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Accountability of Ministerial Staff?

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Abbreviations

APS	Australian Public Service
CPU	Cabinet Policy Unit
DLO	Departmental Liaison Officer
FIRB	Foreign Investment Review Board
GCCS	Government Caucus Committees Secretariat
GMS	Government Members Secretariat
MMG	Ministerial Media Group
MoPS	Members of Parliament (Staff)
MP	Member of Parliament
NMLS	National Media Liaison Service
PM	Prime Minister
UK	United Kingdom
US	United States

Major Issues

There are regular questions raised and complaints made about ministerial staff, partly because of the considerable influence upon their ministers that these staff are believed to wield. The complaints generally go to one of three issues:

- the number of ministerial staff
- the regulation of ministerial staff, or
- the accountability of ministerial staff.

The first issue is mainly about the growing numbers of staff, whether that growth is of real benefit to government, and whether it is a hindrance to parliament or the opposition or both. The second issue is about the lack of detail, whether in the Act of Parliament under which staff are employed or elsewhere, about the conditions of staffers' employment and the parameters that govern their work. The third issue is about whether ministerial staff represent a 'gap' in the accountability structures of our political system or of Westminster-type systems more generally. The number of staff is a constant topic of debate in Senate committee estimates hearings, while the regulation and accountability issues have been thrown into sharp relief by the Senate Select Committee on a Certain Maritime Incident.

The three issues are closely related. For example, there have been regular suggestions that the growth in numbers of ministerial staff is reducing their accountability because they are doing more and more on behalf of their ministers, but unlike ministers do not answer to the parliament. Similarly, there have been suggestions that more regulation of ministerial staff would both increase their accountability and reduce the incentive for governments to employ them in ever increasing numbers.

Ministerial staff numbers have risen, though perhaps not as dramatically as some have claimed. Some of the increase is due to increasing numbers of staff serving ministers, some is due to additional government members being allowed to have staff, and some is due to the development of specialist units that serve the government as a whole, rather than being attached to individual ministers.

Ministerial staff play a wide range of useful roles in ministers' offices, so it is not clear that increasing numbers are a problem. Furthermore, the ratio of opposition staff to government staff has remained fairly stable, suggesting that the number of staff is not in

itself a partisan battleground. The role of Departmental Liaison Officers is more contentious, as their numbers rise without any clear sense of whether this is enhancing or detracting from the accountability of the executive for its interactions with the public service. Nevertheless, as their numbers rise and their role becomes more visible, ensuring accountability becomes increasingly difficult. The obvious avenues through which to pursue greater accountability are through regulation of conduct, and through accountability to parliament. There is currently little of either. To the extent that ministerial staff have been regulated at all, it has been almost entirely to deal with possible conflicts between their individual self interest and the interests of their minister. None of the guidance has been directed at problems that might arise through the ministerial adviser's pursuit of what they perceive as the interests of their minister or their party. Regulation, whether through law, or codes of conduct, is more evident in the United States (US) and the United Kingdom (UK) than in Australia.

There is an ongoing debate about whether ministerial staff can or should in any way be answerable directly to parliament. Normal practice in Australia (at least since the late 1970s) has been to allow public servants, but not ministerial advisers, to appear before parliamentary committees. The decision to attempt to prevent advisers appearing as witnesses is based on a premise that they are accountable to ministers, and that ministers account for the actions of their advisers. Whether ministers actually do so, however, is increasingly debatable. In any case, those same arguments were used when public servants were being prevented from appearing, a practice which has been abandoned by both sides of politics. It seems incongruous that such accountability arguments have been abandoned for one group of people who answer to ministers, while being retained for another group who also answer to ministers.

There are no known constitutional hurdles preventing ministerial staff from giving evidence to parliamentary committees, though governments regularly suggest that conventions of Westminster government imply that ministerial staff answer to the minister, not the parliament. However, while both sides of politics have in opposition sought to assert the Senate's right to call witnesses such as ministerial advisers, both sides have while in government sought to resist the Senate. The conflict between the Senate and the Executive over the appearance of witnesses and the production of documents remains a political conflict for the most part not adjudicated by the courts. There is little sign that the latest foray of the Senate into this area—the Certain Maritime Incident Inquiry—will produce any change in the status quo. The question remains whether at least one of the major political parties will ever be prepared to take the steps that would change the practice that has been maintained up until now, in the way that practice in regard to the appearance of public servants changed in the 1970s.

Introduction

During hearings of the Senate Select Inquiry into a Certain Maritime Incident the Federal Public Service Commissioner, Mr Andrew Podger, remarked that 'there is a case for some articulation of the values and code of conduct of ministerial officers'.¹ This sort of guidance may be needed because of what Senator Faulkner (ALP, New South Wales) referred to as a 'vacuum of accountability' with respect to ministerial staff.² Meanwhile in Victoria, State Attorney-General Rob Hulls (ALP, Niddrie) was claiming that attempts to force ministerial advisers to give evidence to a Legislative Council Committee regarding alleged ministerial intervention in a public sector recruitment process, were a 'total breach of practice and a total breach of procedure'.³ These various remarks highlight the current debate about the role of ministerial staff in our parliamentary system.

This paper is about the staffing resources within the parliament that are available to governments, particularly what are usually referred to as ministerial staff. Governments employ a range of staff, most of them attached to individual ministers, but there are also some who are members of units that serve the government as a whole, and some who are employed by government office holders who are not ministers (such as parliamentary secretaries and whips). All of these will be referred to as ministerial staff in this paper.

The paper considers three areas that contribute to debate about whether current arrangements for ministerial staff are adequate or whether reforms of some sort are called for. The first area is the growth in the numbers of ministerial staff. The second area is the accountability of ministerial staff, particularly their accountability to parliament. The third area is the regulation (or lack of regulation) of the people who work directly to the government of the day.

What are Ministerial Staff?

Government ministers have access to a range of advice and support, most importantly from the departments that they administer. They also receive advice and support from sections of the parliamentary departments, such as the Houses' parliamentary committee secretariats and the Library's Information and Research Services. Although one of their principal sources of advice has been their department and in particular the departmental secretary, in recent decades ministers have increasingly sought advice from other sources.⁴ One of these sources has been the ministers' offices and other executive support units

within the parliament but which lie outside both the Australian Public Service (APS) and the Parliamentary Service.

There typically will be three types of staff working for ministers. Ministers will have their own staff that assist them in performing their ministerial duties. They will generally also have Departmental Liaison Officers (DLOs), who are staff seconded from ministers' departments to play facilitative roles in ministers' offices. Finally, ministers, like every member of parliament, will have electorate staff, who generally do not work in the ministerial office. Ministers' electorate staff are allocated on the same basis as for all other members of parliament.

Ministerial staff are employed under Part III of the *Members of Parliament (Staff) Act 1984* (MoPS Act).⁵ The MoPS Act also allows for the employment of consultants by Ministers (Part II). Not all MoPS Act staff are attached to individual ministers: some work for government support units, the first of which was established at least a quarter of a century ago.

There is a growing diversity of staff employed within ministers' offices. There are many different position titles and duties, as well as different bases for employment. Some of the different types of staff include:

- policy advisers
- media advisers
- personal assistants and secretaries
- consultants (people working for Ministers on contracts under the MoPS Act), and
- the electorate staff of ministers.

While many staff are employed by, and work directly for, individual ministers, there are others who also to varying degrees contribute to supporting the executive function:

- offices funded under the MoPS Act that are not tied to individual ministers (such as the National Media Liaison Service (NMLS) under the Hawke Government, or the Cabinet Policy Unit (CPU) under the Howard Government)
- the staff of parliamentary secretaries
- the staff of government whips and leaders (other than ministers), and
- DLOs.

There have also been changes and diversification in the types of staff working in ministers' offices. The nomenclature has changed: from private secretaries to advisers, and from

press secretaries to media advisers.⁶ There has been some diversification in the work of ministerial staff, reflected in a growing range of position titles. Thus over the last two decades we have seen the emergence, for example, of research officers and parliamentary liaison officers.⁷

Advisers come to the job from a range of backgrounds and for a range of reasons.⁸ A significant number have been public servants, brought into ministerial offices because of their expertise. Some of them have had partisan allegiances; many have not. Some advisers have been political party members, and indeed a few of those have seen working as an adviser as a step toward their own political career, as will be seen below. Paid advisers in government sometimes began their careers as unpaid volunteers in opposition. Others have been recruited from academia to bring particular views, analyses or agendas to bear on the task of government.

Within this overall milieu, ministerial advisers have become important participants in the policy process, playing a range of policy roles.⁹ Ministerial staff have long been regarded as facilitating the relationship between department and minister. Their place in government has however expanded significantly over the last twenty years to the point where they occupy a range of key roles. In 1976, it was possible for an analyst to conclude that 'their part in the policy process is essentially limited and confined'.¹⁰ In 1986 the view was that their role was rather broader than that, though they were still referred to as 'a bit-player in a group enterprise'.¹¹ Emphasising the collective nature of the policy-making endeavour, James Walter concentrated on articulating the range of roles that the many advisers in ministers' offices played. That range was significant, and in particular was broader than just assisting relations with the bureaucracy: it extended to dealing with relations with other stakeholders such as the party, and to having input into policy debates.¹² By 2000, Maria Maley was commenting that advisers in the Keating government 'could play significant roles in policy-making', a view confirmed by the public servants and ministers whom she interviewed.¹³ The view of the Clerk of the Senate was similar, arguing that:

They are said to and seen to:

- control access to ministers, and determine who has that access
- determine the flow of information which reaches ministers, particularly information flowing from departments and agencies
- control and regulate contact between ministers and other ministers, other members of the Parliament and departments and agencies
- make decisions on behalf of ministers
- give directions about government activities and actions, including directions to departments and agencies

- manage media perceptions and reporting.¹⁴

Playing these many roles, it is easy to see them emerging as 'influential actors at the summit of the core executive'.¹⁵ But for how long have they been there?

There have always been personal ministerial staff whose influence on their masters has not gone unremarked. While in 2002 attention might have been focussed on advisers to the Defence Minister,¹⁶ in 1997 it was on the Prime Minister's staffers, Fiona McKenna and Grahame Morris, for their role in the travel rorts affair.¹⁷ In 1995 the focus was on David Epstein and the staff he managed in the National Media Liaison Service.¹⁸ In 1982 it was the staff of the Government Information Unit who were topics for debate.¹⁹ In 1974–5 it was Junie Morosi who was the centre of attention, because of innuendo about her relationship with her boss Deputy Prime Minister Jim Cairns, and because 'she was that most disturbing thing—a woman with influence'.²⁰ In 1969 it was Ainslie Gotto, who as private secretary to the Prime Minister was resented for what was perceived as her zealous approach to her gatekeeping role—and, again, for being a woman.²¹

Advisers often seem influential if not controversial, and some have important public careers both at the side of a minister and in their own right. There was Tony Eggleton, press secretary to Menzies, Holt and Gorton, later federal director of the Liberal Party, who was for years 'one of the most influential behind-the-scenes figures in Australian politics'.²² Peter Wilenski was Whitlam's Principal Private Secretary, went on to be a departmental secretary, and professor of management and was influential in Australian public service reform.²³ Whitlam's Senior Adviser Jim Spigelman was briefly a departmental secretary in 1975, went on to be a prominent lawyer, and became NSW Chief Justice in 1998.²⁴ A range of other Whitlam government advisers went on to federal political careers of their own, including Gordon Bilney, Wendy Fatin, and Chris Schacht.²⁵ David Kemp, the Director of Malcolm Fraser's office, was a former academic who influenced liberal thought in the 1970s and 1980s and went on to a prominent parliamentary career of his own.²⁶ Cliff Walsh and John Hewson also worked in Fraser's office, where their role (together with public servant Ed Visbord) in framing the 1982 budget led them to be described as 'the nation's most influential economic think-tank'.²⁷ John Hewson also went on to become federal parliamentary Liberal Party leader in 1990. Michael Costello was an adviser to Foreign Affairs Minister Bill Hayden and went on to be secretary of the Departments of Industrial Relations, and Foreign Affairs and Trade, as well as being an influential adviser to opposition leader Kim Beazley in the late 1990s.²⁸ Ross Garnaut, an adviser to Bob Hawke, became Australia's Ambassador to China, and a major contributor to Australian international economic policy. Hawke staffers were considered to have 'a substantial influence on [Hawke's] policy positions', and included Peter Barron, referred to as a member of 'the Gang of Four'²⁹ (the other three being the Prime Minister, the Treasurer and powerful NSW Senator Graham Richardson); Barron had also been an adviser to NSW Premier Neville Wran.³⁰ Don Watson, speechwriter to Paul Keating, reported at one point that some cabinet ministers 'complained that Keating's inner office was driving policy'.³¹ And indeed, when Keating's senior adviser Don Russell

announced he was going to resign, Watson thought 'it was not possible to think of anyone else capable of providing the Prime Minister with the support he needed' at that time.³²

It is a matter of conjecture whether advisers are always as influential as is sometimes suggested or whether they, as one former adviser put it, merely 'enjoy a very privileged position in politics: they get to stand very close to the action, but they rarely get hurt'.³³ The evidence certainly suggests that some individuals have exercised great influence on some political leaders, at certain times. However, there has also been a perception of growing influence of advisers in general, suggesting that '[t]he ministerial adviser has been one of the most prominent additions to executive branches over the last two decades'.³⁴ As the numbers and perceived influence of advisers have grown, so their role has become more controversial. This has for many years been most clearly reflected in regular complaints (though not from the government of the day) about the increasing size of ministerial staff.³⁵ It is not however a simple task to say how many staff there are.

How Many Ministerial Staff are There?

Several different approaches can be taken to measuring the number of ministerial staff (as can be seen in Appendix 1 on Answers to Parliamentary Questions about Numbers of Ministerial Staff). The results vary according to whether one relies on staff directories or answers to parliamentary questions as the source of data. The results also fluctuate according to which of the many categories of staff listed above are included. Some analysis has focussed specifically on the use of 'advisers', while others base their remarks on all staff, including those, such as electorate staff, who arguably have nothing to do with ministers' executive responsibilities.³⁶

Many questions have been asked in the Parliament about the numbers of ministerial staff, but it is difficult to compare the answers, because of the way the questions have been put. For example, in 1999 Mr Andren (Independent, Calare) asked a question about the number of staff employed by ministers. As a result, the answer excluded the staff of parliamentary secretaries, but included electorate staff. Later that year Senator Faulkner asked a question about the 'ministerial staffing establishment under the MoPS Act' and specifically asked that the data cover parliamentary secretaries³⁷. Senator Faulkner's choice of words meant that electorate staff were separated out in the answer. The answer to Mr Andren's question included electorate staff and excluded staff of parliamentary secretaries, while the result was the reverse for Senator Faulkner's question. Thus the numbers in the two answers cannot be directly compared. Similarly, some questions have resulted in answers that include vacant positions, while others have excluded vacancies, instead referring only to numbers actually employed, and some examples of this variation can be seen in the Appendix 1.

Comparisons are made more complicated by the difficulty of establishing what responsibilities each staff member has in practice. All MPs are allocated three electorate staff, for example, but some MPs, including ministers, may employ some in their Canberra

offices, while other ministers use their entitlement to advisers to employ extra staff in their electorate. Under the Keating Government in 1995, the number of ministers' staff actually recorded in the *Ministerial Directory* as 'electorate officers' ranged from zero to five; under Howard in 1999, it ranged from one to five. Even setting aside this apparent variation in numbers, there would obviously be occasions on which it would be difficult to draw a clear line between what constituted work for the member as a local representative, and work for the member as a minister.

