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# Should upper houses have ministers?

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*Standing Order 34 of the New South Wales Legislative Council requires that the House will not meet unless a minister is present. An incident in 2009, when this standing order was used to manipulate the sittings of the House, led to consideration of the proposition that the exclusion of ministers from an Upper House strengthens its role as a House of Review. This article examines the proposition from the perspective of the practicalities of the Legislative Council to determine whether the exclusion of ministers would affect the Council's ability to operate as an effective House of Review.*

## HOW MANY MINISTERS DO AUSTRALIAN UPPER HOUSES HAVE?

In NSW, as is generally the case in other bicameral legislatures in Australia, while practice sees the majority of Ministers of the Crown located within the lower house, there are no constitutional requirements that all or any number of ministers must come from either the Lower or Upper House.<sup>1</sup> Traditionally, the Premier is a member of the Legislative Assembly, based on the Westminster convention that the Premier should reside in the House in which government is formed. It is unlikely that this convention will not continue to be observed.<sup>2</sup> However, the convention that the Treasurer should be drawn from the House that has primacy in relation to the financial administration of the State has fared less well. In the period from 1995 to 2010, NSW had three Treasurers, each of whom was a member of the Legislative Council. This convention, to the particular chagrin of some Westminster traditionalists, has subsequently also not been observed in other legislatures, with both Victoria and Tasmania in recent times having a Treasurer appointed from the Upper House. In the federal parliament, although there are no constitutional requirements that any ministers be members of the Senate, all governments since federation have appointed senators to the ministry. In recent decades senators have usually comprised approximately one quarter to one third of the ministry.<sup>3</sup> The following table shows the number of Upper House members that are ministers in relevant Australian State jurisdictions<sup>4</sup>

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	Upper House Members	Government Members	Ministers	Cabinet
NSW	42	19	3	22
Victoria	30	21	6	23
South Australia	22	7	3	15
Western Australia	36	21	5	17
Tasmania	15	1	1	9

In NSW, *Egan v Willis* confirmed a broad notion of ministerial responsibility, with ministers responsible to the House to which they belong, at least to the extent of requiring them to answer to the House for the administration of government:

One aspect of responsible government is that Ministers may be members of either House of a bicameral legislature and liable to the scrutiny of that chamber in respect of the conduct of the executive branch of government. Another aspect of responsible government, perhaps the best known, is that the ministry must command the support of the lower House of a bicameral legislature upon confidence motions. The circumstance that Ministers are not members of the chamber in which the fate of administration is determined in this way does not have the consequence that the first aspect of responsible government mentioned above does not apply to them.<sup>5</sup>

Ministers as representatives of the executive government are subject to the direct scrutiny of the House to which they belong. The corollary to this is that they are not subject to the same level of scrutiny by the other House.<sup>6</sup> While there have been a few occasions in NSW when there have been no ministers appointed from the Legislative Council, in recent times a significant proportion of the Cabinet have been drawn from its members, with up to seven members of the 2003–05 Carr Ministry being members of the Legislative Council. The location of ministers in the Upper House is vulnerable to the criticism that ministers are located there in order to shield them from the scrutiny of the House whose confidence is required for the maintenance of government. However, it must also be acknowledged that Lower House ministers are equally shielded from direct scrutiny of the members of the Upper House, some of whom, as is the case in NSW, are the representatives of political interests that do not easily find a representative voice in the Lower House. In one sense an ideal model of responsible government would see both Houses in a bicameral legislature have equal opportunity to directly scrutinise the representatives of the executive. It could also be argued that all ministers should be subject to the same level of parliamentary scrutiny. If there was a requirement that all ministers be located in the Lower House then at least that House would have the opportunity, through routine parliamentary processes, to hold all members of the executive to account. However, as will be examined later in this article, such a model does not necessarily mean that the Upper House could not also have regular, if not equal, opportunity to hold the executive to account.

