one relating to a conflict of interest). This gives rise to the potential, which actually materialised in the Kangaroo Island Affair, for an overlap of authority to deal with ministerial misconduct.

It is easy to see how such an overlap could lead to dual and conflicting decisions regarding one of the critical findings which formed the basis of the no-confidence vote in the Minister in the hypothetical situation now under discussion and in the Kangaroo Island Affair. The unsatisfactory nature of such an overlap was acknowledged by the Ombudsman himself in the Kangaroo Island Affair.[35]

But arguably in the hypothetical situation the vote of no confidence still stands because the reader was not asked to assume that any doubt was cast on the remaining parliamentary finding of misleading the House subject to one possible qualification. That qualification is that the House of Assembly did not intend the Minister to resign by reference to both parliamentary findings, namely the conflict of interest *and* the misleading of the House, as the reasons for withdrawing its support for the Minister in question.

Had the finding over the conflict of interest been the only finding which led to the vote of no confidence, the House of Assembly would have had the unenviable task of deciding whether to accept the finding of the Ombudsman and in effect reverse its vote of no confidence or disagree with the finding of the Ombudsman and confirm its vote of no confidence based on the conflict of interest.

4 *Situation Four: The Second Complication Involving the South Australian Ombudsman*

It is now necessary to turn to the question illustrated by the final hypothetical situation which the reader is asked to assume. It involves a second complication regarding the Ombudsman. This time the reader is asked to assume the same facts as in the last situation,[36] except that the findings of the Ombudsman were handed down *after* a general election for the South Australian Parliament was held at which

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[34] *Ombudsman Act 1972* (SA) s 14 (‘*Ombudsman Act*’).

[35] Lines (n 3) 6–7 [19]–[21].

[36] See Situation Three described above at Part I(C)(3).

the opposition party gained the right to form a new government in its own right after the former government resigned.

The circumstances of this situation raise the question of whether the same Minister should still have resigned or been dismissed if they had not resigned, without waiting for, and in the light of, the finding of the Ombudsman even if those findings were handed down *after* the minority government was defeated at a general election for the House of Assembly.

It is worth emphasising that it is essentially the same situation as the last one except that defeat of the minority government occurred *after* intervening elections and *before* the conclusion reached by the Ombudsman. The Minister concerned is not able to be reappointed by a minority government because that government lost office. The problem of whether the individual Minister should have by then resigned or been reappointed, goes away altogether because of collective responsibility and not individual responsibility although it might have been a small contributing political factor in explaining that defeat.

The incident would still stand as a precedent in support of the duty to resign if, as in the previous situation, the vote of no confidence was based on the parliamentary finding that the Minister misled the House when the Ombudsman did not deal with that allegation and the misleading of the House did not turn on whether the Minister had a conflict of interest.

5 *Reiteration of the Effect of the Vote of No Confidence in the Hypothetical Situations Discussed*

It is now possible to sum up the effect of a vote of no confidence in the various situations discussed in this address:

- no doubt exits regarding the duty of a government to resign or be dismissed in Situation One;
- the Minister should have resigned or been dismissed in Situation Two notwithstanding the paucity of modern instance where this has occurred;
- the Minister should have resigned or been dismissed in Situations Three and Four despite the contrary finding of the Ombudsman on the question of a conflict of interest but only because the reader was asked to assume that the Ombudsman did not deal with the other finding of misleading the Parliament. However it would have been different and inconclusive if the Ombudsman reached contrary conclusions on both findings upon which the vote of no confidence arose.

D *The Kangaroo Island Affair and Lessons to be Learnt for the Future*

The fourth and last situation discussed most closely resembles, but is not identical in all respects, to what happened in the Kangaroo Island Affair.[37] Before the

37 See Situation Four described above at Part I(C)(4).

elections were held that led to a change of government in March 2022, the Minister concerned did in fact resign as Deputy Premier and as Minister for Planning and Local Government, but not as Attorney-General.[38] Although even then, however, her functions as Attorney-General were transferred to another Minister presumably pending the results of the Ombudsman's investigation on whether there had been a conflict of interest.[39] The referral to the Ombudsman was made: (1) by the House of Assembly Select Committee on the Conduct of the Hon Vickie Chapman MP Regarding the Kangaroo Island Port Application ('Select Committee') and not the House itself;[40] and (2) before the House passed the vote of no confidence in the Minister.[41] Both the Select Committee's referral to the Ombudsman and the vote of no confidence occurred on 18 November 2021. Finally, the details of how the Ombudsman came to be authorised to inquire into a conflict of interest was more complicated than in the simplified and abstract description of the last two hypothetical situations.

It is now possible to offer some brief observations about the lessons that can be learnt from the above analysis and its application to the Kangaroo Island Affair.

1 *Lesson Number One*

Turning first to resignation, as will be clear from the Addendum to the *Statement of Constitutional Principles* both co-authors thought, and still think, that the Minister should have resigned from *all* of her portfolios because the vote of no confidence was also based on the independent parliamentary finding of misleading the House of Assembly. On the face of it, misleading the House is a serious matter on its own and probably would not have been affected by the finding of the Ombudsman denying the existence of a conflict of interest. It is of course not possible to be completely sure of the intentions of the House, but there was nothing in the parliamentary debates to suggest that the vote was to take effect only if an adverse finding was made against the Minister on *both* grounds.

This lesson stems from the importance of insisting on a Minister resigning for misleading the House either with or without a formal vote of no confidence because of the need to avoid further erosion of ministerial accountability to Parliament.

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

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38 South Australia, *South Australian Government Gazette: Supplementary*, No 75, 23 November 2021, 4120.