Figure 1. Ministerial Staff, 1972–2001

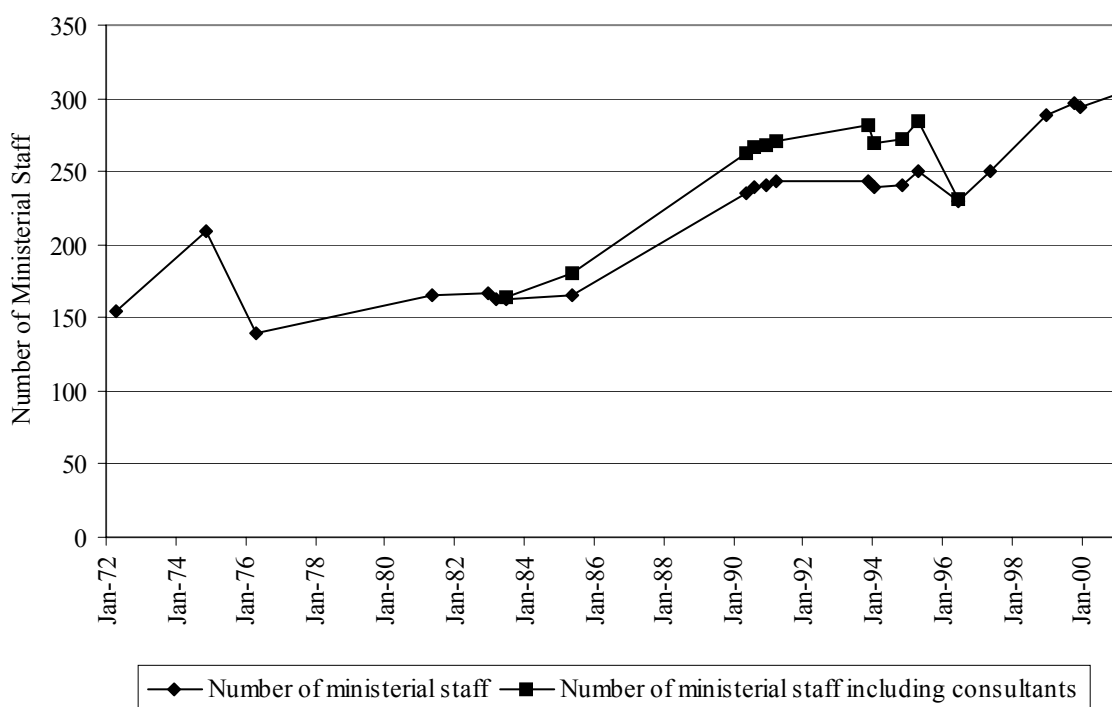


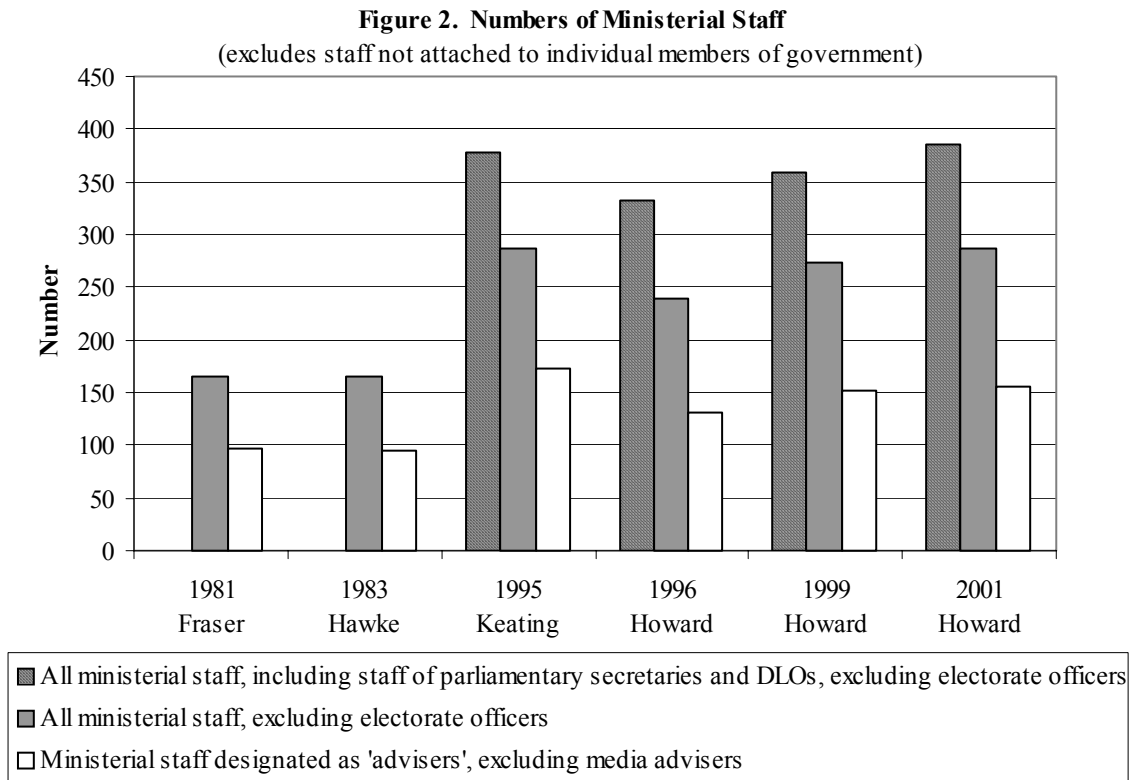
Figure 1 is based on answers to parliamentary questions about ministerial staff. It is confined to answers which gave numbers of staff for ministers (excluding parliamentary secretaries) including support staff, as long as they were employed under the MoPS Act (or equivalent, prior to 1984). The figures exclude the staff of all special units (such as the NMLS, CPU, Government Information Office, Government Members Secretariat, etc.) and consultants.³⁸ (Appendix 1 to this paper contains full details of the figures used here.)

Figure 2 focusses on advisory capacity, and in contrast to the previous figure is based on information contained in the *Ministerial Directories*. It shows three sets of numbers. The right bars show the number of staff described as ministerial advisers (other than media advisers).³⁹ The middle bars show the numbers of ministerial staff, excluding DLOs (for which data was not available prior to the late 1980s).⁴⁰ This includes media advisers and administrative support staff. The left bars show government staff support more broadly: they add in the staff of parliamentary secretaries as well as of ministers; the DLOs as well

as the staff employed under MoPS.⁴¹ All of the estimates in Figure 2 exclude staff not attached to individual ministers.

The figures show several trends:

- The growth in staff providing support to the government has not had a clearly partisan character: the rise and fall in numbers has had more to do with parliamentary reforms, and Prime Ministerial preferences.⁴² The Fraser Government maintained the same sorts of levels of staff as the early Hawke Governments. The current Howard Government is maintaining similar staffing levels as the last Keating Government.
- The available data suggest also that governments of all persuasions increase the numbers of staff as their period in office lengthens. This is true for the Fraser, Hawke, Keating and Howard Governments (adequate data are not available for the Whitlam Governments).

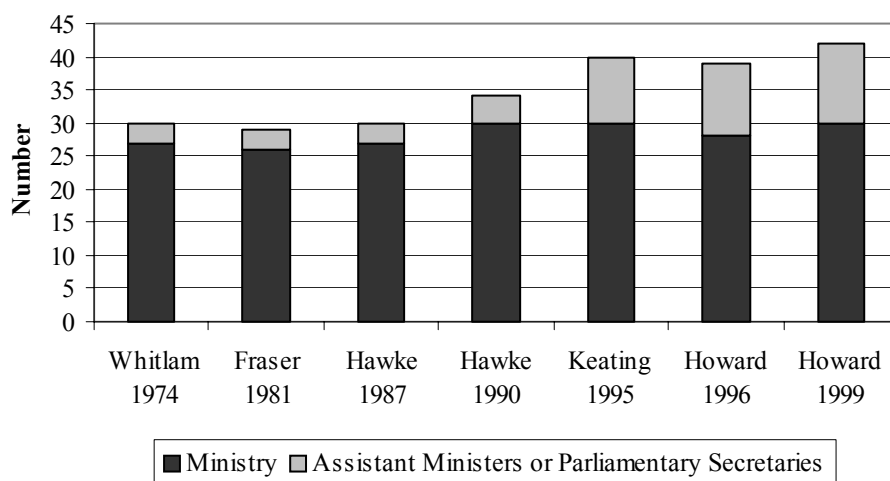


- Although advisers have increased in number, growth has come in other areas, including administrative staff, and an increase in the number of electorate staff available to all MPs (from 2 in the 1980s to 3 in the 1990s). There are now also more DLOs than ever before.⁴³

- One of the important drivers of growth has been the growth in the number of parliamentary office holders who are allowed to recruit staff under Part III of the MoPS Act.

There are three main ways in which support for the government of the day has been expanded. The first is the creation of parliamentary secretaries and the use of increasing numbers of staff to support them. The second is the increasing use of DLOs. The third is the use of ministerial support units, particularly in the media area, that are not tied to individual ministers. It is worth noting that the number of ministers has changed only slightly in recent times, and so has not been a major factor in the changes to the size of ministerial staff (Figure 3).

Figure 3. The Number of Positions with Portfolio Responsibilities



Parliamentary secretaries undertake tasks delegated by a minister and are able to take the role of the minister in the Parliament in almost all respects.⁴⁴ The role of parliamentary secretary forms a 'third tier' of executive government, augmenting the system of portfolio and non-portfolio or assistant ministers.⁴⁵ They are not a new invention. In Australia, parliamentary secretaries have been appointed as far back as the Lyons ministry in 1938,⁴⁶ and in Canada they date back at least to 1916.⁴⁷ The office was formalised through the Fraser Government's *Parliamentary Secretaries Act 1980* and Fraser appointed three parliamentary secretaries: to the Prime Minister, the Minister for Primary Industry, and the Treasurer.⁴⁸ Hawke also appointed three parliamentary secretaries after the 1987 election,⁴⁹ and four after the 1990 election. The position became a more important part of the parliamentary landscape in the early 1990s, when the Parliament formalised the duties of parliamentary secretaries,⁵⁰ and Keating lifted the numbers from four to eight.⁵¹ This grew to 10 and then 12, and with the growth in the number of parliamentary secretaries has come a growth in their staff. In December 1990, only one parliamentary secretary had any additional staff at all, but by October 1991 a pattern was established that has essentially continued since, with each parliamentary secretary's office having two advisers,

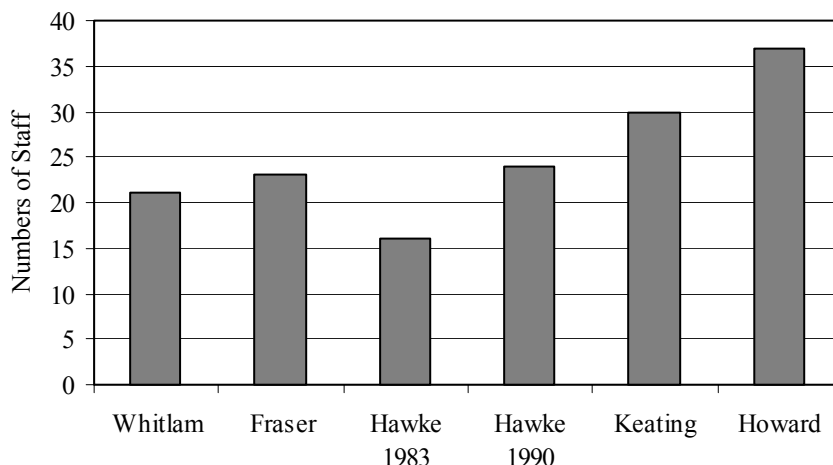
as well as a DLO.⁵² Compared to 15 years ago, there are thus now at least 24 additional MoPS staff working for the parliamentary secretaries.⁵³

DLOs are staff of departments who work in ministers' offices with 'responsibility for facilitating liaison between the minister and the department or agency'.⁵⁴ DLOs come from Ministers' departments, but also from major statutory agencies for which a minister may have responsibility, e.g. AusAID, the Aboriginal and Torres Strait Islander Commission, or the Public Sector and Merit Protection Commission. Their salaries are paid by their Departments, so the appointment of a DLO to a minister's office does not significantly affect the ministerial budget. The use of DLOs in government offices has progressively expanded over recent decades. Before the late 1980s, the use of DLOs was uneven, and they were present in relatively limited numbers. The Whitlam Government, for example had 19, with some ministers having two and others none at all.⁵⁵ By 1993 however the Keating Government had attached to its ministerial offices 53 DLOs,⁵⁶ while in December 1998 there were 69.⁵⁷ They are distributed in general on the basis of two in the offices of portfolio ministers, and one in the offices of non-portfolio ministers and parliamentary secretaries.⁵⁸

There are further ministerial staff not shown in Figures 1 and 2. These include staff with media-related functions. Each government has arranged its media and information functions differently. All governments employ media advisers in individual ministers' offices. Some governments have had units for gathering or disseminating information about government programs: the Government Information Unit (under Fraser) and the NMLS (under Hawke and Keating). The Fraser ministry employed far fewer press secretaries in individual ministers' offices, but also had the Government Information Unit, which comprised two Canberra-based staff and another in each capital city.⁵⁹ The Keating ministry in 1994 had 17 media advisers plus 15 members of the Ministerial Media Group (most of them performing essentially the same functions as ministerial media advisers) and 12 media officers in the NMLS.⁶⁰ The Howard ministry in 1999 had 34 media advisers, plus a media unit within the PM's office with six staff,⁶¹ but no official organisation to parallel the NMLS.⁶²

In addition to media staff, governments have had staff providing other additional administrative or coordinating support. These have included the Government Caucus Committees Secretariat (GCCS) under Labor, the CPU under Howard, and the staff allocated to Government Whips. This last category has grown steadily: there were two such staff in 1991, but by 1998 this had grown to eight.⁶³ The Howard government has also synthesised some of the functions of Labor's GCCS and NMLS in its Government Members' Secretariat (see endnote 62 for more detail).

Figure 4. The Prime Minister's Office



Another feature embedded within these figures has been the growth of the Prime Minister's office, sometimes independently of broader trends (Figure 4). Whitlam's office had 21 staff, while Fraser's office had 23, despite his overall reduction in the number of ministerial staff.⁶⁴ Hawke's office ranged from 16 shortly after the election that brought Labor to power, up to 24 by 1990. Under Keating the office had 30 staff, while under Howard it grew to 37, although Howard's ministry had only a marginally larger staff profile overall.⁶⁵ James Walter's view in the 1980s was that the institutionalisation of ministerial staffing was 'serving as another mechanism to assure prime ministerial pre-eminence', and the continued growth of the office since that time lends weight to this assessment.⁶⁶

The final significant trend has been the increasing seniority of the staff profile of ministerial advisers. The first move to give ministerial staff higher status was, again, made by the Whitlam government, which ensured that 'the gradings given to these ministerial officers were more senior than those that had applied to ministerial staff in the traditional system'.⁶⁷ Fraser advanced this trend further, despite the fact that he cut total numbers of ministerial staff.⁶⁸ Under Hawke, the seniority of ministerial staff was further underlined by a reclassification and restructuring exercise, while there was some evidence that the system of consultants was used to increase levels of pay.⁶⁹ This trend continued steadily from then on, with the proportion of ministerial staff occupying the top two classifications rose from 12.7 per cent in 1988 to 18.7 per cent in 1999.⁷⁰

One question raised by the progressive expansion and diversification of ministerial staff is the appropriate relationship between the numbers of staff available to the government and those available to the opposition and other parties. Interestingly, in contrast to the change that has taken place in executive staffing, there has been considerable stability in the relationship between government and opposition staffing levels. A convention has developed that a set ratio exist between government and opposition staff, that has meant

that changes in the numbers of government staff would be reflected in the opposition's staffing establishment. That ratio has been described as the opposition having 21 per cent of the government's staff numbers.⁷¹ That calculation has been made as a proportion of all government staff employed under the MoPS Act: that is, the staff of parliamentary secretaries, whips, and special units such as the Cabinet Policy Unit, not only the staff of ministers. This removes any incentive to change the designations of staffers to take them out of the base for calculating the staff entitlements of the opposition. It has however added to concerns about the growing numbers of DLOs and graduate administrative assistants, two types of personnel who are not included in the base for determining opposition staff levels (because they are not answerable directly to ministers).⁷² Allaying these fears will depend on maintaining a reasonable level of transparency around the allocation of DLOs and on whether oppositions can be confident that they are not performing partisan political tasks for their minister, particularly toward election time.

Why the Growth in Ministerial Staff?

