



Ministers in the Senate

Minister: ...one appointed by (or under the authority of) the sovereign or executive head of a government to some high office of state, especially to that of head of an administrative department.

The Macquarie Dictionary

Government is traditionally divided into three branches—the legislature, which makes the laws; the executive, which administers the laws; and the judiciary, which hears and determines disputes about the law. The doctrine of the separation of powers, first enunciated by Baron Montesquieu in the 18th century, requires that the three branches of government operate independently of each other. Each branch acts as a check on the others and prevents the undue concentration of power.

In some countries, such as the United States, the constitution clearly separates the executive (the President) and legislature (the Congress) by having them elected separately. In many parliamentary systems, such as those of Britain and Australia, the separation is not quite so clear-cut as the members of the executive (the Prime Minister and other ministers) must be drawn from among the members of the legislature (the Parliament). The ministry thus overlaps the boundaries of two branches of government or, as the 19th century English constitutional writer, Walter Bagehot, put it, the ministry is ‘a hyphen which joins, a buckle which fastens, the legislative part of the State to the executive part of the State’.

This *Senate Brief* examines the constitutional provisions and conventions concerning executive government in Australia, outlines the powers accorded ministers in the Senate, and discusses the mechanisms by which ministers are held accountable to the Parliament in general, and the Senate in particular.

[Section 61 of the Australian Constitution](#) vests the executive power of the Commonwealth in the Governor-General as the Queen’s representative. In practice, however, the Governor-General acts only on the advice of ministers whom he appoints to the Executive Council on the nomination of the Prime Minister. Ministers must be members of Parliament.

The Constitution requires that no minister ‘shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives’ ([section 64](#)). This requirement is the only reference in the Constitution to the practice of responsible or cabinet government, under which the ministry holds office so long as it retains the

confidence of the House of Representatives. In practice this means that the Prime Minister is the leader of the party or coalition of parties which holds a majority in that house, and the other ministers are members of that party or coalition nominated by the Prime Minister or selected by the party or coalition.

Not all ministers need be members of cabinet. Except for the period of the Whitlam Labor government from 1972 to 1975, where all twenty-seven ministers were members of cabinet, ministers are normally divided between the inner ministry (cabinet) and the outer ministry (non-cabinet). Traditionally the Prime Minister and the Treasurer are members of the House of Representatives. When Senator John Gorton



Ministerial benches in the Senate
Image provided courtesy of Auspic, Canberra

became Prime Minister following his election to the position of leader of the Liberal Party on 10 January 1968 he sought to become a member of the House of Representatives as soon as practicable. He resigned from the Senate on 1 February 1968 and was elected

as a member of the House of Representatives on 24 February 1968.

The number of ministers and the maximum amount of funds that can be appropriated to cover their salaries is prescribed, under [sections 65 and 66 of the](#)

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Constitution, by the *Ministers of State Act 1952*. A 1987 amendment to that Act provides that the number of ministers shall not exceed thirty. The previous limit of twenty-seven had been set in 1971.

Although there are no constitutional or statutory 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. Under Liberal-Country Party governments from 1949 to 1972 the number of ministers in the Senate remained steady at five, while the corresponding number of ministers in the House of Representatives increased from fourteen in 1949 to twenty-two in 1972. In the period of Labor government, from 1972 to 1975, there were at different times six or seven senators in the ministry. In 1972 the party insisted that cabinet should contain at least twelve members of the House of Representatives and six senators.

However, under the Fraser government the number of ministers in the Senate was again temporarily reduced to five. During the Hawke and Keating governments the size of the ministry increased from twenty-one in 1983 to thirty in 1991, with a corresponding increase in the number of ministers in the Senate (from six in 1983 to eleven in 1993). Under the first and second Howard governments, nine senators were included in the ministry, which totalled thirty. The number of senators included in the third Howard ministry, also totalling thirty, was increased to ten.

All senators are entitled to a basic salary and an electoral allowance. A Senate minister responsible for a portfolio department is entitled to a staffing allocation of between eight and twelve staff including three electorate office staff.