39 Ibid 4121.

40 Select Committee on the Conduct of the Hon Vickie Chapman MP Regarding the Kangaroo Island Port Application, Parliament of South Australia, *Final Report* (Report PP 396, 18 November 2021) vii ('*Select Committee Report*').

41 South Australia, *Parliamentary Debates*, House of Assembly, 18 November 2021, 8711–30.

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.

2 *Lesson Number Two*

Another lesson that can be drawn is that the houses of parliament should weigh up carefully the implications of referring questions of ministerial misconduct to the Ombudsman for investigation and report. It can be acknowledged that there are both advantages and disadvantages in following that course of action.

The main advantage is procedural in that it would reduce the scope for arguments that are based on a lack of procedural fairness when members of parliament sit in judgment on each other. This would avoid the chances of attracting the criticisms which were, whether rightly or wrongly, levelled at the way the Select Committee conducted its proceedings.[42] If such an avenue is to be pursued the question arises whether the role of the Houses becomes, in effect, relegated to that of establishing a prima facia case which warrants further investigation by non-parliamentary bodies or authorities.

One aspect of the Kangaroo Island Affair which was not highlighted was that the report of the Ombudsman did not appear to consider whether parliamentary privilege should have required him to assume correctness of parliamentary findings of the Select Committee and House of Assembly because of art 9 of the *Bill of Rights 1688* (UK) 1 Wm & M sess 2, c 2 (‘*Bill of Rights*’) which states ‘[t]hat the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament’.[43]

Suffice it to say that future referrals will need to take care to avoid the overlapping of authority to investigate and report on substantially the same issues. Further, referrals will also need to have regard to whether parliamentary privilege would restrict the extent to which the Ombudsman deals with issues which arose during a proceeding of either house of parliament or their committees.

It should also be remembered that the Ombudsman’s findings on the Kangaroo Island Affair were not beyond scrutiny. They were in fact the subject of serious

42 *Select Committee Report* (n 40) appendix E.

43 Applicable to the South Australian Parliament by reason of the *Constitution Act* (n 18) s 38 whose operation is not effected by any the provisions of the *Ombudsman Act* (n 34) by reason of s 4A of that Act. Such an issue gives rise to vexing issues which lie beyond the scope of this address.

criticism regarding his conclusion that there was no conflict of interest which came as a surprise to informed observers.[44]

Furthermore, if, and when, the Houses do decide to refer matters for investigation to the Ombudsman, they run the risk of having ceded their authority. As a practical matter this could entail agreeing, at least politically, to abide by the findings of the Ombudsman on whether the alleged misconduct of Ministers has been established. Whether or not the referral does in effect cede the authority of a House when such a referral does take place, it is strongly arguable that Ministers should usually stand aside pending the results of the Ombudsman's inquiry — which is what actually happened in the Kangaroo Island Affair.

Alex Castles and Michael Harris concluded their lively account of the constitutional and legal history of South Australia, by foreshadowing the likely need for future changes to be made to the system of law and the government in South Australia and by observing that

> the condition of governance in South Australia, particularly in the last quarter of this century, under governments of all political outlooks, does not unequivocally preclude the possibility of an erosion of former constitutional values by inadequately checked governmental power.[45]

This address has focussed on the need to give effect to an existing part of the constitutional structure and values that underlie the system of responsible government in this State.

II Comment by Christopher Sumner

Along with Professor Lindell, I also attended in 1961 the lectures given by Professor Alex Castles in Constitutional Law I, mainly on the principles of the Westminster system. I was also privileged to be lectured by Professor Trevor Wilson in History IC on British constitutional history. At the end of that year, I was in no doubt about the existence of a constitutional convention that required a government that no longer had the confidence of the House of Assembly to resign, and that the same convention applied to an individual Minister. Nothing has happened since then in my experience — which includes nearly 20 years in the South Australian Legislative Council and over 11 years as Attorney-General — to cause me to alter this view.

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44 Who included the Hon CJ Sumner, one of the co-authors of the *Statement of Constitutional Principles*: see CJ Sumner, 'Is that the End of the Matter? Chris Sumner Says No' (Spring, 2022) *Labour History News* 15 ('Ombudsman Report: Response'). See also Tom Richardson who was 'adamant Chapman had a conflict': Tom Richardson, 'Richardson: I Was Adamant Chapman Had a Conflict. The Ombudsman Says She Didn't', *InDaily* (online, 9 May 2022) <https://www.indaily.com.au/opinion/2022/05/06/richardson-i-was-adamant-chapman-had-a-conflict-she-didnt>.

45 Castles and Harris (n 13) 384.

My conclusion is not surprising as the fundamental principle of the Westminster system of democracy as described in our *Statement of Constitutional Principles* is that a government and its Ministers derive their authority from elected Members of a lower house and are responsible to that lower house. It is surely clear as a matter of principle, and indeed of common sense and decency, that if those elected to the house that gave a Minister their authority later withdraw it, then that Minister should go.

In 1885, Professor Dicey enunciated the principles around these conventions and other aspects of the law relating to the UK Constitution.[46] Professor Lindell has referred to Dicey and the authorities which have subsequently echoed his views.[47] In 1867, *The English Constitution* by Walter Bagehot was published,[48] now relied on particularly in relation to the constitutional monarchy. The elected Parliament had assumed supremacy. There have been subsequent changes, particularly in extending the voting franchise, but for 150 years the essential elements of the UK system of responsible government have been in place.