## **STANDING ORDER 34 – A ROD UNINTENTIONALLY FASHIONED**

Since the advent of responsible government in NSW in 1855, there has always been a representative of the executive government in the Legislative Council. While there have been a few occasions when there have been no ministers, the Vice President of the Executive Council has always been appointed from the Council. Standing Order 34 of the NSW Legislative Council provides that: 'The House will not meet unless a minister is present.' Standing Order 34 was adopted in 2004. Prior to 2004 there was a convention in the Council that the House should not meet without the presence of a minister. The intention behind the convention was the protection of the processes of the House: namely that a government representative should be in charge of items of government business, and a government representative should be present in the House to take note of or respond to matters raised during private members' business. Prior to 2004, there were a number of occasions when the convention was invoked and also, albeit to a lesser extent, when it was ignored. However, in 2009, the convention, by then enshrined in standing order 34, was invoked not as a defence to the processes of the House, but rather as a mechanism for manipulating the sittings of the House. On 24 June 2009, the sitting of the House was suspended under the provisions of Standing Order 34 when the remaining minister in the House left the chamber, thereby obliging the President to leave the Chair and to suspend the sitting until the ringing of a long bell. The suspension of the House extended for 69 calendar days over the traditional winter long adjournment, and the House did not meet again until 1 September 2009. At the time of the suspension, the House was due to sit again the following day according to sessional order. As reported in the media at the time, after losing a series of votes during the day (due to the Government's reported loss of the support of the two Shooters Party members), the Minister without warning moved a special adjournment motion, which the Opposition then sought to amend with the intention of having the House sit the next day in order to bring on the debate on the Government's NSW Lotteries (Authorised Transactions) Bill 2009, for which the Government apparently no longer had the required support. The Minister, realising that the Opposition would be successful in amending the adjournment motion, left the Chamber before the question could be put.

The adoption of standing order 34 was intended to bring consistency to the previous convention requiring the presence of a minister in the House. The convention was never intended as a mechanism to be used by the executive government to manage the sittings of the House outside of the opening and proroguing of Parliament. However, this seemingly occurred on 24 June 2009. The forfeiture by the House of its right to determine when it would meet and conduct its own business is in turn injurious to the performance of the House of its function as a House of Review. The incident in 2009 prompted the then Clerk of the Legislative Council to initiate an investigation into whether other Australian parliaments had established any requirement similar to standing order 34. It emerged that no other Houses of Parliament in Australia and New Zealand, with the exception of the New Zealand House of Representatives had a standing order requiring the presence of a minister in the House. While no other Australian Houses have a standing order requiring the presence of a minister at all times, many Houses, notably lower Houses, have a convention that a minister should generally be present in the House. By contrast, in Australian upper

Houses, generally there is no convention requiring the presence of a minister in the House. This difference of approach between lower and upper Houses around Australia reflects the differing roles of the Houses. The Lower House is the House where the Government is made and unmade, and it is appropriate for a government representative to be present at all times. By contrast, the role of the Upper House as a 'House of Review' does not necessarily require the presence of ministers in the House in all instances. Indeed, as will be discussed below, a number of jurisdictions have considered the question of whether it would be best if ministers were excluded from the membership of their Upper House.

## WHAT ARE THE POTENTIAL ADVANTAGES OF EXCLUDING MINISTERS FROM AN UPPER HOUSE?

*Odgers Australian Senate Practice* notes that a change to exclude ministers from the Senate might well strengthen the Senate's role as the House of Review, as distinct from the electoral college role of the Lower House in determining the government. To implement such a proposal, only the Leader of the Government in the Senate would remain a member of Cabinet in order to represent the Government.<sup>7</sup> This option has not been taken up by

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**Generally, when the activities of ministers or parliamentary secretaries are reported in the media, no distinction is made regarding to which house of parliament the minister belongs.**

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any government in the Senate to date. The removal of ministers from the Upper House has also been canvassed as desirable in recent government reports in Western Australia<sup>8</sup> and Victoria.<sup>9</sup> The Victorian Constitution Commission after weighing the arguments both against and for the retention of Ministers in the Upper House concluded that the need to have as independent an Upper House as possible should prevail. However, similar to the situation in the

federal Parliament, this recommendation has not been adopted. The basis for the argument against the presence of ministers in upper Houses is that their presence reinforces party political pressures in the House and reduces the independence of individual members, constraining the role of the House as the 'House of Review'. Ministers tend to see their role as shepherding legislation through the House with minimum amendment or controversy. In turn, members tend to shape their actions as loyal and effective party-members, worthy of promotion to the ministry, and not as independent legislators or representatives of the people, with particular expertise in relation to certain portfolios or committees. John Uhr advanced a similar argument in relation to the optimum overall size of parliaments, he stated that the potential for advancement makes for much intrigue over place and preferment with little spare time or energy for the traditional parliamentary activities of public scrutiny and review of government performance. He further hypothesised that once members come to see that ministerial life is out of reach they will turn to seeking whatever professional satisfaction one can extract from being a good backbencher by, for example 'participating in' and not just 'sitting on' committees, getting a public profile and acting as a bridge between government and community.<sup>10</sup>