Powers of ministers in the Senate

The Senate procedures give ministers certain exclusive powers, most of which are concerned with the management of government business. The standing orders provide that ministers may:

- arrange the order of items of government business on the Notice Paper in the order they choose;
- move a motion connected with the conduct of the business of the Senate at any time without notice. This standing order empowers ministers to move motions to rearrange business before the Senate when there is no other business before the chair;

- move that a bill be declared urgent and, if the motion is agreed to, move further motions concerning the time allocated for consideration of the bill, including an extension of the time allotted to debate. This refers to the limitation of debate on urgent bills, commonly known as the ‘guillotine’;
- move at any time that the Senate adjourn, but such a motion can be moved only when there is no other business before the chair. Debate on a matter under consideration must therefore be adjourned before the adjournment of the Senate is moved;
- move for the adjournment of a debate after having spoken in that debate;
- move that the question be now put on more than one occasion, and after having spoken in that debate. This is commonly known as the ‘gag’;
- present documents;
- present a message from the Governor-General at any time, but not during a debate or so as to interrupt a senator speaking.

While standing orders grant ministers these exclusive powers, ministers may authorise senators who are not ministers to exercise any or all of these powers on their behalf.

Ministers in the Senate represent one or more ministers who are members of the House of Representatives for the purpose of answering questions without notice, tabling documents and taking charge of bills. Conversely, Senate ministers are represented in the House of Representatives by a minister who is a member of that house. These representational arrangements are determined by the government. On several occasions in the history of the Commonwealth Parliament unsuccessful attempts were made to institute a procedure whereby ministers in both the Senate and the House of Representatives would be permitted to speak on, and be questioned about, departmental matters or proposed legislation for which they are responsible, on the floor of both houses.

The burdens and responsibilities for a minister in the Senate can be demanding for he or she will often have responsibility for guiding through the Senate legislation for up to half a dozen House of Representatives ministers. According to Patrick Weller and Michelle Grattan, in their book *Can Ministers Cope? Australian Federal Ministers at Work* (1981), Senate ministers ‘can find question time particularly arduous’ because they must ‘deal with questions not

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only on their own portfolios but on all the others as well'. During question time, if the question concerns a minister who is a member of the other house, questions are addressed to the 'Minister representing the Minister for...'. And while many questions can be dealt with in a pro forma way ('I will take that question on notice', or 'I will refer the question to the minister for an answer') sometimes a minister in the Senate is pressured to address a question more directly.

Questioning ministers

One of the ways in which the Senate seeks to hold the government accountable for its actions is by questioning ministers. The procedures of the Senate provide a number of opportunities for senators to ask questions of ministers—during question time, through written questions on notice and at committee hearings, especially when estimates of expenditure are being considered.

Question time in the Senate is scheduled to begin at 2.00 p.m. on each sitting day and usually continues for an hour. The number of questions (including supplementary questions) asked at question time in recent years has averaged around twenty-two. Questions without notice may be put to a minister relating to public affairs with which he or she is officially connected, or to any matter of administration for which the minister is personally responsible or in respect of which he or she represents another minister. However, there is no corresponding obligation on those questioned to give an answer. President Baker ruled on 26 August 1902 that there was 'no obligation on a Minister or other member to answer a question', and in 1905 he ruled: 'It is a matter of policy whether the Government will answer a question or not. There are no standing orders which can force a Minister or other senator to answer a question.' However, political realities dictate that ministers must seek to demonstrate that they have a firm understanding and command of the matters for which they are responsible by answering questions in a competent manner. In party political terms it is important that a minister performs well at question time.

Following a minister's reply to a question without notice, the questioner or any other senator may, at the discretion of the chair, ask a supplementary question in order to elucidate a reply. Supplementary questions are considered inappropriate for the purpose of introducing additional material, or for proposing a new question. Supplementary questions must be actually

and accurately related to the original question and must relate to or arise from the answer. It is not in order to ask a supplementary question of another minister. As mentioned earlier, in addition to answering questions concerning their own portfolios, each Senate minister also represents one or more ministers in the House and responds to questions concerning matters for which House ministers are responsible.