Significant growth in the numbers of ministerial staff has been closely related to the growing importance of their place in the machinery of government.⁷³ In Australia, the watershed in the development of executive staffing is generally regarded as the election of the Whitlam government, brought to power after 23 years of conservative rule.⁷⁴ Academic Bob Smith described the impetus in these terms:

The change of government brought to office a party long in opposition and impatient to use the machinery of government to implement party policy. The policy ambitions of party enthusiasts were pitched high. However the length of time since the last change of government had allowed knowledge and understanding of transitional procedures to become dim. Moreover among leading members of the governing party, perceptions of the capabilities and roles of the public service were mixed. They ranged from firm belief in the competence and adaptability of the service to suspicion and pervasive distrust.

Out of this emerged a concern for strengthening the hands of ministers in their working relationships with members of the public service. Changes in the size and functions of ministerial offices were part of a series of proposals for increasing the effectiveness of the party in government.⁷⁵

It is sometimes remarked that governments turn to ministerial staff because of suspicion of the public service, a claim made about the Whitlam, Hawke and Howard governments. Yet the figures above show that recent governments (apart from that of Whitlam) cut the numbers of ministerial staff on taking office, while amongst Whitlam's staffers, the majority either were or had been public servants, while very few had worked for shadow ministers when Labor had been in opposition.⁷⁶ Evidence such as that reported by Smith, above, suggests governments have had concerns about public sector responsiveness, but not particularly of a partisan nature. As former Whitlam adviser Michael Sexton wrote:

It should be re-emphasised at this point that the problem was not, as a rule, that the bureaucracy was deliberately obstructing the programs of a Labor administration because of an ingrained conservative bias. It was rather that, as a large institution ... the bureaucracy could only be directed towards the priorities of the government by clear and considered ministerial directions.⁷⁷

Governments have wanted staff who understand their party and its agenda, and who are perceived as free to be more responsive to government demands than the public service. They have also wanted to diversify the sources of advice upon which they rely.⁷⁸ All of these reasons have driven the growth of the ministerial office.

Questions about the number of staff also reflect other concerns about the best ways to organise government within the parliamentary system. Take for example the increase in staff numbers as a result of the development of a system of parliamentary secretaries. The position of parliamentary secretary arose from a desire to spread the workload of ministers, and to develop the skills of future ministers. This development has bipartisan support, but the only ways to prevent it increasing staff numbers would be to give these MPs no support, or to cut other ministers' staff. Neither of these is an attractive option, and there has thus been a growth in the total numbers of staff.

Similarly, the growth in numbers of DLOs may reflect another strategy that seeks to make executive government more effective by enhancing the links between ministers offices and the APS. Prime ministers from Whitlam to Howard have expressed their commitment to ensuring the responsiveness of the public service. Both sides of politics have pursued this through legislative reform and through employing public servants as advisers (Howard once described them as 'ideal' staffers).⁷⁹ Bolstering the departmental presence in ministers' offices through increasing the numbers of DLOs has been another way of enhancing executive capacity to steer the state by bringing departmental officials into ministers offices where then can assist in the administration of portfolio workflows. Nevertheless, as mentioned above, the growth in the use of DLOs has not been uncontroversial. The opposition for example has appeared concerned that the DLOs are effectively being used to expand ministerial staff resources.⁸⁰ There has however been very little examination of what effects their increasing numbers are having. It may be that their impact on lines of accountability and reporting are more important than their contribution to swelling the numbers inhabiting the executive wing of parliament, and it may well be that those impacts are positive rather than negative. It is however a debate that is still to take place.

An alternative view about the growth in ministerial staff suggests that it has protected the public service from governments that have periodically considered politicising its upper echelons.⁸¹ By giving ministers more staff who can be primarily concerned with the partisan politics of issues, it lessens their need to ensure the political responsiveness of the departmental heads. Seen from this perspective, the 'right' number of ministerial staff might be whatever is necessary to satisfy governments that a balance is being struck

between politically-responsive staff and policy-impartial staff in providing support to the government.

Accountability and Ministerial Staff

The main issue that has arisen, however, as the numbers and profile of ministerial staff have grown, is their accountability in our system of government.⁸² There are two aspects to this issue: the relationship between parliament and ministerial staff and the regulation of people employed under the MoPS Act.

In the Australian parliamentary system the greatest scrutiny of government actions tends to take place in the Senate, particularly in its committees, rather than on the floor of the House. There are three reasons for this. First, the Senate often grants its committees considerable powers to obtain documents and call witnesses.⁸³ Second, the government seldom has a majority of Senators on select committees established to inquire into controversial matters. A recent example (relevant to the questions discussed in this paper) is the Select Committee on a Certain Maritime Incident, comprising eight Senators, of whom only three are members of the Coalition government parties. Third, the Senate committees give opposition and minor party representatives their most comprehensive opportunity to examine ministers and witnesses regarding the machinery of government.

Parliamentary Immunities and Ministerial Staff

Political scandals or controversies often result in Senate scrutiny of the actions of a government and its ministers. It is in this context that questions most often arise as to whether ministerial staff can or should be able to be called to account to the parliament through the Senate's committees. This debate revolves around political questions of the determination of the Senate to interrogate the executive and constitutional-legal questions about what is variously referred to as 'executive privilege' or 'public interest immunity'.⁸⁴ In practice, following the directions of their ministers, ministerial staff of governments of all political persuasions have declined requests from parliamentary committees that they appear to give evidence, though there have been rare exceptions, and much debate about this, discussed below. This has led to the claim that ministers' offices are 'accountability-free zones'.⁸⁵

To understand the debate about the appearance of ministerial staff as witnesses before the Senate or its committees, one needs to begin by understanding the Senate's powers. In general, the powers of the houses of parliament are extensive, and have their roots in s. 49 of the Constitution, which states that:

The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House

of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

Those powers include the capacity to summon almost anyone to appear as a witness, and to order that almost any document be made available.⁸⁶ The powers under s. 49 have been refined by a 'declaration' within the meaning of that section, in the form of the *Parliamentary Privileges Act 1987*, however the scope of the powers remains essentially unchanged.⁸⁷ This does not however mean they are either unambiguous or uncontroversial.⁸⁸

The Senate's powers tend rigorously to be asserted by the opposition of the day, and resisted by whomever is in government. Indeed, *Odgers' Australian Senate Practice* takes as its starting point for this topic a declaration that was passed by the Opposition-controlled Senate in 1975:

(1) That the Senate affirms that it possesses the powers and privileges of the House of Commons as conferred by section 49 of the Constitution and has the power to summon persons to answer questions and produce documents, files and papers.

(2) That, subject to the determination of all just and proper claims of privilege which may be made by persons summoned, it is the obligation of all such persons to answer questions and produce documents.

(3) That the fact that a person summoned is an officer of the Public Service, or that a question related to his departmental duties, or that a file is a departmental one does not, of itself, excuse or preclude an officer from answering the question or from producing the file or part of a file.

(4) That, upon a claim of privilege based on an established ground being made to any question or to the production of any documents, the Senate shall consider and determine each such claim.⁸⁹

The key points embedded in this declaration are first that the Senate can summon any person (including those serving the government of the day), and second that it is for the Senate itself to determine the validity of claims of privilege or public interest immunity. On their face, these statements indicate that ministerial staff, like public servants, may be required to give evidence before the Senate or any of its committees on which it confers these powers. However, as *Odgers' Australian Senate Practice* goes on to point out:

[w]hile the Senate has not conceded that claims of public interest immunity by the executive are anything more than claims, and not established prerogatives, it has usually not sought to enforce demands for evidence or documents against a ministerial refusal to provide them.⁹⁰

Thus while the Senate claims the power to compel anyone, including ministerial staff, to appear before it as a witness or to furnish it with documents, the Senate's capacity to exercise that power against the objections of the executive arm of government have not

been fully tested.⁹¹ The practice that has tended to prevail is that articulated by then Senator the Honourable Bob McMullan (ALP, Australian Capital Territory) in 1995, when as Minister for Trade he argued that 'ministerial staff are accountable to the minister and the minister is accountable to the parliament and, ultimately, the electors'.⁹² This 'McMullan principle' is also the approach advocated by the Labor government in Victoria, which ordered its ministerial advisers not to give evidence to the Legislative Council Select Committee on the Urban and Regional Land Corporation Managing Director.⁹³

The History of Attempts to Resolve the Senate's Powers

On several occasions, the dissolution of Parliament has prevented the full extent of the Senate's resolve on this question from being revealed. In 1975 the Labor Government rejected Opposition attempts to compel certain public servants to give evidence before the Senate.⁹⁴ The Privileges Committee divided on party lines over the issue, but Parliament was prorogued before the matter was tested on the floor of the Senate. In 1977, a motion moved by government Senator Reginald Wright (Liberal, Tasmania) to have the Senate endorse the position taken by the (then) Opposition senators in 1975 also lapsed upon Parliament's prorogation.⁹⁵ In 1982, when Labor (now in Opposition) sought to enforce the production of certain documents, the Coalition Government indicated it would take the question of the Senate's powers with respect to the executive to the High Court for resolution. But again, an election (and a change in government) intervened. Both sides of politics have while in opposition sought to assert the Senate's right to call witnesses such as ministerial advisers. Both sides of politics have while in government sought to resist the Senate. The conflict between Senate and executive over the appearance of witnesses and the production of documents thus remains a political conflict for the most part not adjudicated by the courts.⁹⁶

Immunities and the case of the National Media Liaison Service

The standoff that developed in 1975 between the Whitlam Government and the Senate over the appearance of public servants is well known.⁹⁷ On that occasion, several of Whitlam's ministers directed their departmental secretaries to decline to answer questions when called before the Senate. The departmental secretaries duly did so.⁹⁸ The agreement that has since developed that allows public servants to give evidence is also well understood, having been to some extent formalised in a detailed set of government guidelines for official witnesses.⁹⁹ What is less widely known is that on at least two occasions a person employed under the MoPS Act has appeared before a Senate Committee. In 1989 the head of the NMLS, Mr Colin Parks, appeared voluntarily before Senate Estimates Committee D, during which he was questioned extensively about the operations of the Service.¹⁰⁰ In 1995, the head of the NMLS, Mr David Epstein,¹⁰¹ appeared before the Finance and Public Administration Legislation Committee. On that occasion Mr Epstein appeared following a resolution of the Senate directing him to appear to give evidence, after the Minister for Finance had refused to allow him to appear.¹⁰² The

resolution of the Senate was moved by the Opposition, and supported by the Australian Democrats (who held the balance of power) with some reluctance.¹⁰³ Both the Opposition and the Australian Democrats were at pains to indicate the resolution was confined to the NMLS because, unlike other units and individuals employing MoPS staff, its stated purpose was not party political: it was to provide 'accurate and timely information on government policies'.¹⁰⁴ Their view was that if this was the case, it should be subject to the scrutiny of the estimates hearings. In this respect the Senate's willingness to pursue NMLS in estimates hearings was also based in part on some critical comments made by the Auditor General:

NMLS is therefore not subject to the normal accountability mechanisms in place over Government programs. As a consequence, although NMLS is fully funded by the taxpayer and its stated roles and functions are predominantly administrative in nature, its operations are not subject to the scrutiny normally associated with the expenditure of public monies.¹⁰⁵

The Opposition's interest in NMLS was also a result of their belief that the government was using the unit to target them through the media.¹⁰⁶ The leader of the Australian Democrats, Senator Kernot (Queensland), defended her party's support of the Opposition's motion on several grounds. First, she argued that they were not seeking to question ministerial staff in the normal sense: it was the unusual nature of NMLS's responsibilities that opened it up to scrutiny. Second, she anticipated that units such as NMLS might be subject to audit in future under regulations that could be promulgated pursuant to a new audit bill, making inquiries by a Senate committee superfluous in future. Third, she pointed out the whole incident might never have arisen had the government responded to the Pearce report prepared in the wake of problems with the allocation of Pay TV licences (that involved ministerial staff in office of the Minister for Communications).¹⁰⁷ Nevertheless, Senator Kernot worried:

[w]e have seen from experience here that once something is done, irrespective of the assurances given—I acknowledge Senator Kemp's assurances—people with other motivations can always point to the precedent. Down the track, who will remember the facts of this debate and the assurances that were given?¹⁰⁸

Government Senator McMullan shared Senator Kernot's concern about calling the NMLS head before a Senate committee.¹⁰⁹ At the start of the estimates committee hearing in 1995, he commented 'I do want to put on the record how strongly I disagree with this process ... with the decision of the Senate to require the attendance of a ministerial staff member under the Members of Parliament Staff Act. I think it is a precedent that many people will regret before this is over'.¹¹⁰ Nevertheless the hearings went ahead.

Immunities and the Case of Witnesses before the Senate Select Committee on Print Media

In late 1993 the Coalition and Australian Democrats combined in the Senate to initiate an inquiry into suggestions that the government had given undertakings to foreign media

proprietors regarding ownership of Australian media assets, and to examine the role of the Foreign Investment Review Board (FIRB) in media ownership decisions.¹¹¹ The Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media sought evidence from former government ministers, public servants and members of the FIRB. The Committee became involved in a protracted wrangle about gaining access to documents that the government asserted contained commercial-in-confidence information. In the course of arguments about the various issues, it sought a number of legal opinions. One of these concerned whether members of the FIRB, believed to be 'paid advisers to government' and to be 'neither public servants nor statutory office holders' could be compelled by the Committee to appear as witnesses. The Advice of Mr David Jackson QC was that 'there is no reason why [such a witness] might not, by the procedure of Standing Order 34, be required to attend to give oral evidence'.¹¹² The individuals in question did indeed appear before the Committee,¹¹³ though not as a result of a Senate order, and with their evidence constrained by their decision to comply with directions made to them by the Treasurer regarding what evidence to divulge.¹¹⁴ The Senate chose not to further pursue them regarding evidence.

Immunities and the Case of the Community Grants Scheme

Senator Kernot's concerns about the NMLS case were not without foundation. A year earlier, the Opposition had sought to question staffers as part of a proposed Senate inquiry into the Community Grants Scheme administered by Minister for the Environment, Sport and Territories, the Honourable Ros Kelly (ALP, Canberra). There were two notable features of the Opposition's proposal. It was proposed to examine ministerial staff as witnesses, although the minister had accepted responsibility for the failures of her administration, and resigned. Despite this, commenting on the failure of the House of Representatives Standing Committee on Environment, Recreation and the Arts to call a member of the Minister's staff as a witness, Senator Hill (Liberal, South Australia) remarked 'he obviously should have been required to give evidence'.¹¹⁵ The Opposition also proposed to appoint a Commissioner, 'who is or has been a judge of a superior court, or is or has been a Senior Counsel', to assist the Committee, which would have been most unusual.¹¹⁶ The inquiry did not eventuate, but the Opposition had indicated that they believed there were circumstances well beyond those of the NMLS case in which the examination of ministerial staff by parliamentary committees would be appropriate.

Former Staff and Immunities

Adding to the complexity of the issue of the accountability of ministerial staff is the question of the status of different categories of individuals, apart from current public servants and ministerial staff. In particular, how should former ministerial staff and indeed former ministers be treated? Prime Minister Howard has argued that the 'convention' enunciated by Senator McMullan in 1995 'applies to people who may now be back in the Public Service but who were previously employed in a minister's office, particularly if

they were employed under the MoPS Act'.¹¹⁷ The Westminster conventions of government and parliamentary practice in Australia, however, really have nothing to say about former ministers or their staff. Indeed, former ministers have been summonsed by, and appeared before, a Senate Committee. In 1994, former ministers Mr Kerin and Mr Hawke responded to the summons of the Senate to appear before the Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media.¹¹⁸ They objected to appearing but in no way disputed the Senate's power to compel them to give evidence.¹¹⁹ The silence of Westminster conventions with regard to former officers has also been highlighted in a quite different context: the lack of any regulation or guidance on the employment of former ministers in areas related to past portfolio responsibilities.¹²⁰ Mr Howard's remark about former staff is understandable. If one is going to adhere to the principle that the actions of ministerial staff are the responsibility of the minister, then the current minister must arguably bear responsibility for the actions of former staffers.¹²¹ This indeed appeared to be the approach taken by Howard Government ministers in their evidence to the Senate Select Committee on a Certain Maritime Incident.¹²² It remains to be seen however whether people will be convinced that having ministers account for the actions of the staff of their predecessors will be regarded as adequate.