This did not happen overnight; it was over two centuries in the making — a bloody civil war and a continuing dispute about the relative powers of Parliament and the Monarch; the so-called Glorious Revolution and *Bill of Rights*; the French and American revolutions and independence of the American colonies; the *Reform Act 1832*, 2 Will 4, c 45; the philosophers and writers of the 'Enlightenment' who drew on reason and rationality and provided the principled bases for these political movements and political and legal systems that arose from them.

Some such as Thomas Paine and Edmund Burke were active participants in the politics of the day.[49] Whatever differences existed (and there were many) the major actors were concerned with that which by the middle of the 19th century had produced the foundations of our modern liberal democracy.

Given this history there is a substantial onus on anyone who wishes to try to diminish the principles of democratic and responsible government described by Dicey to show that the convention relating to individual ministerial responsibility no longer exists. In the South Australian context, the *Statement of Constitutional Principles* establishes that this onus cannot be discharged.

It is up to those who argue against the convention to demonstrate cases where individual Ministers have stayed in office after a vote of no confidence in them.

46 See AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1st ed, 1885).

47 See above Part I(C)(2)(a).

48 See Walter Bagehot, *The English Constitution* (Chapman and Hall, 1867).

49 See: Yuval Levin, *The Great Debate: Edmund Burke, Thomas Paine, and the Birth of Right and Left* (Basic Books, 2014); John Keane, *Tom Paine: A Political Life* (Bloomsbury, 1995).

According to my research, until the Kangaroo Island Affair controversy involving Attorney-General Chapman, there had been none.[50]

On the other hand, there have been examples of ministerial resignations which reinforce the existence and strength of a convention that requires a ministerial resignation in the face of certain categories of wrongdoing. These include instances of resignations for deliberately misleading Parliament in anticipation of a motion of no confidence ('MNC').

The circumstances of these ministerial resignations are included in the *Statement of Constitutional Principles*.[51] In 2001, Premier John Olsen resigned after a finding by Dean Clayton QC that he had misled Parliament, and in anticipation of a MNC.[52] In 2001, following an Auditor-General's finding of a conflict of interest, Minister Joan Hall resigned specifically citing the likelihood of a successful MNC.[53] In 1998, Minister Graham Ingerson survived a MNC after a Privileges Committee finding that he had misled Parliament,[54] but then resigned two weeks after that.[55] Ministerial resignations have also occurred for mismanagement (Graham Ingerson — Liberal, 2001)[56] and after adverse findings by a court (John Cornwall — Labor, 1988).[57]

The fact that there are examples of Ministers resigning before a MNC is passed strengthens the case for the existence of the convention of individual ministerial responsibility.

Even in the matter involving Attorney-General Chapman there was substantial compliance because she resigned from all portfolios other than Attorney-General and delegated her functions and powers as Attorney-General to another Minister.[58]

The complication identified by Professor Lindell which became apparent after the Ombudsman's finding that Attorney-General Chapman did not have a conflict of

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50 See generally: Combe (n 6); Martin (n 17).

51 See Sumner and Lindell, *Statement of Constitutional Principles* (n 2) pt V(B).

52 For a summary of Dean Clayton QC's findings, see South Australia, *Parliamentary Debates*, House of Assembly, 23 October 2001, 2440–1 (Michael Rann). See also Sumner and Lindell, *Statement of Constitutional Principles* (n 2) pt V(B) nn 43–45 and associated text.

53 South Australia, *Parliamentary Debates*, House of Assembly, 4 October 2001, 2384 (Joan Hall).

54 South Australia, *Parliamentary Debates*, House of Assembly, 21 July 1998, 1449–50 (Mark Brindal); South Australia, *Parliamentary Debates*, House of Assembly, 22 July 1998, 1493–1501.

55 South Australia, *South Australian Government Gazette*, No 114, 3 August 1998.

56 South Australia, *Parliamentary Debates*, House of Assembly, 4 October 2001, 2387 (Graham Ingerson).

57 South Australia, *Parliamentary Debates*, Legislative Council, 4 August 1988, 6 (Legh Davis).

58 See above nn 38–39 and associated text.

interest needs to be considered by application of normal democratic processes. The Select Committee can be justifiably criticised for referring to the Ombudsman the issue that had already been determined even though the referral was not just on this ground but also because the advice of Counsel Assisting, Dr Rachael Gray QC, was that there had been a significant failure of good governance.[59]

Whether on the conflict of interest issue the views of the Select Committee assisted by and based on the advice of Dr Gray are to be preferred over those of the Ombudsman falls back to the House of Assembly and ultimately to the electorate to consider. I have expressed the view that the Ombudsman's report is seriously flawed.[60]

We know that in many parts of the world there are significant attacks on democracy including in the United States where even the established rules relating to the transfer of presidential power are no longer accepted by a substantial number of electors.[61] In the UK the Brexit decision and the appointment of Boris Johnson as Prime Minister has led to tensions unprecedented in recent times.

In a 2022 speech, former British Conservative Prime Minister Sir John Major reflected on the features of UK democracy:

> It relies also upon respect for the laws made in Parliament; upon an independent judiciary; upon acceptance of the conventions of public life; and on self-restraint by the powerful. If any of that delicate balance goes astray — as it has — as it is — our democracy is undermined. Our Government is culpable, in small but important ways, of failing to honour these conventions.[62]

These concerns have now been partly allayed as the House of Commons Committee of Privileges (with a conservative majority) conducted an extensive inquiry and found that Johnson was in contempt of Parliament by intentionally misleading it about parties at Downing Street during the coronavirus lockdown.[63] Johnson has resigned from Parliament.[64] The House of Commons properly upheld the longstanding convention that Ministers should not deliberately mislead the Parliament. The House of Commons performed the essential constitutional role of Parliament in holding the executive government to account.