## **WOULD THE ABSENCE OF MINISTERS IMPROVE THE PERFORMANCE OF THE NSW UPPER HOUSE?**

A number of authors have commented on the impact the increase in party discipline has had on Australian parliaments. Harry Evans noted that it was a reasonable proposition that a government party majority in a House did not necessarily mean government control, but that the increase in the compulsory loyalty of government backbenchers now means that 'crossing the floor' is now such a serious step that governments are mostly able to forget the possibility.<sup>11</sup> Nevertheless, the fact that such instances of backbench independence still occur in the British Parliament<sup>12</sup> perhaps provides some hope that a decision to exclude ministers could, over time, erode the hold of party political dominance. It is not for this article to conclude whether or not the exclusion of Ministers from the NSW Legislative Council would increase the independence of individual members and of the House as a whole. It would be expected to take some time for any discernible benefit to manifest, particularly bearing in mind that members are elected to eight year terms of membership to the Council. For the purpose of the article it will be assumed that if Ministers were to be removed from the Council, then the executive would continue to have a single representative in the Council through the person of the Vice President of the Executive Council.<sup>13</sup> It will also be assumed that the removal of Ministers is taken to mean that Parliamentary Secretaries are also not appointed from the Council. To remove Ministers but retain Parliamentary Secretaries would, while lessening the prize, not remove the potential for advancement which it is argued acts to inhibit the independence of members. The remainder of this article will discuss a number of issues, and difficulties foreseen by some, associated with the exclusion of Ministers and determine whether, in practical terms, each would add to or detract from the NSW Legislative Council's capacity to act as an effective House of Review. With respect to some of these issues, the article will examine potential mechanisms that could be employed to provide avenues by which the Council could continue to directly scrutinise the executive, notwithstanding the absence of ministers.

## **WHO WOULD GUIDE GOVERNMENT LEGISLATION THROUGH THE CHAMBER?**

Currently, in the NSW Legislative Council the three Government Ministers are responsible for introducing and taking carriage of all government bills, whether or not the bills are within their portfolio responsibility. In addition, through the provisions of standing order 25, the parliamentary secretaries in the Legislative Council, of which there are currently five, may also take carriage of government bills passing through the House. In 2012, ninety-seven government bills were introduced into the Council. Seventy-four of these originated in the Legislative Assembly and 23 were Council bills. Of the 23 Council bills, all but two were introduced and guided through the Council by the relevant minister. However, with respect to the Assembly bills, more than half were under the carriage of a parliamentary secretary. Taking carriage of a bill outside a member's portfolio responsibility or area of interest can be a difficult task and the effectiveness with which it is done can vary according to the

complexity of the legislation; the competence of the minister or parliamentary secretary and the extent of their familiarity with the issue; and the robustness of the debate and committee process.

Delivering the second reading speech for an Assembly bill in the Council is not a challenge, as more often than not the Minister or Parliamentary Secretary seeks and is granted leave to incorporate the speech into Hansard. Leave is generally granted if the speech is the same as that delivered in the Legislative Assembly, which is generally the case unless there has been some change in circumstances during the intervening period. The challenge for the minister or parliamentary secretary from the Council is being able to knowledgeably respond during their speech in reply to any questions raised during the debate by other members and to assess and respond to any amendments moved during committee of the whole. Today, in the 55th Parliament of NSW, the likelihood of a government bill being amended against the government's wishes exists only in the Legislative Council. In 2012, fifteen government bills were amended in the Council, with a total of 63 amendments being agreed to. When Assembly bills are under consideration in the Council it is usual to have staff from the relevant government departments present and on hand in the President's gallery in order to monitor the progress of the bill and to provide assistance and advice to the minister or parliamentary secretary who has carriage of the bill. It is also not uncommon, particularly with respect to significant legislation that might be subject to amendment, to have the responsible Minister from the Assembly also present in the President's gallery.<sup>14</sup> In these circumstances it is often the case that the minister who has carriage of the bill in the Council will take the opportunity during proceedings to liaise with the visiting Assembly Minister.