The Regulation of Ministerial Staff

It may be that one reason that the accountability of ministerial advisers is such an issue is that the conduct of ministerial staff is mostly unregulated. Under the MoPS Act, the Prime Minister establishes conditions of employment for all ministerial staff, on an individual basis. The Act does not require those conditions to take any particular form (though in May 2002 the Minister Assisting the Prime Minister for the Public Service Tony Abbott claimed that 'Ministerial staff agreements already require advisers to act with skill, discretion and integrity').¹²³ Ministerial staff are not subject to any equivalent of the Australian Public Service Code of Conduct that govern public servants under the *Australian Public Service Act 1999*, or the Parliamentary Service Code of Conduct governing parliamentary employees under the *Parliamentary Service Act 1999*.¹²⁴ There is no direct equivalent for staffers of the Australian Public Service Values that establish norms to underpin the way staff approach their work.

The main guidance given to ministerial staff lies in the Prime Minister's *Guide on Key Elements of Ministerial Responsibility*.¹²⁵ Section 9 of the *Guide* concerns 'ministerial staff conduct'. Most of its content pertains to conflict of interest issues. The *Guide* indicates for example that:

Members of staff must divest themselves, or relinquish control, of sensitive interests such as shares or similar interests in any company or business involved in the area of their minister's portfolio responsibilities.

Members of staff should not contribute to the activities of interest groups or bodies involved in lobbying the government, if there is any possibility that a conflict of interests or the appearance of such a conflict may arise.

Gifts, sponsored travel or hospitality should not be accepted if acceptance could give rise to a conflict of interests or the appearance of such a conflict.¹²⁶

In addition, ministerial staff have been required to disclose private interests for some time.¹²⁷ The Guide has not been without practical effect. The most prominent example of its operation was in 1998, when Federal Resources Minister Senator Warwick Parer sacked one of his advisers, Mr Bob Baudino, for holding shares in breach of the Ministerial Guide.¹²⁸

None of the guidelines contained in the Guidance on Caretaker Conventions are addressed specifically to ministerial staff. There are details on conduct of public servants, and some points specifically concerning DLOs. The guidelines mention limits to the provision of advice by the APS to ministers. Interestingly, the only explicit reference to ministerial staff states that, if there are any doubts about the appropriateness of responding to a ministerial request, 'agencies should discuss with the Minister *or his/her senior staff* the purpose for which the material is to be used' (emphasis added).¹²⁹ Far from restricting their activities, the guidelines effectively give ministerial staff a significant role adjudicating issues in relation to seeking APS advice during the caretaker period.

The main point to note is that, to the extent that ministerial staff have been regulated at all, it has been almost entirely to deal with possible conflicts between their individual self interest and the interests of their minister. None of the guidance has been directed at problems that might arise through the ministerial adviser's pursuit of what they perceive as the interests of their minister or their party.

Should Ministerial Staff be Regulated in any Way?

Every commentator and analyst seems to agree that ministerial staff have grown in importance in the policy process as they have grown in numbers. The more difficult question however is whether their raised profile warrants new rules to govern them. There is evidence that international practice is moving in this direction. It is probably also true to say that the role of ministerial staff in relation to the machinery of government in Australia has become a target for more sustained public scrutiny over the last ten years. The current public debate about the role of staff probably began with the Coalition Opposition's targeting of NMLS, but has been more significant during the federal travel rorts investigations in 1997 and the 'children overboard' affair in 2001–02. Yet the problems have been around for far longer.

Events surrounding the children overboard affair, it has been suggested, point to possible problems in the procedures being followed by ministerial staff, in their relations with

departmental officials, and internally within ministers' offices.¹³⁰ This has not been the first time that procedures in a minister's office have been the cause of or a factor in a political crisis. Indeed the description of events surrounding 'the VIP affair' of 1967 may seem familiar to those following the children overboard affair. The VIP affair concerned inaccurate answers given in parliament to questions about the use of aircraft for transporting MPs.¹³¹ After this embarrassing debacle, during which records were eventually provided that had initially been claimed not to have existed, Prime Minister Gorton reviewed what had happened:

[T]he affair convinced Gorton that senior public servants in the Prime Minister's Department and in the Prime Minister's office had been dishonest and, in covering up, had exposed Harold Holt to embarrassment and ridicule. His judgment was confirmed following an investigation of the files after he had become Prime Minister. The results were alarming. Some files had simply disappeared and, 'quite contrary to normal practice', almost no record had been kept of the handling of minutes and of other papers on the file, and no record had been retained of action taken. Replies to parliamentary questions had been amended or massaged to the point of providing incorrect answers. Denials had been issued that data existed when officials knew that it did, and there was evidence they had simply failed to act on information received.¹³²

Criticisms of the Keating Government's handling of the process of issuing of Pay TV licences also resembles events associated with the children overboard affair. In his report on the Pay TV incident, Professor Pearce noted that '... there appears to have been a breakdown in the system for bringing matters to the Minister's attention. At the very least, the recording of the movement of documents in and out of the Minister's Office was defective'.¹³³ The difference between incidents in the 1960s and the 1990s has been the increasing emphasis on the roles of ministerial staff in causing breakdowns in governing processes. These alleged problems in ministerial offices have led to suggestions that the roles of ministerial staff need to be clarified and perhaps in some way regulated. After the Pay TV licence affair, Senator Kernot argued:

... we have had a huge increase in the number of ministerial staff as compared with departmental staff. I am not saying that that is inappropriate; I am simply saying that there has been a real blurring of the lines as to what is appropriate responsibility for all these people, including ministers, and it is about time we sorted it out.¹³⁴

In the *Australian Financial Review* Geoffrey Barker recently remarked in similar terms:

[The government] massively expanded the role of ministerial staffers in interceding between ministers and bureaucrats and pressuring bureaucrats to tell ministers what they wanted to hear rather than what they should know.¹³⁵

The Public Service Commissioner has suggested that 'there is a case for some articulation of the values and code of conduct of ministerial officers'.¹³⁶ Public sector analyst and academic John Uhr put this in terms of needing

to carry forward the spirit of reform so that the kind of pretence to accountability can be more properly enacted by making sure that the people who are holding power and exercising the capacities as public decision makers, ministerial advisers, ... really own up when things don't go as planned ...¹³⁷

Dr Uhr had previously suggested that regulation should take the form of a code of ethics that covered both MPs and their staff, and a Parliamentary Integrity commissioner who would investigate 'alleged misconduct by elected members or their staff'.¹³⁸ An alternative, or complementary, approach, would be to have an officer who advised and educated ministerial staff and/or MPs, along the lines of similar officials in Queensland and overseas.¹³⁹ The current Minister Assisting the Prime Minister for the Public Service, Tony Abbott, however, is 'sceptical about new regulations which might turn out to be better at tripping conscientious people focussed on doing their job than trapping villains who know how to cover their tracks'.¹⁴⁰

Regulating Ministerial Staff: Overseas Approaches

Certainly the practice in some other countries is generally to regulate or guide ministerial staff more explicitly than in Australia. New Zealand, like Australia, has no framework for advisers, but that is not the case elsewhere. The UK *Code of Conduct for Special Advisers*, promulgated in July 2001, covers matters such as the tasks which special advisers can do, prevention of the use of resources for political party purposes, contact with the media, relations with the government party generally, and the holding by advisers of political party offices. (The UK Code is reproduced in full in Appendix 2.)¹⁴¹ It also establishes a complaints structure, stating that:

Any civil servant who believes that the action of a special adviser goes beyond that adviser's authority or breaches the Civil Service Code should raise the matter immediately with the Secretary of the Cabinet or the First Civil Service Commissioner, directly or through a senior civil servant.¹⁴²

Even prior to the Code's introduction, however, ministerial staff in the UK were not entirely unregulated. In particular there already existed a Ministerial Code and a Model Contract for Special Advisers, which, together with other policies, covered issues now consolidated in the Code of Conduct.¹⁴³ There are also proposals currently being considered in the UK for parliamentary regulation of the numbers of advisers: 'there should be a limit on the number of special advisers in each government, set by Parliament at the beginning of each new Parliament'.¹⁴⁴

In Canada, there is regulation of ministerial staff, but principally in relation to conflict of interest. This takes place under the *Conflict of Interest and Post-Employment Code for Public Office Holders*.¹⁴⁵ In some respects this is similar to the Australian arrangement. Unlike Australia, however, the Code is backed by the advice and reporting of the office of the Ethics Counsellor. Staff thus are subject to professional advice and scrutiny in a bid to ensure compliance with the Code.

The US is always difficult to compare with Australia, because its system of executive government is different from ours. Nevertheless, executive conduct is more tightly regulated than in Australia, with a legislative basis, and institutionalised ethics advice and support.¹⁴⁶ In the US current and former cabinet officials routinely appear as witnesses before Congressional committees, though there is a form of executive privilege which applies to the president and to the president's advisers. In the US also, the scope of the executive privilege exercised by the president is a perennial source of conflict not dissimilar to the conflict in Australia surrounding advisers.¹⁴⁷

Regulating Ministerial Staff: Possible Future Directions

All the above arrangements aim to regulate the staff. It might also be possible to approach some aspects of the problem through regulation of interactions with ministerial staff, rather than through the regulation of the staff themselves. The Public Service Commissioner recently outlined such a possibility, discussing the extent to which the Public Service Code of Conduct guides interaction between public servants and ministerial staff:

... we are looking at the guidelines on official conduct. The current guidelines are very brief on the relationship, and I think this is an area we need to expand upon to clarify for public servants their relationship with ministers ... there will be a lot of relationships between the minister's office and the staff of an organisation ... The relationships are between the staff and their secretary and between the secretary and the minister. Obviously, in making that relationship work, staff would normally expect that, when they are dealing with a minister's office, they will know what the minister is saying, that they will understand the requirements and that this approach will work very easily and properly. But I think there is a need within each agency to clarify the protocols of the relationship.¹⁴⁸

There are thus several different approaches that can be taken to defining or regulating the activities of ministerial staff. The question that remains is whether a government will decide it is worth pursuing one or more of these options. The existing avenue of scrutiny and accountability, currently almost unused, is the parliamentary one. This however is limited to gathering information, in contrast to regulatory structures such as those just described, which can have disciplinary consequences.

Time to Limit Executive Immunity to Parliamentary Scrutiny?

As public policy analyst Maria Maley has recently argued, it may be time to define the limits to the immunities able to be claimed by executive government, particularly in relation to advisers.¹⁴⁹ Should they be allowed to go so far as governments currently claim, allowing Cabinet to determine whether advisers will appear before a Senate Committee? During the controversy in 1995 over the NMLS, the Auditor-General commented that '[a]ll those who play a role in administrative decision making exercise public power and that

action, especially where public money is involved, should be open to public scrutiny'.¹⁵⁰ The Auditor-General had in mind particular organisations, but the principle could be applied more generally, or to actions rather than institutions. In the United States, it is known for executive staff to appear 'but decline to answer certain questions on the grounds of executive privilege'.¹⁵¹ Perhaps it is certain actions or conversations to which immunity attaches, rather than to persons or to an office (such as ministerial adviser).¹⁵²

One of the difficulties faced by the Houses in attempting to enforce their powers to compel the appearance of witnesses is that they are limited in what they can do to compel appearance. In particular, there exists a difficult ethical question of how to treat public servants who indicate that they have been instructed by their minister not to answer questions put by the Houses. In 1994, Australian Democrat Senator Kernot introduced a Bill that addressed this issue, the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994.¹⁵³ She noted that the 'prospect that the Senate might use its imprisonment power to obtain government documents has been very controversial',¹⁵⁴ and that 'it would be unjust for the Senate to impose a penalty on a public servant who, in declining to provide information or documents, acts on the directions of a minister'.¹⁵⁵

The Senate Committee of Privileges in its report on Senator Kernot's Bill agreed, pointing out:

that any attempt by a House of the Parliament to impose the extreme penalties of either gaol or a fine upon a public servant who obeyed a ministerial instruction not to comply with an order of that House or a committee, while the minister concerned was immune from its contempt powers, was untenable.¹⁵⁶

Despite this remark, the Committee concluded that:

if an order of a House or committee is not complied with by a public servant acting on the instructions of a minister, it is for the relevant House to take such action under its contempt powers as it considers appropriate in the circumstances.¹⁵⁷

Thus the Committee considered the exercise of its powers in such cases was untenable, but at the same time endorsed the very exercising of those powers.

It may be the Committee's position that is in fact untenable. It is worth considering exactly why it is sometimes claimed that public servants should not be confronted by the powers of the chambers of parliament. Implicit in the statement that one should not penalise a public servant who is acting on the directions of a Minister is a concession that the Minister has the legal authority to issue directions to someone to defy the Senate or House of Representatives. In making this concession, those who claim to be seeking to assert the power of the Senate are in fact deferring to the power of the executive and are encouraging the public servants (and probably ministerial staff) to do the same. This seems to rest uneasily with the Parliament's declarations on powers and immunities, and the limited case law that exists in this area.¹⁵⁸ As the Law Institute of Victoria once argued, if a public

servant is asked to choose between complying with a Minister's instruction and complying with a House's demands, they should be deferring to the House, not the executive.¹⁵⁹

Would the scenario be the same in the case of a ministerial adviser? This depends on whether a constitutional distinction can be drawn between public servants and ministerial staff, which was one of several issues relating to parliamentary powers over which the Clerks of the Houses disagreed in April 2002 when providing opinions to the Senate Select Committee on a Certain Maritime Incident.¹⁶⁰ Essentially, the Clerk of the Senate has argued no privilege attaches to ministerial staff:

... the Senate and comparable houses of legislatures have not recognised any immunity attaching to this category of office-holders. There is also no basis for supposing that they possess any legal immunity ...¹⁶¹

Having argued this legal position, the Clerk of the Senate also suggested that calling ministerial staff before parliamentary committees was a good idea:

... there is a strong case for subjecting ministerial personal staff to compulsion in legislative inquiries, on the basis that their role is manifestly now not confined to advice and personal assistance ... they act as de facto assistant ministers and participate in government activities as such ... Moreover, ministers no longer necessarily accept full responsibility for the actions of their staff ...¹⁶²

The Clerk of the House of Representatives accepted that there is precedent for the Senate to call anyone as a witness who is not a current member of the House. He however suggested that:

a reasonable case could be made out for the immunity operating in respect of Ministers who are current Members of the Parliament also applying to their staff, based on a Minister's need for the assistance of staff to perform their roles and functions, especially in the modern complex world of government and administration.¹⁶³

It remains unclear whether there is any legal basis to draw this distinction between ministerial staff and public servants. It also supposes that ministers take full responsibility for the conduct of their staff, which these days is equally unclear.¹⁶⁴ The law to date, such as it is, seems to lean more toward the interpretation of the Parliament's powers favoured by the Clerk of the Senate. It is nevertheless far from clear whether or when the Senate will decide to press the matter to the point where a court will resolve any of the issues involved.

Why Should Ministerial Staff have Immunity?

