**Ministerial responsibility**

Courts have no place in deciding whether a minister should stay on the front bench.

Ministerial responsibility is regularly pronounced dead, or at least moribund. But events of the past month have confirmed its continuing potency as an accountability mechanism. One minister, Joel Fitzgibbon, was forced to resign while another, Wayne Swan, was severely buffeted and is not yet completely in the clear. Taken together, these incidents reinforce the central feature of ministerial responsibility: that its conventions are primarily political in interpretation and application. Constitutional experts can try to encapsulate the principles of ministerial responsibility into textbooks or into codes of conduct. But how the principles play out in practice always depends on the politics of the moment, on public perceptions of ministerial culpability, and on the prime minister’s judgment of potential damage to the government’s standing. The trigger for Fitzgibbon’s resignation was evidence that his office staff had organised and attended a meeting in the minister’s office between the minister’s brother and other health insurance executives. The purpose was to discuss Defence Department health contracts. The minister had not been told of the meeting. He had earlier told his staff that he could not become involved with any of his brother’s business dealings. Prime Minister Kevin Rudd immediately referred the issue to then special minister of state John Faulkner, the general keeper of the Government’s constitutional conscience. After discussion, Fitzgibbon agreed, in his letter of resignation, that he “was not satisfied that [the meeting] leaves it clear that I have entirely conformed with [the] Ministerial Code of Conduct”.

What is most striking about this case is the admitted tenuousness of the fault. The minister admits his guilt very indirectly – it was not clear that the code was conformed with – a form of words that leaves open the possibility of doubt. It was certainly not clear that the code had been actually been breached. Moreover, placing the emphasis on a possible breach of the code rather than on the supposed impropriety itself, suggests further doubt about the minister’s culpability. If the minister had clearly acted improperly, as for instance in actually seeking an advantage for his brother or in misleading Parliament, that would have been given as the reason for his resignation. Instead, Rudd, sensing that the fault was more technical than actual, sent Fitzgibbon off to the architect of the code, Faulkner, for a legalistic interpretation and penalty.

The real reason for Fitzgibbon’s resignation, as generally recognised, lay elsewhere. The meeting in his office, though not a hanging offence in itself, was the last straw in a long line of indiscretions. He had already come under attack for failure to disclose gifts and hospitality as well as for his dealings with Helen Liu, a businesswoman with Chinese government connections. Another incident, however minor and contestable, would be a further distraction for the Government. All in all, Fitzgibbon had become a liability.

If evidence of a similar meeting had been used to incriminate one of the Government’s key ministers with no previous personal blemishes, such as Julia Gillard or Lindsay Tanner, we can easily imagine the response. The meeting, we would have been told, had been held by members of the minister’s staff on their own initiative behind minister’s express instructions. The minister’s back and against the general keeper of the Government’s key ministers to take the blame for the actions of subordinates when such actions were beyond their reasonable knowledge or personal responsibility.

Ministerial responsibility has never required ministers to take the blame for the actions of subordinates when such actions were beyond their reasonable knowledge or personal responsibility. Responsibility for the acts of ministerial staff remains a grey area. Labor, in opposition, criticised ministers in the Howard government who sought to avoid responsibility by passing the buck to accountable advisers. Ministers, it was argued, should accept full responsibility for the actions of their staff. The code of ministerial conduct, however, is less categorical. It merely requires that ministers ensure that “the conduct, representations and decisions of those who act as their delegates or on their behalf are open to public scrutiny and explanation”. Ministers should not shield their staff from scrutiny. But they need not take responsibility and shoulder possible blame for all the culpable acts of their advisers.

Such a position makes sense. Ministerial responsibility, despite perennial claims from misguided purists, has never required ministers to take the blame for the actions of subordinates when such actions were beyond their reasonable knowledge or personal responsibility. When departmental officials are at fault, ministers must answer questions and impose remedies, but they do not need to accept personal blame, still less resign.

Given the current size of ministerial offices, this principle now needs to be extended to advisers as well as to departmental officials. It was open to Rudd to let Fitzgibbon’s staff take the fall. That he...
made Fitzgibbon himself resign indicates a judgment that public opinion had turned against the minister. Further support would prove unpopular and offer easy pickings for the Opposition.

In some respects, the case of Swan leaves less wriggle room than Fitzgibbon’s. The heat over the OzCar affair has been on him personally rather than on his staff. Did he intervene to make special representations on behalf of Labor supporter John Grant? If so, did he lie to Parliament about it? Swan’s statements to the House are equivocal and omit reference to a phone conversation with Grant.

Unlike Fitzgibbon, however, Swan is a minister the Government cannot afford to lose, especially over the Grant connection, which would also damage the Prime Minister.

Swan has also been lucky, in that the Opposition’s attack on Rudd, based entirely on the notorious fake email, failed so spectacularly. Indeed, Rudd audaciously added a new variation to the conventions of ministerial responsibility, urging the new variation to the conventions of Parliament, where alternative leaders stand trading blows toe-to-toe, mutual demands for resignation carry a certain symmetry. Certainly, Turnbull could not afford to deny Rudd’s right to seek his resignation.

The Auditor-General has been left to deal with Swan’s actions over OzCar, but in the much wider context of looking at all representations to Treasury on this matter. Their role is to ask, not to answer. Yet in the gladiatorial theatre of Parliament, where alternative leaders stand trading blows toe-to-toe, mutual demands for resignation carry a certain symmetry. Certainly, Turnbull could not afford to deny Rudd’s right to seek his resignation.

The Auditor-General has been left to deal with Swan’s actions over OzCar, but in the much wider context of looking at all representations to Treasury on this matter. Much will depend on what view the Auditor-General takes of the scheme and of how arm’s-length ministers should have remained from its administration. Representations via ministers are a constant feature of government, as attested to by the multimillion-dollar lobbying industry. If a company is big and powerful enough, ministerial help is not an issue. If it is acceptable to help GM Holden, what is wrong with helping a car dealership?

Another complicating factor is that politicians often exaggerate their influence in order to boost their local reputations. Ministers and their staff pretend that representations from the minister will make all the difference when, in fact, decisions are made by officials using strict guidelines. The report on OzCar will require all the Auditor-General’s tact and will be worth waiting for.

If his claim is upheld, he could have grounds to be reinstated as a minister. Giving ex-ministers the right to sue for unjust dismissal would be fun for lawyers but chaotic for governments.

Richard Mulgan is a former professor at the ANU’s Crawford School of Economics and Government.

The prime minister makes the final call after weighing up all individual circumstances. But the effective decision is often made less by the prime minister than by the public at large, as the punters either endorse or reject the opposition’s attack. It was public opinion, in the end, that determined that Fitzgibbon should go and that Swan should stay, at least for the time being.

The court of public opinion is greatly to be preferred to a court of judges. In NSW, constitutional experts are looking anxiously at the legal case being brought against the state government by sacked minister Tony Stewart. Stewart was dismissed on the basis of a report commissioned by Premier Nathan Rees, which found he had intimidated a female staffer. Stewart contests the report’s conclusions and has produced witnesses who support his version of events. If his claim is upheld, he could have grounds to be reinstated as a minister. Giving ex-ministers the right to sue for unjust dismissal would be fun for lawyers but chaotic for governments.

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