If Ministers (and Parliamentary Secretaries) were excluded from the Legislative Council, the question arises as to who would guide government legislation through the House. As discussed earlier, the removal of ministers might, for administrative reasons, only be able to be contemplated on the basis of the retention of a representative of the executive in the person of the Vice President of the Executive Council. However, to assign just one individual the responsibility for carriage of all government legislation would not on the face of it appear practical, notwithstanding that this was the case on those occasions in the past when there were no Ministers appointed from the Council. Another option would be to assign this responsibility to all or some of the government party members in the Council. However, this might also raise the risk of creating another level of, albeit informal, rank to which government party members might aspire and seek to achieve by demonstrating party loyalty. Rather than seek a solution from within the Legislative Council, an alternative can be found within the NSW Constitution.<sup>15</sup> Section 38A of the *NSW Constitution Act 1902* provides:



### 38A Powers of Ministers to speak in Legislative Council

- (1) Notwithstanding anything contained in this Act, any Minister of the Crown who is a member of the Legislative Assembly may at any time with the consent of the Legislative Council, sit in the Legislative Council for the purpose only of explaining the provisions of any Bill relating to or connected with any department administered by him, and may take part in any debate or discussion in the Legislative Council on such Bill, but he shall not vote in the Legislative Council.

This provision was inserted in 1933.<sup>16</sup> However, a provision proposed in the Constitution (Further Amendment) Bill 1929 provided for the same powers except that it applied to any minister<sup>17</sup> who was a Member of *either House*. The provision inserted in 1933, as proposed in the later Constitution Amendment (Legislative Council) Bill, was instead confined to allowing Ministers from the Legislative Assembly to speak in the Legislative Council.<sup>18</sup> Use of the provision has occurred once. In 1990 the Hon John Fahey, as Minister for Industrial Relations and Employment, sat in the Legislative Council during debate in committee of the whole on the Industrial Relations Bill and cognate bills. The committee proceedings lasted over ten days from 23 August to 20 September 1990 during which 484 amendments were made to the Industrial Relations bill.<sup>19</sup> When the Legislative Council debated the motion regarding the appearance of Minister Fahey, the then Leader of the Government, extolled the virtue of having on hand the minister who was directly responsible for an intricate piece of legislation:

...I have always taken the view that where the Upper House is involved in the consideration of legislation which can be seen to be of enormous importance to the community at large, and which is seen to be of a highly technical nature, and legislation of significant volume, it is appropriate for the Minister responsible for that legislation to attend this Chamber during the committee stages to assist honourable members in understanding the bill. Obviously the Ministers in this House cannot be expected to have a detailed understanding of every piece of legislation that is introduced.<sup>20</sup>

At the time of Minister Fahey's appearance there were four ministers sitting in the Legislative Council. Interestingly, earlier parliamentary debate in 1987 indicates that at that time it was understood that the provision was inserted to cater for the prospect of there being no ministers in the Council:

*The Hon J R Hallam* ...the practical workings of the government dictate that it is necessary for the Government to be represented in the legislative council by a member of the Executive Council...as the Constitution provides – and the Hon M F Willis would be aware of this – it is possible for a member of the Legislative Assembly who is a member of the Executive Council to come into the Legislative Council and present a bill. That requirement has been in the Act for many years. It is a convention that I doubt will ever be exercised.

*The Hon M F Willis*: That is exactly why it was put there.

*The Hon J R Hallam*: In the event of there being no Ministers who are members of this House, certainly.<sup>21</sup>

If ministers were to be excluded from the Legislative Council, then recourse could be made to the mechanism provided by the Constitution to have the Minister directly responsible for a government bill attend and guide its passage through the Chamber. The Government of the day would be better served by having the Minister directly responsible for a bill guiding it through the House in which it is most likely to be amended and the Council would lose nothing in its ability to act as an effective House of Review with respect to government legislation.