Apart from the questions asked orally in the Senate chamber each sitting day, senators may also at any time address written questions on notice to ministers and other senators. In a typical year senators ask a total of about 1000 questions on notice. These questions and the answers to them are not usually read in the chamber, though they are published in Hansard. Standing orders require that answers to questions on notice be provided within thirty days. If a minister does not supply an answer within that period, and does not give an explanation, when asked, of why the answer has not been provided, a senator may move, without notice, a relevant motion—usually a motion for the answer to be tabled by a specific date. Ministers normally comply with such orders. For further details of the procedures for questioning ministers see [Senate Brief No. 12, Questions](#).

Ministers from the Senate are frequently invited to appear before Senate committees to give evidence and answer questions. Ministers from the House of Representatives have also occasionally given evidence. Standing order 26(5) provides that Senate committees considering estimates of government expenditure 'may ask for explanations from ministers in the Senate, or officers, relating to the items of proposed expenditure'. While many of the more detailed answers are provided by government officials, ministers are responsible for answering questions about policy matters which public servants are not required to comment on (see [Senate Brief No. 5, Consideration of Estimates by Senate Committees](#) and [Senate Brief No. 13, Rights and Responsibilities of Witnesses before Senate Committees](#).)

Ministerial accountability

While the ministry as a whole is responsible to the House of Representatives, in that it can hold office only so long as it has the confidence of that House, individual ministers are responsible, in effect, only to the Prime Minister because it is he who advises the Governor-General to appoint or dismiss ministers. Because the Senate cannot appoint or dismiss

ministers it cannot hold them responsible, but it can hold them accountable, that is, require them to explain and to give an account of their policies and actions. When the government party does not hold a majority of votes in the Senate, the non-government senators can use their combined voting power to make Senate ministers accountable by, for example, answering questions, appearing before committees, and providing documents requested by the Senate. In October 1967 the Senate forced a government minister to table documents in relation to the use of the government's fleet of VIP aircraft. This was regarded as a dramatic and unusual event at the time but in fact this is a power which the Senate has exercised on a regular basis since 1901. In the period 2000-2005 the number of orders averaged twenty-six per year.

Censure resolutions may have an important political impact and for this reason have frequently been moved and carried in the Senate. The Senate has also passed motions of censure on ministers in the House of Representatives. Since 1973 there have been thirty-four successful censure motions passed in the Senate.

Ministers in the Senate have been censured for matters such as misleading the Senate, failing to answer questions on notice within the stipulated time limit, maladministration of a department, and refusing to produce documents in compliance with an order of the Senate. In addition to censure motions, the Senate may conduct inquiries into ministerial conduct.

Parliamentary secretaries

Statutory provision is made in the *Ministers of State Act 1952* for the Prime Minister to appoint a member of either house of Parliament to be a parliamentary secretary to a minister. While [section 44 of the Constitution](#) prohibits a member of either house of Parliament from holding an 'office of profit under the Crown' (i.e. a salaried government position), ministers are specifically exempted by the Constitution from this provision. This meant that parliamentary secretaries, unlike ministers, could not be paid a supplement to their basic salaries. The *Ministers of State and Other Legislation Act 2000* amended the Ministers of State Act by providing that parliamentary secretaries are to be appointed as ministers of state for constitutional purposes, which enables them now to be paid a salary.

A parliamentary secretary makes inquiries, conducts correspondence and deputises for his or her

minister under the direction of that minister. While parliamentary secretaries can exercise the powers and perform the functions conferred upon ministers by the procedures of the Senate, they cannot take political responsibility for a department, be asked questions or answer questions that are put to ministers, or represent a Senate minister in relation to that minister's responsibilities before a Senate legislative and general purpose standing committee considering estimates.