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59 *Select Committee Report* (n 40) 16 [2.3].

60 See Sumner, 'Ombudsman Report: Response' (n 44).

61 See Jennifer Agiesta and Ariel Edwards-Levy, 'CNN Poll: Percentage of Republicans Who Think Biden's 2020 Win Was Illegitimate Ticks Back up Near 70%', *CNN* (online, 3 August 2023) <https://edition.cnn.com/2023/08/03/politics/cnn-poll-republicans-think-2020-election-illegitimate/index.html>.

62 Sir John Major, 'In Democracy We Trust?' (Speech, Institute for Government, 10 February 2022).

63 See Committee of Privileges, House of Commons, *Matter Referred on 21 April 2022 (Conduct of Rt Hon Boris Johnson)* (Final Report, 15 June 2023) 6 [15].

64 Ibid 62 [215].

In establishing the Select Committee and adopting its recommendations, the South Australian House of Assembly acted in a similar manner. It helped ensure the rules of democratic engagement were upheld.

We should all endorse the requirement for Members of Parliament, Ministers, public officials and judicial officers to act not just technically within the law, but in accordance with the ethical principles that inform it.

STATEMENT OF CONSTITUTIONAL PRINCIPLES OF 20 FEBRUARY 2022 BY GEOFFREY LINDELL AND CHRISTOPHER SUMNER, WITH ADDENDUM OF 17 JANUARY 2023

I Purpose of Statement

To provide information to the public on the constitutional principles applicable to the actions of the Hon Vickie Chapman MP, Attorney-General, in relation to the Kangaroo Island Port, conflicts of interest, misleading the House of Assembly and motions of no confidence.[1]

II Background Facts

Because of their fundamental nature, constitutional principles and rules are meant to operate to whichever 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, Member of Parliament ('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 that had been recommended by the State Planning Commission.[2] The proposal was not taken to Cabinet.[3] The Attorney-General had a long family history on the Island.[4] 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.[5]

[1] This Statement is a republication of the version first published in the *History Council of South Australia Newsletter*, subject to minor editorial revisions and the addition of the text associated with nn 53–56 below: see CJ Sumner and Geoffrey Lindell, 'Statement of Constitutional Principles 20 February 2022 with Addendum 17 January 2023' (2 March 2023) *History Council of South Australia Newsletter*. The events discussed herein reflect the circumstances as they existed on 20 February 2022 (concerning the Statement) and 17 January 2023 (concerning the Addendum).

[2] Select Committee on the Conduct of the Hon Vickie Chapman MP Regarding the Kangaroo Island Port Application, Parliament of South Australia, *Final Report* (Report PP 396, 18 November 2021) 3, 26–7, 33, appendix G, 23, 29–31 ('*Select Committee Report*').

[3] See ibid 17 [2.4], appendix G, 78, annexure H, 93.

[4] Ibid appendix G, annexure H, 33–5.

[5] See, eg, ibid 14, appendix G, 25, 28–9.

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 several million dollars to get the project ready for approval.[6] It was to be a $40 million investment in a multipurpose port that would ensure the continuing existence of a plantation forestry industry with significant long term economic benefits to Kangaroo Island and the State.[7]

The House of Assembly in the South Australian Parliament, set up a Select Committee on the Conduct of the Hon Vickie Chapman MP ('Select Committee') regarding the Kangaroo Island Port Application to examine issues relating to this matter and engaged prominent Adelaide law firm, LK Law, to brief Dr Rachael Gray QC as Counsel Assisting the Committee.[8] 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 ('*Select Committee Report*') was tabled in and noted by the House of Assembly.[9] Pursuant to standing orders, the *Select Committee Report* was published.[10] The Select Committee had accepted the extensive submissions made to it by Dr Gray and rejected those of the Attorney-General made by Ms Frances Nelson QC.[11] The *Select Committee Report* was supported by a majority of three of its members (two Labor and one independent).

The Select Committee found that the Attorney-General had a perceived conflict of interest because of her friendship with the Mayor of Kangaroo Island, Michael Pengilly, an opponent of the proposal, and her pecuniary interest in land adjacent to a forest contracted to the proponent.[12] The Attorney-General had a meeting with Mr Pengilly 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.[13] The Select Committee also found that the Attorney-General held a pecuniary interest in land adjacent to

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6 Ibid appendix G, annexure H, 5, 14.

7 State Planning Commission, *Deep Water Port Facility: Smith Bay, Kangaroo Island* (Assessment Report, July 2021) 12–13, 26–7.

8 South Australia, *Parliamentary Debates*, House of Assembly, 12 October 2021, 7822–7. See *Select Committee Report* (n 2) 2 [1.3].

9 South Australia, *Parliamentary Debates*, House of Assembly, 18 November 2021, 8687.

10 Ibid.

11 See, eg, *Select Committee Report* (n 2) v [5]–[8].

12 Ibid 14–15.

13 See ibid.

a forest contracted to the proponent company and that an actual conflict of interest existed because the Smith Bay port impacted on the Attorney-General's interests.[14]

The two Liberal Members on the Select Committee filed a very short dissenting statement which complained about the behaviour of one of the Labor Members on the Select Committee, Tom Koutsantonis, who made accusations about the Attorney-General in the House of Assembly, and endorsed Ms Nelson's submissions.[15] 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'.[16] 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*'.[17]

On 30 November 2021, the House of Assembly carried a motion whereby it:[18]

- agreed with the recommendations in the *Select Committee 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* (2002) ('*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.