## **WHO WOULD ANSWER QUESTIONS REGARDING THE PERFORMANCE OF THE EXECUTIVE?**

Chapter 11 of the Legislative Council Standing Rules and Orders concerns 'Questions Seeking Information'. Standing Order 64 (1) provides that: 'Questions may be put to Ministers relating to public affairs with which the minister is officially connected, to proceedings pending in the House, or to any matter of administration for which the minister is responsible.' Questions without notice may be put to ministers during Question Time, while written questions to ministers may be lodged with the Clerk. The three ministers currently sitting in the Legislative Council are responsible for responding to questions relating to firstly their own respective portfolio responsibilities and secondly to the portfolio responsibilities of the 19 Ministers from the Assembly that between them they represent. In 2012 in the Legislative Council, 1207 questions were asked during Question Time, while 2030 written questions were lodged with the Clerk. If ministers were removed from the Legislative Council, while the capacity for submitting written questions would remain there would be no capacity for asking questions without notice. Commentators have argued that many aspects of parliamentary activity are increasingly becoming not much more than theatre or ritual.<sup>22</sup> This criticism can apply to Question Time, which has been described as 'tailor made for the low-minded pursuit of ministerial scalps'.<sup>23</sup> In comparison, the Victorian Constitution Commission was of the view that Question Time may properly be seen as a valuable part of the review and accountability process. With respect to Question Time in the NSW Legislative Council, it would not be unjust to say that the volume of information sought (not counting Dorothy Dixers) from Ministers during Question Time considerably outweighs the volume actually elicited. The point of order most frequently raised during Question Time is that the answer being provided by the Minister is not relevant to the question. It would be fair to say that when individual members are seeking detailed information of the administration or expenditure of government departments that they are more likely to seek this information by way of written questions.

As noted previously, the fact that the majority of Ministers reside in the Assembly means that the minor parties that are represented in the Council have no regular opportunity to directly scrutinise most members of the executive government. It is the case that, possibly partly because of this minority of ministerial representation, Question Time in the Legislative Council commands much less media and public interest than that commanded by Question Time in the Legislative Assembly. Given the above, it could be argued that the Legislative Council, in its duty to scrutinise and hold the government to account, would lose little if it no longer had the capacity to ask Ministers questions without notice.



Nevertheless, there is a potential mechanism by which, despite the removal of Ministers from the Council, Question Time could be retained and enhanced. This problem regarding Question Time in bicameral legislatures, whereby neither House has full opportunity to directly scrutinise all the representatives of the executive has a long history of consideration by various parliaments in Australia. At the Commonwealth level there have been a number of attempts to institute an arrangement whereby ministers in both the Senate and the House of Representatives are permitted to speak on, and be questioned about, departmental matters or proposed legislation for which they are responsible on the floor of both houses.<sup>24</sup> None of these various attempts, commencing with Andrew Inglis Clark at the Federal Convention of 1891 and including the 1986 report of the House of Representatives Standing Committee on Procedure, were successful – with more passion being evident in their opposition than in their support. It appears that in the late 1980s in NSW the concept had also been the subject of some discussion between the then government and the Legislative Council cross-bench members. The Hon Fred Nile alluded to these discussions during debate on the motion (discussed in the previous section) to invite a Minister from the Legislative Assembly to attend the Council and explain the provisions of a bill:

I wish to put on the record that the Call to Australia group warmly supports the motion moved by the Hon Elisabeth Kirkby. That motion is in line with the original promises of the Government that Ministers would be available at question time and at other times.<sup>25</sup>

However, the only implementation in an Australian legislature of a regular arrangement whereby ministers from one House appeared in the other during Question Time occurred in Tasmania in 2009. The impetus for the joint question time in Tasmania was the appointment to the Ministry of an additional two Members of the Legislative Council in September 2008. At the time while three political parties were represented in the Lower House, only one of those parties was also represented in the Upper House, which was comprised of a majority of independent members and minority of Government members. This political composition meant that the two non-Government parties had no capacity, through their parliamentary membership, to directly question ministers that were members of the Legislative Council.<sup>26</sup> Before proceeding, the prospect of a joint Question Time was referred to the Joint Select Committee on Working Arrangements of the Parliament. The report of the committee found and recommended that the proposal could, and would best, be achieved by complementary resolutions of the two Houses. The arrangement commenced in March 2009 and continued until the 2011 election, following which no Ministers were located in the Legislative Council. So while it is argued that the NSW Legislative Council could continue to operate as an effective House of Review notwithstanding the loss of the opportunity to ask questions without notice, it must be noted that there is the potential to reap the purported benefits of excluding Ministers from membership of the Council while also instituting what would be a more fully representative Question Time.