It is worth asking why the 'McMullan principle' of ministerial staff accountability is worth preserving.¹⁶⁵ A March 2002 newspaper editorial in the wake of the Victorian

government's refusal to let ministerial staff appear before a parliamentary committee commented:

The question is whether, even if such a convention does exist, is it still defensible? The definition of public servant has been blurred in recent times. Whether they are career public servants or partisan advisers, the immediate personal staff of ministers are paid by the taxpayer and as such should be accountable to the taxpayer.¹⁶⁶

No-one has suggested that parliaments would actually censure, penalise or reward ministerial staff according to the content of any information they might disclose under questioning. It is not proposed that they be on trial. The proposal is merely that they provide information. To quote Senator Rod Kemp (Liberal, Victoria) when he was in opposition, 'There is no precedent being established here—except the precedent of accountability'.¹⁶⁷ Over 25 years ago this same debate took place over the appearance of departmental secretaries before parliamentary committees. Many of the same arguments were made then as are now being made regarding ministerial staff. As professor of politics Patrick Weller pointed out during evidence in the Senate Select Committee Inquiry into a Certain Maritime Incident, the additional transparency that came with making departmental secretaries available to parliamentary committees was 'probably desirable' and it had not damaged the machinery of government.¹⁶⁸ Professor Weller also highlighted the link between the growth in the role of ministerial staff and the issue of accountability. He pointed out that it can no longer be assumed that ministers can speak for their staff on issues relating to procedure:

if secretaries of departments can be asked to appear before your committee and asked what they told ministers then equally ministerial staff should be able to be called before the committee and asked what they told ministers, because we can no longer assume that telling a minister's staff is telling a minister.¹⁶⁹

Of the participants in parliamentary debates on these issues, Liberal Senator Hill has probably given the clearest indication that the immunity of the executive might need to be tempered when it comes to ministerial staff, if executive accountability to parliament is to remain credible. It was Senator Hill who in 1994 led the Opposition's unsuccessful push to have ministerial staff answer questions in relation to the Community Grants Scheme.¹⁷⁰ On that occasion he argued it was necessary to seek evidence from staffers following the minister's resignation because 'we are determining the proper response of the Senate in what amounts to a prima facie case of political corruption'.¹⁷¹ He reasoned that this involved doing 'everything reasonably possible to bring the government to account for improper conduct in the administration of the public purse'.¹⁷² Eight years later during a discussion regarding the children overboard incident in estimates hearings, he was involved in the following interchange:

Senator Faulkner: What is going to be your approach—and Mr Scrafton is just one example—if, perchance, Mr Scrafton [as a former MoPS employee] were to be invited by the Senate select committee to provide evidence on this or any other matter?

Senator Hill: I would defer ... to a whole of government position on that. To my mind it is treading on very dangerous ground. On the other hand, that must be weighed against the benefit of getting as much relevant information as possible on the public record. I have certainly not been party to a discussion yet on how we should weigh that balance. I will be doing that in due course if the committee gives an indication that it wishes to call MOPS staffers.¹⁷³

In both 1994 and again in 2002, the question was one of how to ensure that 'as much relevant information as possible' was presented to the parliament (and, in both cases, the mechanism was to be a Senate committee). In these cases, as Professor Weller also indicated, this would mean putting questions to ministerial staff.

Should there be any restrictions governing the appearance of ministerial staff? Information could be provided by ministerial staff on the same basis as public servants currently provide information to parliamentary committees. Those limitations, set out in the *Government Guidelines for Official Witnesses*, state:

There are three main areas in which officials need to be alert to the possibility that they may not be able to provide committees with all the information they seek, or may need to request restrictions on the provision of such information. These are:

matters of policy;

public interest immunity; and

confidential material where in camera evidence is desirable.¹⁷⁴

As mentioned earlier, guidelines such as these have not been set explicitly for ministerial staff, but they would seem readily applicable were ministerial staff to be called to give evidence. In these circumstances, it is hard to see how the calling of ministerial staff, following similar guidelines to those followed by public servants, would undermine ministerial responsibility. Rather, as Senator Kemp recognised, it might be said to enhance it, because it might help strengthen what is regarded as one of the weaker links in the system as it currently stands: the capacity of the parliament to call the executive to account.¹⁷⁵

Whether the desire for improved accountability will mean appearance before parliamentary committees remains, as always, a political question. Ministerial staff will appear when one side of politics finally finds their absence from hearings politically intolerable both in the short term and the long term. In the short term, a major party will have to be convinced staffers have evidence that cannot be acquired other than by them answering questions in committee, and that the evidence will cause their rivals political damage. However they will have also to be convinced that in the long-term, the electoral benefits of being the party that introduced improved transparency will be worth the pain when their rivals one day inevitably turn this weapon of accountability on them. And when these two conditions are met, the parties or individuals holding the balance of power in the

Senate will have to agree with the major party's assessment.¹⁷⁶ This set of conditions may take some time to coincide. When they do, however, the result is unlikely to be earth shattering. The appearance of ministerial staff before a parliamentary committee will, like the appearance of public servants, quickly become standard practice. It will, like the appearance of public servants, be guided by a set of procedures that ensure the executive answers to the parliament on matters of policy. And it will, like the appearance of public servants, be likely to enhance rather than undermine ministerial accountability.

Postscript

In late May 2002, the Senate Select Committee on a Certain Maritime Incident resolved on an unusual course of action. Faced with the continued refusal of some potential witnesses to respond to invitations to appear, and with correspondence from ministers indicating others would not appear, the Committee decided not to directly confront the prospective witnesses. It instead resolved:

to appoint an Independent Assessor to perform the following task and report to the committee:

To assess all evidence and documents relevant to the terms of reference of the committee, obtained by the committee or by legislation committees in estimates hearings, to:

- (a) determine what evidence should be obtained from the persons referred to in paragraph (1) [Former minister Reith and his advisers], and what questions they should answer, to enable the committee to report fully on its terms of reference; and
- (b) formulate preliminary findings and conclusions which the committee could make in respect of the roles played by those persons with the evidence and documents so far obtained.¹⁷⁷

However at the same time the committee essentially capitulated in the face of the executive's determination, and confirmed the previously expressed view that 'it would be unjust for the Senate to impose a penalty on an officer who declines to provide evidence on the direction of a minister'.¹⁷⁸ A lawyer (Stephen Odgers SC) was duly recruited to fulfil the role of 'Independent Assessor',¹⁷⁹ but it is not clear what an outside lawyer might achieve that would not be ably and properly achieved by the Committee itself. In this author's view, the approach taken by the Committee continues to give the executive the upper hand in its tussle with the Senate, despite the government lacking any unequivocal legal basis to its stance. Until one of the Houses tackles a government over ministerial staff, using the full force of the powers available to it, ministerial staff will remain in the accountability vacuum so condemned by oppositions and beloved of governments.

Conclusion

The number of staff working in ministers' offices has been growing steadily. It has at least doubled in thirty years, though the growth has been relatively constant, and not the product of sudden 'explosions' in numbers that some commentators claim have occurred. Whether this might mean that the numbers of staff should be revisited is not clear. The issue, after all, is not about numbers but about accountability. Reform might mean a renewed examination of the process for managing ministerial staffing levels, rather than of the particular numbers. It might be desirable to look at a proposal similar to the one currently in circulation in the UK, for parliament to fix, and periodically to review, staffing levels, rather than leaving the decision in the hands of the government or the Prime Minister.¹⁸⁰

The public's growing awareness of the activities of ministerial staff is likely to become a factor in driving the major parties' attitudes toward regulating this group of people. The opinion of analysts and the media seems increasingly to be that staffers' lack of accountability sits uneasily with both their power and their public position. The question is what can or will be done to bring accountability and power back into balance. Oppositions seem to step back from forcing ministerial staff to appear before Senate committees almost as often as they receive legal advice confirming that they have the power to take that step. Their reluctance is to a certain degree the result of a partisan calculation: once they get what they want in opposition, they will be unable to resist the same treatment when in government. Beyond this, there are genuinely held concerns about the impact on government of advisers appearing as witnesses before the Senate. Anyone doubting the genuineness of this concern should consider how reluctant was the leader of the Australian Democrats—hardly a party that hesitates to take a strong line on scrutiny of the executive—to demand the appearance of the head of NMLS (discussed earlier).

Nevertheless, these concerns do not address the accountability question. Ministers take only limited responsibility for their staffers' actions, while the problem of how to examine the actions of staffers of former ministers is even more acute. Put most simply, if ministerial staffers are more than merely their bosses' ciphers—and the general view is that they are—then their actions must be more transparent than is currently the case. There is a range of mechanisms that might improve on the current situation, for example:

- in certain circumstances calling of staffers as witnesses to Parliamentary committees, on a similar basis to the appearance of public servants
- insertion of binding conduct-related clauses into the Members of Parliament (Staff) Act (that might parallel Public Service Act clauses)
- transparency of ministerial staff contracts
- Parliamentary regulation of numbers and/or conditions of employment of ministerial staff, or

- establishment of a complaints review process beyond merely review by the Prime Minister.

The first issue that will need to be settled, however, is whether any of the major parties wants to drive significant change to the accountability of ministerial staff in our parliamentary system.

Endnotes

1. *Senate Select Committee on a Certain Maritime Incident, Hearings*, 18 April 2002, p. 1203.
2. *ibid.*, p. 1218.
3. Victoria. Legislative Assembly, *Debates*, 20 March 2002, p. 376. See also Ewin Hannan, 'Hypocrisy muddies Labor's transparency credentials', *The Age*, 7 March 2002.
4. Anne Tiernan, 2001, 'Problem or Solution? The Role of Ministerial Staff', in Jenny Fleming and Ian Holland (eds), *Motivating Ministers to Morality*, Ashgate, Aldershot, 2001, p. 92; Patrick Weller, *Australia's Mandarins: the Frank and the Fearless?* Allen & Unwin, St Leonards, 2001.
5. The MoPS Act was introduced by the Hawke government partly to regularise the basis on which ministerial staff were employed, and partly to provide protection to public servants who took positions in ministerial offices, by giving them a legislated framework within which they could move between ministerial service and public service.
6. Senate Estimates Committee D, *Additional Information Received*, Volume 1, November 1990, p. 136.
7. The Hon. Dr D. Kemp, House of Representatives, *Debates*, 4 February 1997, pp. 108–9.
8. For description see James Walter, *The Ministers' Minders: Personal Advisers in National Government*, Oxford University Press, Melbourne, 1986; and RFI Smith, *Ministerial Advisers*, Ministers and the Administration Research Paper No. 5, Royal Commission on Australian Government Administration, 1974–76.
9. Walter, *op. cit.*, pp. 129–76; Maria Maley, 'Conceptualising Advisers' Policy Work: The Distinctive Policy Roles of Ministerial Advisers in the Keating Government, 1991–96', *Australian Journal of Political Science*, vol. 35, no. 3, 2000, pp. 449–70.
10. Smith, *op. cit.*, p. i.
11. Walter, *op. cit.*, p. 160.
12. *ibid.*, pp. 150–7.
13. Maley, 'Conceptualising Advisers' Policy Work', *op. cit.*, p. 454.
14. Clerk of the Senate, Correspondence to the Senate Select Committee on a Certain Maritime Incident, 22 March 2002, p. 4, to be included in the Report of the Committee.
15. Tiernan, *op. cit.*, p. 102.

16. John Kerin, 'Ministerial advisers know the truth about boat saga', *The Australian*, 19 February 2002; Kirsten Lawson, 'Children-overboard affair looking like a conspiracy now', *Canberra Times*, 23 February 2002; Michelle Grattan, 'Inquiry threat to "overboard" staff', *Sydney Morning Herald*, 13 March 2002.
17. Tiernan op. cit., p. 100.
18. See, e.g. The Auditor-General, *National Media Liaison Service: A Loophole in Accountability? Audit Report No.17 1994–95*, AGPS, Canberra. See also discussion later in this paper.
19. Senate, *Debates*, 27 October 1982, p. 1844; 10 November 1982, p. 2108; House of Representatives, *Debates*, 21 October 1982, p. 2162; 28 October 1982, p. 2696.
20. Graham Freudenberg, *A Certain Grandeur: Gough Whitlam in Politics*, Macmillan, Melbourne, 1977, pp. 319–24.
21. Ian Hancock, *John Gorton: He did it his way*, Hodder, Sydney, 2002; "'Ruthless, cold-blooded": Sacked minister accuses Gorton's secretary', *Daily Mirror*, 13 November 1969.
22. Walter, op. cit., p. 42.
23. *ibid.*, pp. 69–75.
24. Freudenberg, op. cit., p. 256; Supreme Court of New South Wales, *Swearing In Ceremony of The Honourable J J Spigelman QC as Chief Justice of The Supreme Court of New South Wales*, Monday 25 May 1998, Cited: http://www.agd.nsw.gov.au/sc/%5Csc.nsf/pages/cj_swearin, accessed May 2002.
25. Smith, op. cit., Appendix 2.
26. Walter, op. cit., pp. 78–85.
27. Mark Westfield, 'The men who sank John Stone', *Australian Business*, 25 November 1982, p. 31, cited in Walter, op. cit.
28. Tony Walker, 'The big boys behind Beazley', *Australian Financial Review*, 6 May 2000.
29. Or the 'Manchu Court', as Keating described Peter Barron and another of Hawke's advisers, Bob Hogg. See Michael Gordon, *A True Believer. Paul Keating*, University of Queensland Press, St Lucia, 1996, p. 125.
30. Geoff Kitney, 'How Hawke rules, OK?', *National Times*, 11 May 1984; Walter, op. cit., pp. 103–110.
31. Don Watson, *Recollections of a Bleeding Heart: A Portrait of Paul Keating PM*, Knopf, Milsons Point, 2002, p. 220.
32. *ibid.*, p. 385.
33. Stephen Mills, *The Hawke Years: The Story from the Inside*, Viking, Ringwood Vic., 1993, preface.
34. John Halligan and John Power, *Political Management in the 1990s*, Oxford University Press, Melbourne, 1992, p. 81.

35. Examples include Senator the Hon. R. Kemp, Senate, *Debates*, 28 November 1990, p. 4686; Mr EC (Ted) Mack, House of Representatives, *Debates*, 22 February 1994, p. 1001; Rt Hon. Ian Sinclair, House of Representatives, *Debates*, 21 February 1994, p. 950; Senator Andrew Murray, 'Ministerial advisers must account for their actions', *The Canberra Times*, 9 April 2002.
36. This issue is discussed in more detail in Maria Maley, 'Too Many or Too Few? The Increase in Federal Ministerial Advisers 1972–1999', *Australian Journal of Public Administration*, vol. 59, no. 4, 2000, pp. 48–53.
37. Mr P. Andren, House of Representatives, *Debates*, 17 February 2000, p. 13 854; Senator the Hon. J. Faulkner, Senate, *Debates*, 3 April 2000, p. 13 206.
38. The exclusion of consultants is necessary to maintain long-run comparability of the data in this figure. It does however mean that the level of advisory capacity available to ministers in the later Hawke and Keating governments is underestimated by up to around 40 staff. See, e.g. Senator the Hon. N. Bolkus (ALP, South Australia), Senate, *Debates*, 13 August 1991, p. 173. The problem does not arise in Figure 1, however, in which consultants have been included.
39. These figures slightly underestimate the staff allocations, as they do not count all vacant positions. The numbers of advisers were drawn from Maria Maley, 'Too Many or Too Few', op. cit., pp. 48–53, Tables 4 and 6. Maley's method was applied to 2001 data by the author.
40. Figures derived by taking data from Maley, 'Too Many or Too Few?', op. cit., Tables 3 and 5, and deducting the numbers of DLOs, derived from the Ministerial Directories for 1995, 1996 and 1999 (DLOs were not included in the original data for 1981 and 1983). 2001 result arrived at by applying Maley's methodology to the May 2001 Parliament House *Communications Directory*.
41. Figures derived by adding counts of parliamentary secretary staff and all DLOs to the above figure. Estimate of staffing for parliamentary secretaries in 2001 was adjusted for differences in coverage between 1999 *Ministerial Directory* and 2001 *Communications Directory*. Staff not attached to particular ministers were excluded as uniform data on these was not available. The figures therefore do not include members of the Ministerial Media Group or the National Media Liaison Service under Labor, or the Government Information Unit, Cabinet Policy Unit or Government Members' Secretariat under the Coalition.
42. On Fraser see Pat Weller, *Malcolm Fraser PM*, Penguin Books, Ringwood Vic., 1989, pp. 22–5; on Keating see John Halligan, 'Labor, The Keating Term and the Senior Public Service', in Gwynneth Singleton (ed.) *The Second Keating Government*, Centre for Research in Public Sector management, University of Canberra / Institute of Public Administration Australia, Canberra, 1997, p. 54.
43. DLOs include staff titled Departmental Liaison Officer, Assistant Departmental Liaison Officer, Departmental Officer or Escort Officer.
44. *House of Representatives Practice*, 4th edition, Department of the House Of Representatives, Canberra, 2001, p. 69.
45. Ministers without portfolio date back to the first Barton Ministry, when former Tasmanian Premier Sir Philip Fysh held such a role; the terminology of assistant minister dates to Fisher's Ministry of 1914, in which Jens Jensen, Hugh Mahon and Senator Edward Russell were so