Consequent upon finding 11 of the Select Committee and pursuant to s 14(1) of the *Ombudsman Act 1972* (SA), the following matters were referred to the Ombudsman by the Select Committee: (1) any matter relevant to whether the Attorney-General had a conflict of interest in determining the application; (2) any breach of the *Code*

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[14] See ibid 15–16.

[15] Ibid 29.

[16] Ibid 30.

[17] South Australia, *Parliamentary Debates*, House of Assembly, 18 November 2021, 8711–30.

[18] South Australia, *Parliamentary Debates*, House of Assembly, 30 November 2021, 8779–95.

of Conduct; and (3) 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.[19]

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.[20] 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 JB Teague MP.[21]

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.[22] This does not alter the status of the Select 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 South Australia 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.

III Constitutional Law, Convention and Practice

The constitutional law of South Australia can be found in the *Constitution Act 1934* (SA) ('*Constitution Act*'), other legislation and constitutional conventions developed over centuries of practice in the United Kingdom ('UK') and elsewhere. These are a

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19 *Select Committee Report* (n 2) 16–17.

20 South Australia, *South Australian Government Gazette: Supplementary*, No 75, 23 November 2021, 4120.

21 Ibid 4121.

22 See South Australia, *Parliamentary Debates*, House of Assembly, 30 November 2021, 8794–5.

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 constitutional law 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'.[23]

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

A *United Kingdom*

As described in the recent UK case of *R (Miller) v The Prime Minister* (for this case the Supreme Court comprised a full bench of 11 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.[24]

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 — ie they can be regarded as part of our constitution even if they are not expressed in a written constitution or in legislation.

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[23] David Blunt, 'Responsible Government: Ministerial Responsibility and Motions of "Censure"/"No Confidence"' (2004) 19(1) (Spring) *Australasian Parliamentary Review* 71, 73, quoting Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press, 1984) 7, 12.

[24] [2019] UKSC 41, [39]–[40].

B *Canada*

Similar views have been expressed by the Supreme Court of Canada in *Re Resolution to amend the Constitution* 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.[25]

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.

IV Responsible Government

South Australia has enjoyed a system of representative government known as responsible government since 1856. Its existence is partially recognised in s 66 of the *Constitution Act* which requires Ministers to be Members of the South Australian Parliament. What was said of the position in New South Wales by the New South Wales Court of Appeal in *Egan v Willis* 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'.[26]

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 South Australia 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 the parliament asserts its authority over and ensures the accountability of the government to it.

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25 [1981] 1 SCR 753, 883–4.

26 (1996) 40 NSWLR 650, 660.

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:

> 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.[27]

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 Menzies wrote in the Sydney Daily Telegraph of 18 February 1968 (quoted by Prime Minister the Hon EG Whitlam QC, MP in his Chifley Memorial Lecture delivered on 14 August 1975), he 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 … and therefore holds office at the *will* of the House of Representatives.[28]

V Applicable Constitutional Conventions

There are two fundamental principles which have the status of constitutional conventions that are relevant to the present case: (1) the confidence of the House; and (2) the obligation not to mislead Parliament.

A *The 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

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27 Brian Galligan, *Parliamentary Responsible Government and the Protection of Rights* (Papers on Parliament No 18, December 1992), quoting Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation* (Cassell, 1967) 54.

28 EG Whitlam (Chifley Memorial Lecture, University of Melbourne, 14 August 1975) 8 (emphasis in original), quoting Robert Menzies, *Daily Telegraph* (Sydney, 1968).

losing the confidence of the lower house. The authorities and examples of ministerial resignations given in this Statement confirm this position.[29]

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 recognised as the duty of a government to resign in the same circumstances, but this does not negate the existence of the convention.[30]

In the UK, 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.'[31]

The Australian Constitutional Commission in 1988 echoed these views:

> Part and parcel of the notion of parliamentary government is 'responsible government' whereby the ministers are individually and collectively answerable 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 House of Assembly in the case of the States.[32]

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 — 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).[33]

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

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29 See below Part V(B).

30 See, eg: Blunt (n 23) 71; Geoffrey Lindell, 'The Effect of a Parliamentary Vote of No Confidence in a Minister: An Unresolved Question' (1998) 1(1) *Constitutional Law and Policy Review* 6.

31 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 325.

32 Constitutional Commission, Commonwealth, *Final Report of the Constitutional Commission* (Report, 30 June 1988) 84 [2.177].

33 Bradley Selway, *The Constitution of South Australia* (Federation Press, 1997) 39 ('*The Constitution of South Australia*').

expected to resign if there was a vote of "no confidence" in that Minister at least in the lower house'.[34]

These authorities make clear that ministers individually, as well as collectively, owe their responsibility to the lower house 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 concerning the Hon Vickie Chapman. 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 a minority government situation which, although not unknown before, 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.[35]

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 the confidence of the House. By their very nature (in 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 an individual 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

34 Brad Selway, 'The "Vision Splendid" of Ministerial Responsibility versus the "Round Eternal" of Government Administration' in Clement Macintyre and John Williams (eds), *Peace, Order and Good Government: State Constitutional and Parliamentary Reform* (Wakefield Press, 2003) 166–7 ('The "Vision Splendid" of Ministerial Responsibility').

35 See below Part V(B).

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 the executive government to Parliament as described by the High Court in *Egan v Willis*.[36] The underlying policy reasons for maintaining the convention of individual responsibility are compelling.

B *The 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 deliberately and seriously misleading 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 (ie 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 cites the authoritative text from the UK Parliament, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, which states that the deliberate misleading of the House can be treated as contempt.[37]

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[36] (1998) 195 CLR 424, 501–3 [153]–[155] (Kirby J).