## **WHAT WOULD BE THE EFFECT ON THE HOUSE'S COMMITTEE SYSTEM?**

The work of parliamentary committees is one of the primary sources of effective Upper House scrutiny of the executive. This is certainly the case of the committee system in the Legislative Council of NSW. The effectiveness of the committee system largely depends on the commitment and interest of its members and overall also generally benefits from the diversity of views and experience that a wide committee membership brings. In the Legislative Council it is practice that ministers are not appointed to any of the Legislative Council policy or scrutiny standing committees that examine the performance of government departments. While this, quite appropriately, distances a Minister from involvement in an inquiry that may be examining his or her portfolio responsibilities, this practice has consequences for the committee workload of the other government party members. For example, in the 53rd and 54th Parliaments the then Labor Governments held 18 and 19 seats respectively in the Legislative Council. During these years, there were consistently six Ministers appointed from the Council. Taking into account that in both parliaments the President was also a Labor party member, this left 11 or 12 government party members to fill the 19 spots reserved on scrutiny and policy committees for government party members. The additional requirements to fill positions on joint standing committees and on any select committees that happened to be established, gave rise to committee overload for some government members and frequently caused scheduling difficulties for individual members serving on multiple committees. Problems such as these are further exacerbated when parliamentary secretaries also seek to lessen their involvement in committee activities. In addition, senior members of the Opposition in the Council and members elevated to the position of shadow minister also often need to seek to lessen their involvement in committees. Therefore, in terms of allowing members more time to more fully participate in inquiries and in terms of broadening the level of experience and individual perspective brought to the committee system, the removal of ministers (and the possible consequential removal of shadow ministers) from the Upper House would be beneficial.

## **WOULD MINISTERS BECOME LESS LIKELY TO APPEAR BEFORE COMMITTEES?**

Under section 4 of the *Parliamentary Evidence Act 1901*, Legislative Council committees do not have the power to compel the attendance of members of the Assembly or of the Council to appear before them and give evidence. However, the Council could, on its own volition or at the request of a committee, direct one of its members to appear before a committee. Therefore, if Ministers were removed from the Council there would be absolutely no avenue by which Legislative Council committees could compel the attendance of a Minister. However, the loss of this potential avenue is not a threat to the effectiveness of the Legislative Council committee system. The media and the public's interest in and support for the Council's committee system is now so well entrenched that it ensures that the executive government cannot become or afford to become dismissive of Council committee inquiries.

There are a number of recent examples where the Premier and Ministers from the Legislative Assembly have voluntarily appeared (sometimes after intensive prompting by the media) as witnesses at Legislative Council committee inquiries, notwithstanding that the inquiries were viewed as being hostile or potentially damaging to the government of the day.<sup>27</sup>

## **WOULD THE HOUSE STILL BE ABLE TO REQUIRE THE EXECUTIVE TO PRODUCE DOCUMENTS?**

The power of the Legislative Council to order the production of government documents was firmly reaffirmed in *Egan v Willis* which upheld the Council's imposition of a penalty (suspension) on a member of the executive for refusing to comply with an order of the House. It has been argued that an advantage of retaining Government ministers in a House of Review is that the House can direct those Ministers to produce State articles.<sup>28</sup> However, in the NSW Legislative Council the power and the procedure for ordering government documents is now so well established that the order is not by necessity channelled through any representative of the executive in the Council. Standing Order 52 which governs the procedure for orders for the production of documents provides that: The House may order documents to be tabled in the House. The Clerk is to communicate to the Premier's Department, all orders for documents made by the House. It could be argued that the ability of the House to order the production of articles is not dependent upon one (or more) of its members being a representative of the executive and the threat of a sanction being imposed upon that member should the order of the House be refused. If in the seemingly unlikely event that a future Government began to depart from the established practice of compliance with Standing Order 52, and the threat or use of sanction was required to bring about compliance then this could be achieved by the retention of a sole representative of the Government in the person of the Vice President of the Executive Council. In the current situation, where the Government does not have a majority in the House, it is likely that the Government will continue to comply with orders for documents. These orders are effectively the political demand of a majority coalition of opposition and cross-bench parties, the support of some elements of whom the Government must also rely upon for other matters to be determined by the House. The frequency with which the House chooses to exercise its power to order State documents is subject to the alliances that are made and unmade between the various political parties that comprise the House. If the removal of Ministers from the Council did over time result in greater independence in the decisions of members then, it might reasonably be assumed there would be an increase in the likelihood of the House making orders for documents.