- designated. See Bob Bennett, 'Ministers of State and Other Legislation Amendment Bill 1999', *Bills Digest no. 110*, Department of the Parliamentary Library, 1999-2000, p. 5.
46. *Votes and Proceedings of the House of Representatives*, 21 September 1938, p. 188.
 47. Claude Majeau, 'A Question of Luck: The Job of a Parliamentary Secretary', *Parliamentary Government*, vol. 4, no. 3, 1983, pp. 3–6; Miriam Vanderhoff-Silburt, 'The Role of Parliamentary Secretaries', *Canadian Parliamentary Review*, vol. 6, no. 4, 1984, pp. 6–9.
 48. *House of Representatives Practice*, 2nd edition, Department of the House of Representatives, Canberra, 1989, p. 109. Prime Minister Malcolm Fraser had indicated his intention to appoint two parliamentary secretaries when the Parliamentary Secretaries Bill 1980 was being debated: House of Representatives, *Debates*, 26 November 1980, p. 81. Sometime later a third appointment was also made: see House of Representatives, *Debates*, 7 September 1982, p. 1099.
 49. The three were the Parliamentary Secretary for Justice (Senator M. Tate, Tasmania), the Parliamentary Secretary for Local Government (Senator M. Reynolds, Queensland), and the Parliamentary Secretary for Defence Science and Personnel (Ms R. Kelly, Canberra). These three appointments were, however, only short-term. The government used the title only for a period of two months, until amendments to the *Ministers of State Act 1952* was amended to allow a two-tiered system of ministers, and the appointment of three additional ministers. Once the amendments were passed, the three parliamentary secretaries were re-designated as ministers.
 50. See resolutions of the House of Representatives in this regard, 9 May 1990 and 16 October 1991.
 51. *House of Representatives Practice*, 4th edition, op. cit., p. 69; The Hon. R. Hawke, House of Representatives, *Debates*, 8 May 1990, p. 13; *Ministerial Directory*, March 1992, pp. 32–9.
 52. Senate, *Debates*, 21 December 1990, pp. 6388–95; *Ministerial Directory*, October 1991; Senate, *Debates*, 3 April 2000, pp. 13 208.
 53. See, e.g. Senate, *Debates*, 3 April 2000, pp. 13 208.
 54. Senate, *Debates*, 31 March 1999, pp. 3688–9.
 55. Smith op. cit., Appendix 2, Table 2.
 56. House of Representatives, *Debates*, 21 February 1994, p. 944.
 57. Senate, *Debates*, 31 March 1999, pp. 3688–9. One recent newspaper article suggests the contrast between Labor and Coalition use of DLOs was greater: 42 under Labor, 72 under the Coalition. These figures may reflect different measurement dates to those used here: Kate Legge, 'The new class of untouchables', *The Australian*, 25 March 2002.
 58. Senate, *Debates*, 31 March 1999, p. 3688.
 59. Mr D. Cameron, House of Representatives, *Debates*, 8 April 1981, p. 1455. The Opposition disputed the numbers involved. Mr Hayden suggested that while the originally staffing level had indeed been eight in 1979, it had grown to 18 by 1981: House of Representatives, *Debates*, 8 April 1981, p. 1448.

60. The Hon. F. Walker, House of Representatives, *Debates*, 5 December 1994, p. 3958. Note that NMLS had 22 or 23 staff in 1994, but only 12 were media professionals, with the others being administrative support. The distinction between ministerial media advisers and the MMG existed largely only on paper. Thus at the time that there were on paper 17 media advisers and 15 members of MMG, the *Ministerial Directory* shows the Keating ministry having 26 media advisers allocated to individual ministers plus a press office of five in the PM's office, with the MMG having only one officer not attached to a minister: its director Mr David Epstein. Both sets of numbers add up to the same total of 32, but they make clear that MMG was not functioning as a discrete entity. See also *Commonwealth Government Directory March–May 1994*, AGPS, Canberra, p. 53.
61. Senator Ellison, Senate, *Debates*, 3 April 2000, pp. 13206–9; *Parliament House Communications Directory*, August 1999. Fraser had three press secretaries in 1979; Hawke had three in a unit of five members in 1991: See *Ministerial Directories*, March 1979; April 1991.
62. The absence under the Howard Government of a parallel organisation to NMLS is a controversial issue. The Coalition has indicated it has no parallel organisation to the NMLS (e.g. Senator the Hon. R. Hill [Liberal, South Australia], Senate Finance and Public Administration Committee, *Estimates Hearings*, 22 October 1996, p. 554; Senator the Hon. I. Campbell [Liberal, Western Australia], Senate, *Debates*, 29 September 1997, p. 7065). It has however had a network of additional media advisers in the offices of six ministers, one in each State (see, e.g. Senate Finance and Public Administration Committee, *Estimates Hearings*, 4 June 1997, p. 463; Senate, *Debates*, 3 April 2000, pp. 13 206–9). Questioned about the duties of the second media staffer, Senator W. Parer (Liberal, Queensland, in whose office one such person was located) commented that the person 'keeps his eye on things relating to Queensland in regard to federal issues ...' (*Estimates Hearings*, 4 June 1997, p. 464), 'keeps his finger on the electoral pulse in the state and reports to me...' (*ibid.*, p. 466), that his role was different to that of his other media adviser (*ibid.*, p. 466), that the person 'actually became a media person in the state of Queensland' (*ibid.*, p. 469) and that the person was sending newspaper clippings, transcripts and tapes to Canberra, including to the Prime Minister's office (*ibid.*, p. 470). Senator Hill had previously agreed that 'the duties of those [additional] media advisers relate to the whole of government rather than necessarily to the minister they have been allocated to' (Senate Finance and Public Administration Committee, *Estimates Hearings*, 22 October 1996, p. 553), while Minister the Hon. D. Jull (Liberal, Fadden) that day added that 'the entitlement of a second media adviser is part of a strategy to provide additional media resource in each state to promote coordination of media relations' (*ibid.*, cited by the Chair of Committee, p. 663).

In addition to these six additional media staff, the Government Members' Secretariat also provides some media-oriented support, particularly in terms of advice, training and production of materials for members to distribute. They would provide assistance with press releases (Senate Finance and Public Administration Committee, *Estimates Hearings*, 18 September 1996, p. 199) and provision of newsletters (*ibid.*, p. 196). See also Louise Dodson, 'Once were Animals: Howard's farm denial', *Australian Financial Review*, 5 June 1998; Verona Burgess, 'Government sets up secret media watch', *Canberra Times*, 6 June 1998.

Taken together, the work of the additional media officers and the Government Members Secretariat is essentially the same as some of the official functions of the NMLS: 'to provide and coordinate the provision of accurate and timely information on Government policies and programs throughout Australia' (Senator the Hon. G. Richardson [ALP, New South Wales], Senate, *Debates*, 16 August 1991, p. 619); and 'to monitor local media to provide media summaries' (Senator the Hon. N. Bolkus, Senate, *Debates*, 12 November 1992, p. 3119).

63. Senate, *Debates* 15 May 1991, pp. 3445–6; Senate, *Debates* 8 March 1999, p. 2430.
64. James Walter, 'Prime Ministers and their Staff', in Pat Weller (ed.), *Menzies to Keating: The Development of the Australian Prime Ministership*, Melbourne University Press, Melbourne, 1992, p. 54.
65. See *Ministerial Directories*, August 1983; October 1990; October 1995; September 1999. These numbers may exclude vacant positions. For example, the official number for Howard's office was 38 in October 1999, but one position was vacant. Senate, *Debates*, 3 April 2000, p. 13 206.
66. Walter, op. cit., p. 98.
67. *ibid.*, p. 53.
68. *ibid.*, p. 79.
69. *ibid.*, pp. 95, 97.
70. The top two classifications were Principal Adviser and Senior Adviser. The figures are based on analysis of the answer to a parliamentary question: House of Representatives, *Debates*, 17 February 2000, p. 13 854.
71. Senator the Hon. N. Minchin (Liberal, South Australia), Senate Finance and Public Administration Committee, *Estimates Hearings*, 3 June 1998, pp. 300, 310; Senator E. Abetz (Liberal, Tasmania), Senate Finance and Public Administration Committee, *Proof Estimates Hearings*, 19 February 2002, p. 183. Figures discussed in estimates hearings in 1995 appear to confirm the stability of the ratio at least as far back as 1983: Senators R. Kemp and B. McMullan, Senate Finance and Public Administration Committee, *Estimates Hearings*, 9 February 1995, p. 73. There has been some debate about whether the ratio was maintained on the basis of numbers of staff, cost of staff, or both. Senator the Hon. R. Ray (ALP, Victoria) suggested that the agreement between the parties in 1983 had been based on both, and was concerned that the commitment to a fixed ratio of numbers had been kept, but the agreement on cost was not: see Senate Finance and Public Administration Committee, *Estimates Hearings*, 3 June 1998, p. 300.
72. Senator the Hon. J. Faulkner, Senate Finance and Public Administration Committee, *Estimates Hearings*, 3 June 1998, pp. 300, 309–10.
73. Walter, op. cit., pp. 52–4.
74. Tiernan, op. cit., p. 92; Maley, 'Too Many or Too Few?', op. cit., p. 48.
75. Smith, op. cit., p. 2.

76. M. Roberts, *Ministerial Advisers: A Background Paper*, Ministers and the Administration Research Paper No. 6, Royal Commission on Australian Government Administration, 1974–76, p. 5.
77. Michael Sexton, *Illusions of Power: The Fate of a Reform Government*, George Allen & Unwin, Sydney, 1979, p. 194.
78. Smith, op. cit., pp. 3–4; Pat Weller, *Australia's Mandarins: The Frank and the Fearless?* Allen & Unwin, St Leonards, 2001.
79. Hon. J. Howard, 19 June 2001 cited in Maria Maley, 'Australian Ministerial Advisers and the Royal Commission on Government Administration', *Australian Journal of Public Administration*, vol. 61, no. 1, 2002, p. 106.
80. See, e.g. Senator the Hon. R. Ray, Senate Finance and Public Administration Committee, *Estimates Hearings*, 7 February 2002, p. 20.
81. See Weller, op. cit., p. 103.
82. Delmer Dunn, *Politics and Administration at the Top: Lessons from Down Under*, University of Pittsburgh Press, Pittsburgh, 1997, p. 107; Editorial, 'The silence of the backroom boys', *The Sydney Morning Herald*, 1 April 2002.
83. 'Senate Committees', *Senate Brief* No. 4 1998, cited: <http://www.aph.gov.au/Senate/pubs/briefs/brief4.htm>, accessed 20 March 2002; 'Parliamentary Privilege', *Senate Brief* No. 11 1998, cited: <http://www.aph.gov.au/Senate/pubs/briefs/brief11.htm>, accessed 20 March 2002; 'Orders for Production of Documents', *Brief Guides to Senate Procedure* No. 11 November 2001, cited: <http://www.aph.gov.au/Senate/pubs/guides/briefno11.pdf>, accessed 20 March 2002.
84. The use of the word 'privilege' itself often confuses matters. This is in part because of a confusion of 'parliamentary privilege' with 'executive privilege', the latter, as Maley argues, being an essentially American doctrine that governments have used to prevent staff in the executive arm of government from appearing before the Senate. Talk of 'executive privilege' mistakenly encourages the perception that ministers have some discretionary advantage over others in their dealing with the parliament, rather than acknowledging that privileges attach to the parliament, and it is for the parliament to determine whether certain immunities should be granted to executive functions. See Maria Maley, 'Political advisers should be protected', *Canberra Times*, 19 March 2002; 'Parliamentary Privilege', *Senate Brief No. 11*, 1998, cited: <http://www.aph.gov.au/Senate/pubs/briefs/brief11.htm>, accessed 20 March 2002; Senator Wright, Senate, *Debates*, 17 February 1977, p. 175.
85. John Nethercote, 'Chain of command under the spotlight', *Canberra Times*, 17 April 2002.
86. On the appearance of witnesses, *Odgers' Australian Senate Practice* states:

Although the question has not been adjudicated, there is probably an implicit limitation on the power of the Houses to summon witnesses in relation to members of the other House or of a house of a state or territory legislature. (9th edition, p. 55).

In the case of documents the exception pertains to Cabinet papers, though even this exemption is limited. See John McMillan, 'Parliament and Administrative Law', in Geoffrey Lindell and Robert Bennett (eds.), *Parliament: The Vision in Hindsight*, The Federation Press,

- Annandale NSW, 2001, pp. 369–72; Christos Mantziaris, 'Egan v. Willis and Egan v. Chadwick: Responsible Government and Parliamentary Privilege', *Research Paper no. 12*, Department of the Parliamentary Library, 1999–2000; *R v. Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.
87. Enid Campbell, 'Parliamentary Privileges', *Research Paper no. 1*, Department of the Parliamentary Library, 2000-01. See also John Uhr, *Deliberative Democracy in Australia*, Cambridge University Press, Cambridge, 1998, pp. 172–3.
 88. See, e.g. Tony Walker, 'Coercion by committee', *Australian Financial Review*, 26 February 2002.
 89. 16 July 1975, Senate, *Journals*, no. 87, p. 831.
 90. *Odgers' Australian Senate Practice*, 10th edition, Department of the Senate, Canberra, 2001, Section 19.6.
 91. McMillan, 'Parliament and Administrative Law', op. cit., pp. 369–72.
 92. Senator B. McMullan, Senate, *Debates*, 7 February 1995, p. 610. He was recently quoted by Prime Minister Howard in defence of his (Howard's) Government's approach: House of Representatives, *Debates*, 12 March 2002, p. 995.
 93. Gabrielle Costa, 'ALP gags advisers on Bracks' mate affair', *The Age*, 7 March 2002. See also Victoria, Legislative Council, Select Committee on the Urban and Regional Land Corporation Managing Director, *First Interim Report on the Urban and Regional Land Corporation Managing Director*, March 2002. Cited: http://www.parliament.vic.gov.au/council/Reginal_Land_Commitee/default.html, accessed 26 April 2002.
 94. See Senate, *Debates*, 15 July 1975, pp. 2729–30.
 95. Senator the Hon. R. Wright, Senate, *Debates*, 17 February 1977, pp. 175–9. The unusual feature of Senator Wright's action is that it was undertaken while he was a member of the government of the day. Such moves have otherwise invariably come from the opposition ranks. Wright's action probably reflects the fact that he 'devoted the whole of his parliamentary career to attacking encroachments of the Executive on the parliamentary arena', a commitment which led him to cross the floor many times (Senator J. Watson [Liberal, Tasmania], Senate, *Debates*, 8 May 1990, p. 30). The fact that this motion lapsed probably reflects a lack of support for the proposal from his colleagues, as they were in government at the time.
 96. *Odgers' Australian Senate Practice*, 10th edition, op. cit., p. 493. The law governing conflict between parliament and executive with respect to the production of documents has been adjudicated in some respects in two cases: *Egan v. Willis* (158 ALR 527) and *Egan v. Chadwick* (NSWCA 176). See Mantziaris, op. cit.
 97. Senate, *Debates*, 15 July 1975, pp. 2729–30.
 98. *Odgers' Australian Senate Practice*, 10th edition, op. cit., p. 489.
 99. Department of the Prime Minister and Cabinet, *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*, November 1989.