[37] David Natzler and Mark Hutton (eds), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (LexisNexis, 25th ed) [15.27] ('*Erskine May*').

Menzies, on misleading Parliament, said: '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'.[38]

This historically long-standing principle and convention has more recently been recognised in the *Code of Conduct.* Cabinet approved the *Code of Conduct* to provide guidance to Ministers 'in order to uphold the highest standards and avoid conflicts of interest'.[39] Amongst the general requirement to act honestly, diligently and with propriety,[40] Ministers must ensure that they do not deliberately mislead the public or Parliament on any matter of significance arising from their functions.[41]

The duty in question is not only owed to the Premier and Cabinet under the *Code of Conduct*, but it is more importantly a duty that is owed to Parliament and thereby to the public. The *Code of Conduct* in this regard merely supplements the parliamentary duty, a breach of which can constitute contempt of 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.[42]

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 that he gave, misleading, inaccurate and dishonest evidence to the 1998 Second Software Centre Inquiry (known as the 'Cramond Inquiry') into his handling of a government mobile communications system contract involving Motorola.[43] He resigned before a motion of no confidence was moved, perhaps motivated by the possibility that independents might support it. Olsen strenuously objected to Claytons' findings but still resigned because he was a 'political realist'.[44] He later said he had resigned on a point of principle and that the standard he applied to himself seemed to have 'disappeared from modern politics'.[45]

On 6 July 1998, Graham Ingerson MP resigned as Deputy Premier and although he still remained at that stage the Minister for Industry, Trade and Tourism his portfolio responsibilities with respect to racing were transferred to the new Deputy

38 Troy Bramston, *Robert Menzies: The Art of Politics* (Scribe Publications, 2019) 178.

39 *Ministerial Code of Conduct* (2002) [1.2].

40 Ibid [1.1].

41 Ibid [2.4].

42 See ibid [1.4].

43 See South Australia, *Parliamentary Debates*, House of Assembly, 23 October 2001, 2439 (Michael Rann).

44 'New Liberal Premier for SA', *7.30* (ABC News, 22 October 2001).

45 Michael McGuire, 'The Political Return of John Olsen', *The Advertiser* (Adelaide, 22 June 2018).

Premier.[46] This was 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 South Australian Thoroughbred Racing Authority Chief Executive Officer, Mr Merv Hill.[47] On 21 July 1998, the Privileges Committee found statements in Parliament to have been deliberately misleading and not a matter of little consequence.[48]

An ensuing motion of no confidence moved by the Leader of the Opposition, the Hon MD Rann on 22 July 1998, was defeated on the casting vote of the Speaker.[49] Despite this, some two weeks later, Mr Ingerson resigned from his remaining portfolio as Minister for Industry, Trade and Tourism.[50]

There have been other relevant resignations.

1 *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.[51] In her ministerial statement, Mrs Hall 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 of the independents.[52]

On 13 February 1997, the Hon Dale Baker, Minister for Mines, resigned following questions in Parliament about an alleged conflict of interest in 1994 when he was Minister for Primary Industries relating to the purchase of a property by a company with which he was associated.[53] The Premier, the Hon John Olsen, established an inquiry undertaken by Mr Tim Anderson QC to establish the facts about the

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[46] South Australia, *South Australian Government Gazette: Extraordinary*, No 93, 7 July 1998.

[47] See: South Australia, *Parliamentary Debates*, House of Assembly, 1 July 1998, 1212–13 (Kevin Foley); South Australia, *Parliamentary Debates*, House of Assembly, 7 July 1998, 1304 (John Olsen).

[48] See South Australia, *Parliamentary Debates*, House of Assembly, 21 July 1998, 1449–61.

[49] South Australia, *Parliamentary Debates*, House of Assembly, 22 July 1998, 1493–1501.

[50] South Australia, *South Australian Government Gazette: Extraordinary*, No 114, 3 August 1998.

[51] See South Australia, *Parliamentary Debates*, House of Assembly, 4 October 2001, 2382–4 (Joan Hall).

[52] Ibid 2384.

[53] South Australia, *Parliamentary Debates*, House of Assembly, 6 February 1997, 887 (Dale Baker); South Australia, *South Australian Government Gazette*, No 22, 13 February 1997, 912. The details of the Hon Dale Baker's resignation were not included in the Statement of Constitutional Principles published in the *History Council of South Australia Newsletter* (see above n 1).

allegations.[54] The Premier then determined that there had been a conflict of interest and said that Mr Baker would not be returning to the Ministry then or following the upcoming election.[55] A vote of no confidence was not necessary as the Premier observed the conventional rules about the Minister taking individual responsibility for the wrongdoing. He made an important statement about the need for accountability in government:

> Australians need to have confidence in the accountability of the political process. Governments must at all times be seen to be above reproach. We must never ignore nor seek to hide from conflict of interest allegations, nor from alleged breaches of our own ministerial code of conduct. … It was a promise of clean Government to the people of South Australia. Society has rules; politics as part of this cannot be any different.[56]

2 *Resignation for Mismanagement*

On 3 October 2001, Liberal Member Graham Ingerson resigned as Cabinet Secretary.[57] 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.[58] Mr Ingerson was criticised for pursuing cost increases in the stadium upgrade without proper or adequate due diligence.[59]

3 *Resignation After Critical Findings by a Court*

On 4 August 1988, Dr John Cornwall, Member of the Legislative Council ('MLC') and the Minister of Health in the Bannon Labor Government, resigned following adverse findings by the District Court in a defamation case.[60]

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.[61]

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[54] South Australia, *Parliamentary Debates*, House of Assembly, 11 February 1997, 906 (John Olsen).