## **WOULD THE PARLIAMENT AND GOVERNMENT SUFFER FROM A LOSS OF TALENT?**

The NSW Legislative Council is a continuing body whose members are elected for an eight year term. General elections are held in NSW every four years, during which a periodic Council election is held for the return of half (21) of its members. The system used in

periodic council elections with group voting squares and the option to vote either above or below the line, means that the main political parties can guarantee election to the Council of a certain number of their candidates. Upper Houses, with electoral systems such as that used for the Legislative Council, are seen as an avenue by which persons of unquestionable merit but who are not interested in meeting the particular challenges of campaigning for and holding a lower house seat, could enter parliament. Such talented persons who might become very able parliamentarians might not see the Upper House as their preferred career path if they cannot become Ministers. The ability of political parties to nominate the candidate to fill casual vacancies that arise in the Legislative Council has been used recently to revive the political careers of members who were unable to retain their seats in the Legislative Assembly. Most notable of these is the Hon Michael Egan who was a member of the Council for 18 years. Prior to entering the Council by way of filling a casual vacancy, Mr Egan had served as the Member for Cronulla for two terms. More recently, following the 2011 State general election, a member who failed to retain his seat in the Legislative Assembly was subsequently elected to fill a casual vacancy in the Council.

At the same time there have also been recent examples of Members of the Legislative Council, after proving themselves and establishing a public profile in the Council subsequently moving to the Legislative Assembly. The current Minister for the Environment and the Leader of the Opposition were both previously members of the Legislative Council, prior to being elected to the Legislative Assembly in the 2011 State general election. A fundamental aspect of responsible government is that Ministers are responsible to the Parliament and through the Parliament to the electorate. It would not be unreasonable to argue that all Ministers should be made directly responsible to the electorate at each general election. A decision to exclude Ministers from the Legislative Council should not as a necessity result in a loss of talent to the Parliament or the government of the day. For the main political parties, the Council will remain as a means by which they can introduce talented persons into the parliament. If such persons prove themselves worthy and do aspire to ministerial rank, then they would eventually need to submit themselves to the electorate for a Lower House seat. While the prospect of contesting a Lower House seat might possibly dissuade some it must be noted that the existence of safe seats provides the main political parties with an ongoing means by which to guarantee a place in parliament.

## **WILL THE LACK OF MINISTERS AFFECT THE LEGITIMACY AND PRESTIGE OF THE UPPER HOUSE?**

Up until 1987 the NSW Constitution required that the Vice President of the Executive Council be appointed from the Legislative Council. However, in 1987 the Constitution was amended so that the Vice President of the Executive Council could be appointed from either the Council or the Legislative Assembly. During the second reading speech debate in the Legislative Council on the Constitution Amendment Bill a number of speakers voiced concerns over the prospect of the House not having any ministerial representation, which was variously described as 'a total and utter derogation of the duties of the House'

and as a 'denigration of the status of the House'.<sup>29</sup> One must ask if the legitimacy and prestige of the Legislative Council is dependent upon the appointment of ministers from among its members. If this was the case, would the level of legitimacy then wax and wane according to the number of ministerial appointments? The Legislative Council is constantly seeking to raise the level of public awareness and understanding of its role. Generally, when the activities of Ministers or Parliamentary Secretaries are reported in the media, no distinction is made regarding to which House of Parliament the Minister belongs. However, unfortunately over the last two years media reporting on four separate Independent Commission Against Corruption inquiries has significantly raised public awareness of the existence and activities of (former) Upper House Ministers. Apart from such instances of scandal, public awareness and media reporting of specific Legislative Council activities centre primarily on three things: committee inquiries, the amendment of significant government legislation, and the return to orders for State articles – neither of which are dependent upon the location of Ministers in the council. The legitimacy of the Legislative Council is based on its ability to act as an effective House of Review, and, as has been discussed, in order to undertake this role, the presence of Ministers is not a necessity and quite possibly a hindrance.

## CONCLUSION

The decision to exclude Ministers from the Legislative Council could be provided for in legislation or could become a convention observed by the Government of the day. If such a decision was made, this article argues that it would not be a detriment to the Council's ability to operate as an effective House of Review. Indeed, if the hypothesised benefit of this exclusion – an increase in the independence of individual members and an erosion of party dominance – were to emerge over time, this would only increase that effectiveness. Very little is required to test this hypothesis, other than a decision and the passage of time. However, the likelihood of that decision being taken depends on those vested with the power to do so being convinced that a more effective House of Review is a desirable outcome.