100. Senate Estimates Committee D, *Estimates Hearings*, 5 October 1989, pp. 103, 186–214.
101. Both Mr Parks and Mr Epstein were Directors of the Ministerial Media Group, and their salaries were paid in that capacity. They also had responsibility for the operations of the NMLS. Senate Estimates Committee D, *Estimates Hearings*, 5 October 1989, pp. 186.
102. See Senate, *Debates*, 7 February 1995, pp. 606, 616.
103. Senator C. Kernot, Senate, *Debates*, 7 February 1995, p. 613.
104. Senator R. Kemp, Senate, *Debates*, 7 February 1995, p. 607. Senator Kemp's quoting of the document tabled by Senator Bolkus did not, however, tell the whole story. The brief to provide 'accurate and timely information on government policies' was only one of NMLS's official functions. The full description was:
 - (a) To provide accurate and timely information on Government policies and programs to the media throughout Australia as well as information on policies to interest groups within electorates.
 - (b) Representatives in each of the State capitals, Darwin and Townsville, should co-operate with Ministerial staff to co-ordinate media arrangements but not have direct responsibility for arranging itineraries.
 - (c) State representatives are to provide local members of all Parties with details of Government programs.
 - (d) Representatives will not work with local or state Party branches and will not be involved in Party programs nor electoral campaigning.
 - (e) To co-ordinate the distribution of detailed information on Government policies and programs from the information units of various departments to the local media.
 - (f) To monitor local media to provide media summaries. Monitoring, however, is secondary in importance to active information dissemination.(Senator the Hon. N. Bolkus, Senate, *Debates*, 12 November 1992, p.3119). Thus there were ministerial and party-based functions as well as government information functions.
105. The Auditor-General, *op. cit.*, p. 1.
106. Senator R. Kemp, Senate, *Debates*, 7 February 1995, pp. 607–8.
107. In 1992, a bidding process was implemented to allocate pay TV licences. It subsequently emerged that there were problems with the process, particularly in regard to the failure to require deposits as part of the bidding process for licences. It emerged that some of the problems resulted from procedural failures either within the Department of Transport and Communications or between the Minister's department and the Minister's office. Professor Dennis Pearce, 1993, *Independent inquiry into the circumstances surrounding the non-requirement of a deposit for satellite pay-TV licences, and related matters*, Report to the Secretary of the Department of Transport and Communications, Canberra; Senator C. Kernot, *Senate Debates*, 7 February 1995, p. 613.
108. Senator C. Kernot, Senate, *Debates*, 7 February 1995, p. 613.
109. Senator the Hon. B. McMullan, Senate, *Debates*, 7 February 1995, p. 611.

110. Senator the Hon. B. McMullan, Senate Finance and Public Administration Committee, *Estimates Hearings*, 9 February 1995, p. 51.
111. Mr David Jackson QC, Opinion, in Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media, *Percentage Players: The 1991 and 1993 Fairfax Ownership Decisions*, Report of the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media, June 1994, p. xvii.
112. *ibid.*, Mr David Jackson QC, Opinion, Appendices, p. 34.
113. *ibid.*, Appendices, p. 18. They appeared at 21 April 1994 hearings. Senate Standing Order 35 merely states:
 - (1) The examination of witnesses before a committee shall be conducted by the members of the committee in accordance with procedures agreed to by the committee, subject to the rules of the Senate.
 - (2) The examination of witnesses shall be recorded in a transcript of evidence.
114. *ibid.*, Majority Report, p. 29.
115. Senator R. Hill, Senate, *Debates*, 3 March 1994, p. 1420. Similar remarks were made by Senator I. Campbell, Senate, *Debates*, 3 March 1994, p. 1446.
116. Motion moved by Senator R. Hill, Clause 3, Senate, *Debates*, 3 March 1994, p. 1417.
117. The Hon. J. Howard, House of Representatives, *Debates*, 12 March 2002, p. 939.
118. Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media, *op. cit.*, p. 20.
119. Mr Kerin, Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media, *Committee Hearings*, 24 March 1994, pp. 455–6.
120. Tony Walker, 'New rules needed for ex-ministers', *Australian Financial Review*, 12 March 2002. See also Ian Holland, 'Post-separation Employment of Ministers', *Research Note*, no. 40, Department of the Parliamentary Library, 2001–02. Cited: <http://www.aph.gov.au/library/pubs/rn/2001-02/02rn40.pdf>
121. This broad approach (of continuity in privileges or immunities) was endorsed by the Clerk of the House of Representatives: correspondence to the Senate Select Committee on a Certain Maritime Incident, 3 April 2002, p. 13.
122. Mr Howard's reference to someone 'who may now be back in the Public Service' is likely to have been directed at Mr Mike Scrafton, who had been an adviser to the Hon. P. Reith (Liberal, Flinders) but by 2002 was in the Department of Defence. It left open the question of the status of advisers who subsequently worked for other ministers (e.g. Mr Ross Hampton) or advisers no longer employed either under MoPS or in the public service. The last category is particularly problematic. Based on the Howard Government's approach to former ministers no longer in parliament, one might conclude that such staffers would not be protected in any way. This is clear from Mr Howard's response to calls for former minister Mr Reith to appear, when he remarked 'The question of whether the former minister appears is a matter for him. He is no longer a member of my government and he is not a member of the House' (House of

Representatives, *Debates*, 12 March 2002, p. 997). Senator Hill at one point argued that it is not the person's current status, but their status at the time of events in question, that would determine the approach to be taken. He remarked: 'I do not agree [that questions are in order] that refer to alleged actions that took place under a MOPS relationship' (Senate Foreign Affairs, Defence and Trade Committee, *Proof Estimates Hearings*, 20 February 2002, p. 102). As this paper argues, however, Senator Hill's view has not always been cast in these terms.

Finally, it should be noted that the Clerk of the House of Representatives has argued that in fact former ministers should continue to enjoy immunity after they cease to be ministers. He has argued that 'to regard the immunity otherwise would render it incomplete and defeat the essential objective of that immunity.' Clerk of the House of Representatives, 3 April 2002, op. cit., p. 9.

123. Tony Abbott, 'Our public service a pillar of democracy', *Canberra Times*, 23 May 2002. It is not clear what is meant by 'ministerial staff agreements', but they are probably individual Australian Workplace Agreements under the *Workplace Relations Act 1996*.
124. A *Canberra Times* editorial incorrectly suggested that Ministerial staff were covered by the Code of Conduct: 'Minders ought to be accountable', 11 March 2002.
125. The Hon. John Howard, 1998, *A Guide on Key Elements of Ministerial Responsibility*, Prime Minister, Canberra.
126. *ibid.*, pp. 20-1.
127. Senator the Hon. J. Button (ALP, Victoria), *Senate Debates*, 22 September 1983, p. 966.
128. Greg Roberts, 'Parer, aide in firing line', *The Age*, 5 August 1998; Greg Roberts, 'Parer sacks key adviser over shares', *Sydney Morning Herald*, 6 August 1998.
129. Department of Prime Minister and Cabinet, *Guidance on Caretaker Conventions*, September 2001. Cited: <http://www.pmc.gov.au/pdfs/CaretakerConventions.pdf>, accessed 27 May 2001.
130. Jennifer Bryant, *Investigation into Advice Provided to Ministers on "SIEV 4"*, Report prepared on behalf of the People Smuggling Task Force, 21 January 2001 [sic: was January 2002], p. 41; Senator the Hon. J. Faulkner, Senate, *Debates*, 13 February 2002, p. 209; Sid Marris, 'Advisers gave PM "flawed" account', *The Australian*, 20 February 2002.
131. Senate, *Debates*, 5 October 1967, pp. 1196-7; 25 October 1967, pp. 1633-4; 27 October 1967, p. 1854; Freudenberg, op. cit., pp. 111-113.
132. Hancock, op. cit.
133. Pearce, op. cit., p. 12.
134. Senator C. Kernot, Senate, *Debates*, 3 March 1994, p. 1425.
135. Geoffrey Barker, 'Fallen pillars. The assault on public institutions', *Australian Financial Review*, 28 March 2002.
136. Andrew Podger, Senate Select Committee on a Certain Maritime Incident, *Hearings*, 18 April 2002, p. 1203.
137. John Uhr quoted in *Background Briefing*, ABC Radio National, 24 March 2002.

138. Uhr, 1998, op. cit., p. 246.
139. Noel Preston, 'Integrity and Ministerial Office: The Queensland Integrity Commissioner', in Jenny Fleming and Ian Holland, *Motivating Ministers to Morality*, Ashgate, Aldershot, pp. 119–28; Charles Sampford, 'Prior Advice is Better than Subsequent Investigation', in Jenny Fleming and Ian Holland, *ibid.*, pp. 173–86.
140. Abbott, op. cit.
141. UK Cabinet Office, *Code of Conduct for Special Advisers*, cited: <http://www.cabinet-office.gov.uk/central/2001/codconspads.htm>, accessed 18 April 2002.
142. Clause 22.
143. See, in particular, Clause 50 of the Ministerial Code. *Ministerial Code: A Code of Conduct and Guidance on Procedures for Ministers*, Cabinet Office, July 2001, cited: <http://www.cabinet-office.gov.uk/central/2001/mcode/contents.htm>, accessed 18 April 2002. For discussion see Terence Daintith, 'Analysis: "A very good day to get out anything we want to bury"', *Public Law*, Spring 2002, pp. 13–21.
144. UK Cabinet Office, *Portrait of a Profession Revisited*, Speech by Sir Richard Wilson, 26 March 2002, cited: <http://www.cabinet-office.gov.uk/2002/senior/speech.htm>, accessed 28 May 2002, p. 20.
145. Canada. Office of the Ethics Counsellor, cited: <http://strategis.ic.gc.ca/pics/oe/coiencod.pdf>, accessed 19 April 2002.
146. US Office of Government Ethics, cited: <http://www.usoge.gov/home.html>, accessed 29 May 2002.
147. See, for example, Pam Holt, 'Steady the privilege pendulum', *Christian Science Monitor*, 4 April 2002; Joshua Marshall, 'Bush's executive-privilege two-step', *Salon.com*, 7 February 2002, cited: http://www.salon.com/politics/feature/2002/02/07/bush_records/index.html, accessed 29 May 2002; Claire Shipman, 'Not telling', *ABC News*, 20 March 2002, cited: <http://abcnews.go.com/sections/GMA/GoodMorningAmerica/GMA020320WHSecrecy.html>, accessed 29 May 2002.
148. Podger, op. cit., p. 1203.
149. Maley, 'Political advisers should be protected', op. cit. See also Senator C. Kernot, Senate, *Debates*, 3 March 1994, pp. 1423–5.
150. The Auditor-General op. cit., p. 2.
151. Maley, 'Political advisers should be protected', op. cit.
152. This is indeed the position taken by Clerk of the Senate, Harry Evans, who remarked: 'public interest immunity relates to categories of information, not to categories of office-holders.' Clerk of the Senate, 22 March 2002, op. cit., p. 3.
153. Senator C. Kernot, Senate, *Debates*, 23 March 1994, p. 2010.
154. *ibid.*, p. 2012.
155. *ibid.*, 11 May 1994, p. 680.

156. Senate Committee of Privileges, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994 (49th Report)*, September 1994 (Parliamentary Paper 171 of 1994), p. 5.
157. *ibid.*, p. 13.
158. Senate Privileges Committee, *Parliamentary Privilege Precedents, Procedures and Practice in the Australian Senate 1966-1999, (76th Report)*, June 1999. Cited: http://www.aph.gov.au/senate/committee/priv_ctte/report_76/index.htm, accessed 9 May 2002; Mantziaris *op. cit.*; Duncan Kerr, 'Mr Egan and the Legislative Council: Federal Implications', *Australian Bar Review*, vol. 19, pp. 67–88.
159. Submission of the Administrative Law Section of the Law Institute of Victoria, cited in the House of Representatives Committee of Privileges, *Report Concerning Proposal to Transfer to the Federal Court Certain Responsibilities in Relation to Disputed Claims for Public Interest Immunity*, November 1994.
160. Clerk of the Senate, Correspondence to the Senate Select Committee on a Certain Maritime Incident, 22 March and 5 April 2002; Clerk of the House of Representatives, Correspondence to the Senate Select Committee on a Certain Maritime Incident, 3 April and 8 April 2002; 'Clerks trade insults on political power', *The Sydney Morning Herald*, 13 April 2002.
161. Clerk of the Senate, 22 March 2002, *op. cit.*, p. 2.
162. *ibid.*, p. 4.
163. Clerk of the House of Representatives, 3 April 2002, *op. cit.*, p. 12.
164. See, for example, Diana Woodhouse, 'The Role of Ministerial Responsibility in Motivating Ministers to Morality', in Jenny Fleming and Ian Holland, *op. cit.*, pp. 37–48.
165. See, e.g. Editorial, 'Ministerial advisers should have to testify', *The Age*, 8 March 2002; Editorial, 'Parties conspire to toss truth overboard', *The Australian*, 13 March 2002.
166. Editorial, 'Ministerial advisers should have to testify', *op. cit.*
167. Senator R. Kemp, Senate, *Debates*, 7 February 1995, p. 608.
168. Professor Weller, Senate Select Committee on a Certain Maritime Incident, *Hearings*, 18 April 2002, p. 1220.
169. *ibid.*, p. 1219.
170. Senator R. Hill, Senate, *Debates*, 3 March 1994.
171. *ibid.*, p. 1418.
172. *ibid.*, p. 1419.
173. Foreign Affairs, Defence and Trade Legislation Committee, *Estimates Hearings*, 20 February 2002, p. 137.
174. Department of the Prime Minister and Cabinet, *op. cit.*, p. 6, para 2.22.
175. Jenny Fleming and Ian Holland, 'The Case for Ministerial Ethics', in Jenny Fleming and Ian Holland, *op. cit.*, p. 6.

176. This is assuming that the confrontation, if it comes, will come in the Senate, and that the Senate is still elected in a way that means the government of the day does not necessarily control the Senate. Both of these conditions seem likely. Of course, were a scandal to emerge during a period of minority government, the showdown could develop in the House of Representatives.
177. Senate Select Committee on a Certain Maritime Incident, Committee Resolution 22/05/02, 'Witnesses – Former Minister and Ministerial Staff', paragraph 4.
178. *ibid.*, paragraph 3(a).
179. Kirsten Lawson, 'Sydney lawyer to probe Reith and staffers' roles in overboard affair', *The Canberra Times*, 29 May 2002.
180. UK Cabinet Office, *Portrait of a Profession Revisited*, *op. cit.*

Appendix 1: Answers to Parliamentary Questions about Numbers of Ministerial Staff

This appendix lists select sources of information about numbers of ministerial staff in the records of Parliament, and provides notes that explain some of the variations between the figures. The figures shown in **bold** are comparable, subject to variations only in whether or not they include currently vacant positions, and whether or not they include the personal assistant to the PM's spouse.

Date	Figure	Source	Context	Basic format of answer	Notes
20 April 1972	155	House of Representatives Debates, 27 April 1972, pp. 2182–5	Question on Notice no. 5080	Table of numbers by position classification by minister only	Question phrased as 'what is the staff of each minister'. Definitely excludes staff of the opposition. Not known whether table includes vacancies.
25 November 1974	209	House of Representatives Debates, 5 Dec 1974, pp. 4844–50	Question on Notice no. 1862	Table of names by position classification by minister only, plus table of DLOs	Figure of 227 (cited by Forward, 1977) includes DLOs. Definitely excludes staff of the opposition. NPLV
1975	242	House of Representatives Debates, 10 June 1981, p. 3511	Question on Notice no. 442	Single number, with some breakdown	Comprised 94 'ministerial officers consultants, et cetera', 31 'press secretary and related grades' and 117 'support' staff. Question phrased as 'how many persons are employed on each ministerial staff?'
8 March and 5 April 1976	139	Senate Debates, 16 March 1976, pp. 526–7; 18 May 1976, pp. 1690–3	Questions on Notice nos 79–84	Table of names by position classification by minister and opposition office bearer	The figure of 138 cited by Forward (1977) appears to be a counting error. In his reply, Senator Withers described the total establishment as 166, and contrasted this with the equivalent figure at 10 November 1975 of 242. The 166 would have included staff of the opposition (though the total shown in the Hansard answer to the question is 163). NPLV

Accountability of Ministerial Staff?

Date	Figure	Source	Context	Basic format of answer	Notes
28 February 1981	194	House of Representatives Debates, 2 April 1981, p. 1326	Question on Notice no. 530	Single number only (for each of two dates)	Question phrased as 'what is the current establishment for Ministerial staff' (whereas previous Qs asked about who were the ministerial staff). Thus this answer may include vacancies. The answer also repeats the figure for Whitlam's last government of 242. Probably includes staff of leaders of the opposition (see below).
1981	190	House of Representatives Debates, 10 June 1981, p. 3511	Question on Notice no. 442	Table of position classifications for ministry	Comprised 65 'ministerial officers consultants, et cetera', 8 'press secretary and related grades' and 117 'support' staff. Question phrased as 'how many persons are employed on each ministerial staff?' Excludes the staff of the Government Information Unit (GIU).
1 May 1981	165	Senate Debates, 19 August 1981, pp. 99–108	Question on Notice no. 486	Table of names by position classification by minister and opposition office bearer, and tables of names for all members	PLV. Requires reconciliation with the result above. Most likely explanation is that the figure of 194 comprises 165 ministerial staff, 2 parliamentary secretary staff and 27 opposition leaders' staff.
23 March 1982	N/A	House of Representatives Debates, 6 and 7 May 1982, pp. 2540–1	Question on Notice no. 4234	Table of position classification by Cabinet minister only	Not comparable to other data as comprises Cabinet only: 97 Cabinet ministerial staff. Excludes 1 full-time and 1 part-time consultant.
December 1982	167	Senate Estimates Committee D, Additional Information Received, Volume 1, May 1990, pp. 25–31, 48–9.	Question asked in Senate Estimates Hearings, 15 May 1990, p. D24	Table of position classifications for ministry	Question phrased as 'the numbers employed on Ministerial staff'. The number of staff actually employed was 185. Number excludes consultants, staff of the GIU, and shadow ministry. Excludes 26 positions classified as 'electorate secretary'. See note * below.