[55] South Australia, *Parliamentary Debates*, House of Assembly, 10 July 1997, 1899 (John Olsen).

[56] Ibid. See also Robert Martin, *Responsible Government in South Australia*: *Playford to Rann 1957–2007* (Wakefield Press, 2009) vol 2, 52.

[57] South Australia, *Parliamentary Debates*, House of Assembly, 4 October 2001, 2387 (Graham Ingerson).

[58] Ibid 2395 (Graham Ingerson).

[59] KI Macpherson, *Final Report of the Auditor-General on the Hindmarsh Soccer Stadium Redevelopment Project* (Report, 2 October 2001) 3.

[60] South Australia, *Parliamentary Debates*, Legislative Council, 4 August 1988, 6 (Legh Davis).

[61] See ibid 7, 11–13.

The Government agreed to indemnify Dr Cornwall.[62] The Premier, JC Bannon, said that he had not forced Dr Cornwall to resign.[63] 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.[64]

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 South Australia 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 CJ Sumner considers that these resignations reflect a well-established convention of individual ministerial responsibility that were generally accepted by other Members of both Houses.

VI Strong Convention Against Deliberately Misleading Parliament in South Australia: 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 Dixon J of the High Court 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.'[65]

Nevertheless, the extent to which South Australia's parliamentarians acknowledge the seriousness of a Minister deliberately misleading Parliament was 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.

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62 Ibid 6 (Martin Cameron).

63 South Australia, *Parliamentary Debates*, House of Assembly, 4 August 1988, 25 (John Bannon).

64 Selway, 'The "Vision Splendid" of Ministerial Responsibility' (n 34) 167; Selway, *The Constitution of South Australia* (n 33) 60.

65 *New South Wales v Bardolph* (1934) 52 CLR 455, 509.

The debate followed the tabling by the Attorney-General (the Hon CJ Sumner MLC) of a report prepared by Mr Terry Worthington QC on his inquiry into allegations of conflict of interest against the Minister ('Worthington Report') as well as the Attorney-General's report for Cabinet on the principles relating to conflict of interest.[66]

The current Treasurer, the Hon RI Lucas MLC, was the Leader of the Opposition in 1992 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, Mr Lucas moved that the

> Council concludes that the Minister of Tourism … has mislead the Legislative Council, declares that it has no confidence in the Minister 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.[67]

As a result of an amendment moved by the Hon MJ Elliott MLC for the Australian Democrats, a simple motion of censure for misleading the Council was passed.[68]

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.[69]

He asserted that there were a number of examples of where Minister Wiese had seriously misled Parliament and said:

> 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 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.[70]

The Hon CJ 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

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66 South Australia, *Parliamentary Debates*, Legislative Council, 25 August 1992, 172 (Christopher Sumner).

67 South Australia, *Parliamentary Debates*, Legislative Council, 26 August 1992, 195 (Robert Lucas).

68 Ibid 206 (Michael Elliott), 214.

69 Ibid 195 (Robert Lucas).

70 Ibid.

no confidence in the upper house as it is a matter for the House of Assembly.[71] This position was not seriously disputed.

The Shadow Attorney-General (and long-standing Attorney-General in a number of Liberal governments), the Hon KT Griffin MLC, probably expressed the correct approach when he said:

> 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.[72]

On the question of the consequences of misleading, the Hon KT Griffin also set out correctly the well-established position:

> 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.[73]

Mr Griffin cited *Erskine May*, the most authoritative work on parliamentary practice and procedure in the UK House of Commons, which provides that '[t]he House may treat the making of a deliberately misleading statement as a contempt'.[74] He referred to the notorious Profumo affair in 1963 and concluded that '[t]he consequences of contempt of the Parliament … is that the Minister should resign'.[75] In the present case concerning the Hon Vickie Chapman, the House of Assembly has found that the Attorney-General was in contempt of the House of Assembly.[76]

The Hon LH Davis MLC also participated in the debate echoing the views expressed by Mr Lucas.[77] 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 South Australia.

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71 Ibid 199–200 (Christopher Sumner).

72 Ibid 205 (Kenneth Griffin).

73 Ibid 206 (Kenneth Griffin).

74 Ibid, citing *Erskine May* (n 37) [15.27].

75 South Australia, *Parliamentary Debates*, Legislative Council, 26 August 1992, 206 (Kenneth Griffin).

76 See above n 18 and associated text.

77 See South Australia, *Parliamentary Debates*, Legislative Council, 26 August 1992, 203–5 (Legh Davis).

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.[78]

VII Relationship Between Misleading Parliament and Votes 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 deliberately misleading Parliament, 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 South Australia at least, the examples of resignations for misleading the House outlined in Part V(B) 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.

[78] Rosemary Laing (ed), *Odgers' Australian Senate Practice* (Commonwealth, 14th ed, 2016) 635; Richard Pye (ed), *Odgers' Australian Senate Practice: Fourth Supplement* (Commonwealth, 2022) 64.

VIII 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 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 it 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 the 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 Independent Commissions Against Corruption, 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 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 voters and citizens have to influence events through normal democratic processes.

The Attorney-General has already resigned from her position as Deputy Premier and Minister for Planning and Local Government, as well as having ceased performing her functions as Attorney-General.[79]

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[79] See above nn 20–21 and associated text.

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.

IX 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.

