Constitutional precedents aren’t ‘bubble nonsense’

Anne Twomey

I am not going to be distracted by all the frankly – I know you don’t like the phrase – but the bubble nonsense of people going on about all sorts of precedents, all the rest of it."

Thus said Prime Minister Scott Morrison, dismissing the relevance of precedent to his government’s defeat in Parliament on amendments to its own bill. But those precedents, and the constitutional conventions they illustrate, are essential to the very existence of governments and our parliamentary system of responsible government. This is not “bubble nonsense” – it is fundamental to the right to govern.

There are no express words in the constitution to say it, but our constitutional system operates on the basis the government must hold the confidence of the lower house of Parliament. Critical to confidence and the ability to govern are control over the budget and the ability to secure supply. That is why, in 1941, the Fadden government resigned after its budget was reduced by a symbolic amount of £1. It wasn’t the loss of £1 that counted – it was the symbolic loss of control.

It is also why the government’s attempt to characterise the Senate’s medevac amendments as turning the bill into a money bill was a high-risk manoeuvre. If it had passed in that form, there would have been a serious argument that the government had lost control over the budget, threatening its right to continue governing. Labor’s amendment to remove the money aspect of the bill rescued the government from that fate. But is defeat on a bill itself enough to signal a loss of confidence? It is not necessary for a formal vote of no confidence to be passed to show that the House has lost confidence in the government. In fact, on no occasion at the national level has the government fallen on an express vote of no confidence. Instead, a loss of confidence has been indicated by other votes, such as an amendment to a bill against the wishes of the government (Deakin, 1904, and Bruce, 1929), an amendment to the budget (Fadden, 1941), or a procedural motion, such as a motion to adjourn (Scullin, 1931).

Whether defeat upon an amendment to a bill causes a government to resign or seek an election depends on its assessment of whether it can continue to obtain supply and get legislation passed. In many cases, a government may not wish to struggle on and would prefer the chance to obtain a clear majority in an election. In other cases, it may decide it can continue to govern effectively. The Menzies government was defeated on an amendment to the Repatriation (Special Overseas Service) Bill in 1962, but decided to keep governing.

A government could take the view that its defeat was tied to a particular issue and does not amount to a loss of confidence. The Morrison government could legitimately consider that to be the case now. But its position may become more difficult if it accumulates a string of defeats, including in relation to the parliamentary timetable.

Defeats on motions to adjourn have on occasion been the grounds for a government to resign (Fisher, 1909) or seek an election (Scullin, 1931). The reason is that the House has taken control of its business out of the government’s hands. In other cases, defeats on procedural motions (Menzies 1962-3, Gillard 2010 and Turnbull 2016) were not considered significant and did not lead to the government’s resignation or an election.

Under our system of government, we do not ask the courts to decide on political issues such as whether a government has lost confidence and should resign. It is up to the government, in the first instance, to decide whether defeats on bills or procedural matters genuinely indicate a loss of confidence. But if it decides to continue governing, ultimate control still rests with the House, when it is sitting. A majority of the House can always choose to vote no confidence in the government, which would force the government to resign or seek an election.

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