## REFERENCES

- 1 Section 50 of the Victorian *Constitution Act 1975* provides that no more than 6 ministers may be drawn from the Legislative Council at any one time.
- 2 For example, on 4 July 1986 following the resignation of the Hon Neville Wran as Premier, the Hon Barry Unsworth, the then Leader of the Government in the Council was appointed as Premier. Despite there being no legal or constitutional requirement for him to do so in order to remain as Premier, he resigned as a member of the Council on 15 July 1986 and successfully sought election to the Assembly at a by-election in August that same year.
- 3 Odgers, p583

- 4 Information drawn from relevant parliament websites, accessed 2 November 2012. With respect to Tasmania, the Hon Craig Farrell MLC while not a Minister is a member of Cabinet by virtue of his position as Leader for the Government in the Legislative Council.
- 5 *Egan v Willis* (1998) CLR, 424, per Gaudron, Gummow and Hayne JJ, at 453
- 6 The article acknowledges the opportunity for Upper Houses to scrutinise Ministers provided through the committee system, in particular the annual Budget Estimates. However, it must be noted that these are not frequent occurrences and that, in New South Wales, the Legislative Council cannot compel the attendance of Assembly Ministers before it or its committees.
- 7 Evans H and Laing R (eds) *Odgers' Australian Senate Practice*, 13th edn, Department of the Senate, Canberra, 2012, p583.
- 8 See the *Report of the Royal Commission into Commercial Activities of Government and Other Matters*, 1992, Part II, para 5.36. See also the Western Australian Commission on Government Report No 2, 1995, pp163–164.
- 9 Victorian Constitution Commission, 'A House for our Future', June 2002, pp54–56.
- 10 Uhr, J *Keeping Government Honest: Preconditions of Parliamentary Effectiveness*, article presented to the Western Australian Commission on Government, Perth, August 1995
- 11 Evans, H, *The case for bicameralism*, in Aroney et al (eds) *Restraining Elective Dictatorship*, University of Western Australia Press, 2008, p71
- 12 See for example *Rebels in the ranks sting British PM*, Sydney Morning Herald, 2 November 2012
- 13 Up until 1987, the NSW Constitution required that the Vice President of the Executive Council be appointed from among the members of the Legislative Council. However, since 1987 and currently the Vice President may be appointed from either the Council or the Legislative Assembly.
- 14 See for example, acknowledgments of the presence of the relevant Minister during debate on the Environmental Planning and Assessment Amendment Bill 2012: Legislative Council, Parliamentary Debates, 14 November 2012, p16801; and the Local Government Amendment (Conduct) Bill 2012: Legislative Council, Parliamentary Debates, 14 November 2012, p16781
- 15 A similar option also exists in Victoria, provided under Section 52 of the Victorian *Constitution Act 1975*.
- 16 The provision is referenced in the Legislative Council Standing Rules and Orders: Standing Order 163 'Explanation, under the Constitution Act, of a departmental bill'
- 17 The provision, as did section 38A when inserted in 1933, referred to Executive councilors rather than ministers, a 1987 amendment to the Act changed the terminology to Ministers of the Crown.
- 18 Twomey, A, *The Constitution of New South Wales*, The Federation Press, 2004, p690
- 19 Lovelock & Evans, *Legislative Council Practice*, The Federation Press, 2008, p207
- 20 Legislative Council Debates, 4 June 1990, pp 4889–4890
- 21 Legislative Council Debates, 27 May 1987, p12518
- 22 Various sources cited in Aroney, N, Nethercote R, Prasser S, *Restraining Elective Dictatorship: The Upper House Solution?*, University of Western Australia Press, p1.
- 23 Uhr, J, *Keeping Government Honest: Preconditions for Parliamentary Effectiveness*, article presented to the Western Australian Commission on Government, Perth, August 1995.



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- 24 D Drinkwater, *To speak or not to speak: ministerial accountability in the Senate and the House of Representatives*, *Legislative Studies*, Vol 13, No 2, Autumn 1999, pp47–54
  - 25 *Legislative Council Debates*, 4 June 1990, p4890
  - 26 Joint Select Committee on the Working Arrangements of the Parliament, Report No 18, *Attendance of Ministers who are Members of the Legislative Council at the House of Assembly Question Time*, March 2009, p4
  - 27 For example, in 2010 the then Premier appeared before the Inquiry into the Gentrader transactions, and in 2011 the Premier, the Minister for Health and the Minister for the Environment appeared before the inquiry into the Kooragang Island Chemical leak.
  - 28 See, Uhr J, *Deliberative Democracy in Australia: The Changing Place of Parliament*, Cambridge University Press, 1998, pp230–231; and Twomey, A, *The New South Wales Constitution*, The Federation Press, 2004, p696
  - 29 *Legislative Council, Parliamentary Debates*, 27 May 1987, p 12513; 12516