ADDENDUM OF 17 JANUARY 2023

On 19 March 2022, a State election was held which resulted in the election of a Labor Government and the defeat of the Liberal Government in which the Hon Vickie Chapman, MP was a Minister.[80] Ms Chapman has now resigned from Parliament after having been re-elected albeit with a reduced majority.[81]

On 2 May 2022 the Ombudsman, Mr Wayne Lines, finalised the investigation referred to him by the Select Committee.[82]

On 3 May 2022 the Ombudsman's report was tabled in the new Parliament.[83] The Ombudsman found that the Hon Vickie Chapman MP, the former Attorney-General:

[80] See South Australia, *South Australian Government Gazette: Supplementary*, No 18, 21 March 2022.

[81] See South Australia, *Parliamentary Debates*, House of Assembly, 1 June 2022, 483.

[82] See Wayne Lines, *Investigation of a Referral by a Select Committee on the Conduct of the Hon Vickie Chapman MP* (Final Report, 2 May 2022).

[83] South Australia, *Parliamentary Debates*, House of Assembly, 3 May 2022, 4.

- 'did not have a conflict of interest, whether actual, potential or perceived, when she decided the Smith Bay application';[84]
- 'did not breach the *Ministerial Code of Conduct* by not advising the former Premier of South Australia, the Hon Steven Marshall MP, of having a conflict of interest';[85] and
- 'did not commit maladministration in deciding the Smith Bay application'.[86]

Not surprisingly the Members of the newly elected Leader of the Liberal Opposition and the former Attorney-General treated the findings as having cleared her of wrongdoing and vindicated the position she had consistently asserted before the elections.[87] Others were surprised and highly critical of the decision — including CJ Sumner one of the authors.[88]

The authors consider that the constitutional principles enunciated in this Statement remain valid. What is now in dispute are the facts to which the principles are applied.

The Ombudsman's findings on conflict of interest and the *Code of Conduct* contradict those of the Select Committee. If he is correct, then part of the factual basis for the motion of no confidence is not justified.

The Ombudsman was critical of the House of Assembly for referring to him a question already determined by it.[89] This criticism is valid. In any future matter it would be advisable for Parliament to either deal with the matter itself according to its own procedures or, if the conduct of a Minister is to be referred to the Ombudsman or some other person or body, to await their findings before making a decision on whether the Parliament still has confidence in the Minister.

The question of whether Ms Chapman had misled Parliament was not referred to the Ombudsman and the issue was not specifically dealt with by him. There were a number of grounds for the finding that Ms Chapman misled Parliament which were not contradicted by the Ombudsman. The convention for which the authors have argued that Ministers should resign if found to have deliberately misled Parliament and any resulting loss of confidence by the House is not affected by the Ombudsman's decision on conflict of interest and the *Code of Conduct*.

The convention relating to the consequences of a Minister misleading Parliament has arisen recently in Westminster around the conduct of the former Prime Minister

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84 Lines (n 82) 68.

85 Ibid.

86 Ibid.

87 See Tom Richardson, 'Chapman Cleared by Ombudsman After Conflict Probe', *InDaily* (online, 3 May 2022) <https://www.indaily.com.au/news/2022/05/03/chapman-cleared-by-ombudsman-after-conflict-probe>.

88 See CJ Sumner, 'Is that the End of the Matter? Chris Sumner Says No' (2022) (Spring) *Labour History News* 15.

89 Lines (n 82) 6–7 [19]–[21].

Boris Johnson in relation to parties held at 10 Downing Street and the Cabinet Office contrary to rules prohibiting such events because of the coronavirus pandemic.[90] Statements made in the House of Commons by Mr Johnson have been referred to the Privileges Committee to determine if they were misleading.[91] This inquiry is ongoing. The United Kingdom *Ministerial Code* says:

> It is of paramount importance that Ministers give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity. Ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister.[92]

In a wide-ranging speech on the importance of ethical behaviour in government and the 'acceptance of the conventions of public life', former Prime Minister Sir John Major confirmed the convention when he said '[t]hat is why deliberate lies to Parliament have been fatal to political careers — and must always be so'.[93]

The issue of whether the views of the Select Committee, assisted by Dr Rachael Gray QC whose legal expertise includes public and constitutional law, are to be preferred over those of the Ombudsman now falls back to Parliament and the electorate to consider. The Premier has announced that the Government will be considering the issues raised by the conflicting reports.[94] Parliament will also be able to consider them along with the concerns expressed by the Ombudsman on the undesirability of the Select Committee referring to him matters about which it had already decided.

The authors' views were based on the findings of fact made by the Select Committee which were endorsed by the House of Assembly. With respect to the misleading of Parliament, the convention requiring ministerial resignation for misleading remains unaffected.

In the unusual circumstances of the present case on the issues of a conflict of interest and breach of the *Code of Conduct* there is a dispute about the facts. This has had the effect of creating a duality of authority. Future parliaments and governments will need to consider the relevance of these aspects of the present case to any situation involving a motion of no confidence against a Minister. It is to be hoped that in future the creation of a dual authority on the facts would be avoided.

[90] United Kingdom, *Parliamentary Debates*, House of Commons, 21 April 2022, vol 712, col 351 (Keir Starmer).

[91] Ibid.

[92] *Ministerial Code* (2022) [1.3].

[93] Sir John Major, 'In Democracy We Trust?' (Speech, Institute for Government, 10 February 2022).

[94] Tom Richardson, 'Ombudsman's Finding "Extraordinary": Premier', *InDaily* (online, 25 May 2022) <https://www.indaily.com.au/news/2022/05/25/ombudsmans-chapman-finding-extraordinary-premier>.

The authors are still of the view that based on the concept of responsible government for which they have argued in this Statement the fundamental underlying constitutional principle is that the House of Assembly is the elected body from which the government and its Ministers derive their authority and Ministers should have the confidence of it to remain in office individually as well as collectively.