Though not responsible for a portfolio, parliamentary secretaries are appointed as Federal Executive Councillors. Until recently, this enabled them to act for or on behalf of a minister in the exercise of statutory functions (see section 19 of the *Acts Interpretation Act 1901*). But a landmark decision of the Federal Court (*Foster v Attorney-General*, 12 October 1998) cast significant doubt on whether a minister can rely on section 19 of the Acts Interpretation Act to give another minister or a parliamentary secretary unlimited authorisation to exercise statutory powers for or on his or her behalf. Because this decision had significant ramifications for other authorisations made under section 19 of the Act, the Government put before the Parliament legislative measures designed to remove the uncertainty created by the decision. Parliament enacted measures in the *Acts Interpretation Amendment Act 1998*, providing for a minister to authorise a non-portfolio minister or a parliamentary secretary to act on his or her behalf, which commenced on 21 December 1998. In addition to these legislative measures, the Attorney-General appealed to the Full Court of the Federal Court of Australia against the decision in *Foster*, and on 16 February 1999, it overturned the decision.

Whither ministers in the Senate?

The question of whether a proportion of the ministry should be members of the Senate is not new; it was debated in the 1890's by delegates to the [Australasian Federal Conventions](#). Several interesting proposals for supporting either a constitutional or legislative requirement for ministerial representation in the Senate were debated (and rejected) in September 1897. Unlike contemporary criticisms of ministerial representation in the Senate, the concerns aired during the Convention debates related to proposals for specifying in the constitution a fixed minimum number of ministers in the Senate, and not to ministerial representation in the Senate per se. Edmund Barton and Isaac Isaacs opposed this proposal, arguing that it was unnecessary to add to the constitution a clause specifying the

minimum number of ministers in the Senate, even though it would probably be impossible in practice for a government to function with no ministers in the Senate. In recent decades some members of the major political parties, including former senators, have argued that there should be no ministers in the Senate. The reasons advanced in support of this include:

- that unlike the House of Representatives, the Senate is not the house of government or ‘the people’s house’, but a house of review and a states’ house;
- with ministerial representation in the Senate, the upper house has merely become an extension of the House of Representatives rather than a distinct house of review;
- the Senate can only effectively carry out its restraining role on the executive if senators are prevented from holding office as ministers;
- governments are responsible only to the House of Representatives and not the Senate;
- because of the different parliamentary terms for each house, ministers in the Senate do not necessarily face the people in an election for the House of Representatives, and this is considered unfair.

In 1979 a motion was moved in the Senate by Senator David Hamer to the effect that senators should no longer hold office as ministers of state, with the exception of the Leader of the Government in the Senate; and that Chairmen of the Senate’s legislative and general purpose standing committees should be granted allowances, staffs and other entitlements similar to ministers. The motion was debated but not voted on. Senator Hamer argued that ‘the presence of Ministers in [the Senate] is incompatible with its effective performance as a House of Review. There is an inherent and insoluble conflict in having a House of

Review in which five of its most influential members are devoted entirely to preventing its performing effectively as a House of Review’.

Similar arguments were advanced in a 1986 Report by the House of Representatives Standing Committee on Procedure on the conduct of question time. In considering a proposal for the rostering of ministers to answer questions in both houses, the committee was firm in expressing the opinion that ‘all Ministers should be Members of and responsible to the House of Representatives, the House directly elected by the people’, and ‘Ministers who are members of the House of Representatives should be responsible to the Parliament and the people through the House of Representatives only.’ And in 1998 a private member’s motion was debated in the House urging the party winning the next and subsequent elections to appoint all ministers from the House of Representatives, and urging the Senate to further expand its committee system and adopt greater powers of investigation and inquiry.

One commentator, John Uhr, in his book *Deliberative Democracy in Australia (1998)*, argues that one of the main advantages of retaining government ministers in the Senate is that ‘they can be formally directed by the assembly to produce specified government information.’ He concludes that ‘government compliance with Senate directions is one of the best kept secrets of Australian responsible government.’ The case was also well expressed by Liberal Senator Baden Teague in the Senate chamber in 1981: ‘I believe that in the debates of this chamber [the Senate] Ministers bring a sense of direct responsibility in what we talk about and a direct answerability on the part of the Executive Government under question from senators.’

Further reading

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