Date	Figure	Source	Context	Basic format of answer	Notes
March 1983	163	Senate Estimates Committee D, Additional Information Received, Volume 1, November 1990, p. 130–6.	Question asked in Senate Estimates Hearings: 13 September 1990, p. D52	Table of position classifications by minister, plus separate tables for NMLS, shadow ministry, etc.	Question phrased as 'the numbers of staff positions currently available to Ministers'. Number excludes shadow ministry, and probably excludes units such as the GIU. Excludes 27 positions classified as 'electorate secretary'. See note * below.
15 June 1983	163	Senate Debates, 13 September 1983, pp. 610–3	Question on Notice no. 218	Table of names by position classification by minister and opposition office bearer, and tables of names for all members	PLV. Three part-time consultants and one personal assistant to the PM's wife not included.
1 May 1985	166	House of Representatives Debates, 23–24 May 1985, pp. 3174–5	Question on Notice no. 826		Question phrased as 'how many ... ministerial staff ... work for each minister'. Answer is a table of numbers, but question implies NPLV. Comprises 157 ministerial staff and nine leaders' staff. 15 consultants and one personal assistant to the PM's wife not included.
Annual, 1 July each year, 1988 to 1998	various	House of Representatives Debates, 17 February 2000, pp. 13854–5	Question on Notice no. 450	Table of position classification aggregated for ministry	Question phrased as 'how many staff were employed by ministers ... at 1 July each year since 1988', thus may not exclude electorate staff. Vacant positions probably excluded. The unusual feature of the figures in this answer is that they are higher than all other figures for the period 1988 to around 1997, but the figures for 1 July 1998 (281.5) and 15 February 1999 (294) are exactly in line with other figures below.

Accountability of Ministerial Staff?

Date	Figure	Source	Context	Basic format of answer	Notes
c. December 1988	169	Senate Debates, 13 December 1988, pp. 4128–31	Question on Notice no. 581	Table of position classifications by minister	Question phrased as 'what is the current number ... of the ministerial staff in the offices of the ... Ministers'. Answer is missing staff numbers for nine ministers. Number excludes personal assistant to the PM's wife, consultants, staff of the National Media Liaison Service (NMLS), and Ministerial Media Group (MMG). Extrapolating for missing nine ministers suggests a staffing establishment of approximately 220.
c. May 1990	235	Senate Estimates Committee D, Additional Information Received, Volume 1, May 1990, pp. 25–31, 48–9.	Question asked in Senate Estimates Hearings, 15 May 1990, p. D24	Table of position classifications by minister	Question phrased as 'the numbers employed on Ministerial staff'. The number of staff actually employed was 208. Number excludes consultants, staff of the NMLS, MMG, Government Caucus Committees Secretariat (GCCS) and shadow ministry. Includes 36 positions classified as 'personal secretary': see note * below.
April 1990	235	Senate Estimates Committee D, Additional Information Received, Volume 1, November 1990, p. 130–6.	Question asked in Senate Estimates Hearings, 13 September 1990, p. D52	Table of position classifications for ministry, plus separate tables for NMLS, shadow ministry, etc.	Question phrased as 'the numbers of staff positions currently available to Ministers'. Number excludes shadow ministry, and probably excludes units such as the NMLS. Reports number of positions classified as 'electorate secretary' as zero: see note * below.
31 August 1990	239	Senate Estimates Committee D, Additional Information Received, Volume 1, November 1990, pp. 79–128.	Question asked in Senate Estimates Hearings, 13 September 1990, p. D52	Table of names by position classification by minister and opposition office bearer	PLV. Excludes personal assistant to the PM's wife, consultants, staff of parliamentary secretaries, the NMLS, MMG, GCCS and shadow ministry.
c. December 1990	240	Senate Debates, 21 December 1990, pp. 6388–95	Question on Notice no. 307	Table of names by position classification by minister and opposition office bearer	PLV. Excludes personal assistant to the PM's wife, consultants, staff of parliamentary secretaries, the NMLS, MMG, GCCS and shadow ministry.

Date	Figure	Source	Context	Basic format of answer	Notes
31 March 1991	244	Senate Debates, 15 May 1991, pp. 3430–54	Question on Notice no. 593	Table of names by position classification by minister and other staffing groups	PLV. Answer explicitly only staff employed under MoPS Act.
30 November 1993	243	Senate Finance and Public Administration Committee, Budget Estimates 1994–95, Additional Information Received, Volume 3, pp. 395–6	Question asked in Senate Estimates Hearings, 2 December 1994, p. F&PA126	Single number only	Question phrased as 'whether there had been any changes in Ministers' staff numbers over the past 12 months'.
31 January 1994	239	Senate Estimates Committee E, Additional Information Received, Volume 1, March 1994, pp. 20–4.	Question asked in Senate Estimates Hearings, 24 February 1994 pp. E83–4.	Table of position classifications for ministry and other staffing groups	PLV. Excludes personal assistant to the PM's wife, consultants, staff of parliamentary secretaries, the NMLS, MMG, GCCS and shadow ministry.
30 November 1994	240	Senate Finance and Public Administration Committee, Budget Estimates 1994–95, Additional Information Received, Volume 3, pp. 395–6	Question asked in Senate Estimates Hearings, 2 December 1994, p. F&PA126	Single number only	Question phrased as 'whether there had been any changes in Ministers' staff numbers over the past 12 months'.
c. December 1994	239	House of Representatives Debates, 5 December 1994, p. 3958	Question on Notice no. 1627	Single number	Question phrased as 'how many staff positions ... are assigned, in addition to a parliamentarian's basic entitlement of three positions, to Ministers ...' Number excludes staff of parliamentary secretaries, MMG, NMLS, Backbench Committee Secretariat.

Notes:

- * There is confusion regarding whether some electorate staff are included in the totals. It seems likely that the confusion has its origins in answers to questions asked during estimates hearings in 1990. In those hearings (both in May and again in September) the Opposition sought comparative data on ministerial staff numbers for 1982, 1983 and 1990. The former dates involved data for the final year of the Fraser Government and pre-dated the introduction of the MoPS Act, while the last date was for the (then) Hawke Government and post-dates the MoPS Act. Whether because of re-classifications of positions, the introduction of the Act, or because the data were 'massaged' to make the contrast less striking, the 1983 data included electorate secretaries, while the 1990 data excludes them, but includes a similar number of staff classified as personal secretaries.
- NPLV The staffing total was derived by adding up positions in a list, and none of those positions was listed as vacant. Implies that the total establishment may have been larger than indicated in this list.
- PLV The staffing total was derived by adding up positions in a list, and some positions were listed as vacant.
- c. about.

Appendix 2: The UK Code of Conduct for Special Advisers

As the Ministerial Code explains, the employment of special advisers on the one hand adds a political dimension to the advice available to Ministers, and on the other provides Ministers with the direct advice of distinguished experts in their professional field, while reinforcing the political neutrality of the permanent Civil Service by distinguishing the source of political advice and support (paragraph 50).

2. Special advisers are employed to help Ministers on matters where the work of Government and the work of the Government Party overlap and it would be inappropriate for permanent civil servants to become involved. They are an additional resource for the Minister providing advice from a standpoint that is more politically committed and politically aware than would be available to a Minister from the Civil Service.

3. The sorts of work a special adviser may do if their Minister wants it are

i. reviewing papers going to the Minister, drawing attention to any aspect which they think has Party political implications, and ensuring that sensitive political points are handled properly. They may give advice on any aspect of departmental business, including giving advice to their Minister when the latter is taking part in Party political activities;

ii. "devilling" for the Minister, and checking facts and research findings from a Party political viewpoint;

iii. preparing speculative policy papers which can generate long-term policy thinking within the Department, including policies which reflect the political viewpoint of the Minister's Party;

iv. contributing to policy planning within the Department, including ideas which extend the existing range of options available to the Minister with a political viewpoint in mind;

v. liaising with the Party, to ensure that the Department's own policy reviews and analysis take full advantage of ideas from the Party, and encouraging presentational activities by the Party which contribute to the Government's and Department's objectives;

vi. helping to brief Party MPs and officials on issues of Government policy;

vii. liaising with outside interest groups including groups with a political allegiance to assist the Minister's access to their contribution;

viii. speechwriting and related research, including adding Party political content to material prepared by permanent civil servants;

- ix. representing the views of their Minister to the media including a Party viewpoint, where they have been authorised by the Minister to do so;
- x. providing expert advice as a specialist in a particular field;
- xi. attending Party functions (although they may not speak publicly at the Party Conference) and maintaining contact with Party members;
- xii. taking part in policy reviews organised by the Party, or officially in conjunction with it, for the purpose of ensuring that those undertaking the review are fully aware of the Government's views and their Minister's thinking and policy.

Status and conduct as temporary civil servants

4. Special advisers are temporary civil servants appointed under Article 3 of the Civil Service Order in Council. They are exempt from the general requirement that civil servants should be appointed on merit and behave with political impartiality and objectivity so that they may retain the confidence of future governments of a different political complexion. They are otherwise required to conduct themselves in accordance with the *Civil Service Code*, attached at A. Their appointment ends at the end of the Administration which appointed them.

5. Special Advisers should conduct themselves with integrity and honesty. They should not deceive or knowingly mislead Parliament or the public. They should not misuse their official position or information acquired in the course of their official duties to further their private interests or the private interests of others. They should not receive benefits of any kind which others might reasonably see as compromising their personal judgement or integrity. They should not without authority disclose official information which has been communicated in confidence in Government or received in confidence from others. The principles of public life set down by the Committee on Standards in Public Life, attached at B, provide a framework for all public servants

6. Special Advisers should not use official resources for Party political activity. They are employed to serve the objectives of the Government and the Department in which they work. It is this which justifies their being paid from public funds and being able to use public resources, and explains why their participation in party politics is carefully limited. They should act in a way which upholds the political impartiality of civil servants and does not conflict with the Civil Service Code. They should avoid anything which might reasonably lead to the criticism that people paid from public funds are being used for Party political purposes. They stand outside the departmental hierarchy. They should not be responsible for budgets or for the line management of permanent civil servants including their recruitment and matters covered by their contract of employment such as their appraisal, reward, discipline and promotion.

7. Article 3(3) of the Civil Service Order in Council allows the Prime Minister to appoint up to three special advisers in No.10 who are not subject to the general restriction that their role is to provide advice to a Minister.

Contacts with the media

8. Special advisers are able to represent Ministers' views on Government policy to the media with a degree of political commitment that would not be possible for the permanent Civil Service. Briefing on purely Party political matters should however be handled by the Party machine.

9. All contacts with the news media should be authorised by the appointing Minister and be conducted in accordance with the *Guidance on the Work of the Government Information Service* (GWGIS), issued on behalf of the Prime Minister. Departmental Heads of Information are responsible for managing press and publicity operations in their department, and should be kept informed of Special Advisers' contacts with the news media not only to ensure consistency of briefing, but also to ensure that contacts are recorded. Heads of Information are the department's source of advice on the GWGIS.

10. Special Advisers must not take public part in political controversy whether in speeches or letters to the Press, or in books, articles or leaflets; must observe discretion and express comment with moderation, avoiding personal attacks; and would not normally speak in public for their Minister or the Department.

Relations with the Government Party

11. Special Advisers provide advice on the development of Government policy and its presentation. It is in these two areas of activity that Government and Party may overlap.

12. The Civil Service has no monopoly of policy analysis and advice. The Government takes account of views from many sources of which the Government Party is legitimately one. Although public funds and resources must not be used to support the contribution of such views, the Government may need to liaise with the Party, as it does with others, to obtain a full and accurate understanding of the Party's policy analysis and advice.

13. The Government needs to present its policies and achievements to the public in order to aid understanding and so maximise the effectiveness of its policies, and this is a legitimate use of public funds and resources. It would be damaging to the Government's objectives if the Party took a different approach to that of the Government, and the Government therefore needs to liaise with the Party to make sure that Party publicity is factually accurate and consistent with Government policy. To secure this consistency, the Government will also want to make sure that Party MPs and officials are briefed on issues of Government policy.

14. In providing a channel of communication in these areas of overlap, special advisers paid from public funds have a legitimate role in support of the Government's interest, which they can discharge with a degree of party political commitment and association which would not be permissible for a permanent civil servant. In all contacts with the Party, special advisers must observe normal Civil Service rules on confidentiality unless specifically authorised, in a particular instance, by their appointing Minister.

15. Special advisers must not take part in the work of the Party's national organisation; and although they may continue, during Elections, to give specialist or political advice to their Ministers they must be careful not to take any active part in the campaign going beyond the provision of such advice.

16. Where a special adviser wishes to undertake work for a political Party which does not arise out of government business they may do this either in their own time, outside office hours, or under a separate contract with the Party, working part-time for the government. Detailed rules on their involvement in political activities are set out below.

Involvement in politics in a private capacity: national political activities

17. Special Advisers must not take part in national political activities, which are: holding, in a party political organisation, office which impinges wholly or mainly on party politics in the field of Parliament, the Scottish Parliament, the National Assembly for Wales, the Northern Ireland Assembly or the European Parliament; speaking in public on matters of national political controversy; expressing views on such matters in letters to the Press, or in books, articles or leaflets; being announced publicly as a candidate or prospective candidate for Parliament, the Scottish Parliament, the National Assembly for Wales, the Northern Ireland Assembly or the European Parliament; and canvassing on behalf of a candidate for the institutions or on behalf of a political party.

18. In particular:

i. if Special Advisers are publicly identified as a candidate or prospective candidate for Parliament, the Scottish Parliament, the National Assembly for Wales, the Northern Ireland Assembly or the European Parliament, either by adoption by a political party or in any other way, they must resign their appointment;

ii. if they wish to take part in a General, European or by-election campaign, or to help in a Party headquarters or research unit during such a campaign, they must first resign their appointment. If they wish their appointment to carry on during a campaign, they may continue to give specialist or political advice to their Minister as before, but they must be careful not to take any active part in the campaign going beyond the provision of such advice. They should not, for example, take part in public meetings.

iii. if, with the approval of their Minister, they wish to assist with other party political matters such as a leadership campaign, they may do so while on paid or unpaid leave or at times which do not interfere with their normal duties, for example, out of office hours.

Involvement in politics in a private capacity: local political activities

19. With the approval of their Minister, Special Advisers may undertake, or continue to undertake, all forms of local political activity, but not local activities in support of national politics. They must comply with any conditions laid down by their Department.

20. Local political activities are: candidature for, or co-option to, local authorities; holding, in a party political organisation, office impinging wholly or mainly on party politics in the local field; speaking in public on matters of local political controversy; expressing views on such matters in letters to the Press, or in books, articles or leaflets; and canvassing on behalf of candidates for election to local authorities or a political organisation.

21. If Special Advisers take part in local political activities, they must at all times observe discretion, take care to express comment with moderation and avoid personal attacks. In particular, if they serve on a local authority they must adhere to the following points:

- i. they should not speak publicly or in the Council, or vote, on matters for which their Minister has responsibility;
- ii. they should not serve on any committee considering such matters;
- iii. they should not take part in deputations or other representations to Ministers;
- iv. they should declare an interest in relation to any case or application which comes before the Council in which their Department is involved;
- v. they should observe discretion in relation to policies for which other Ministers are responsible, in order to avoid causing them embarrassment;
- vi. they should not disclose to the Council privileged information obtained in the course of their duties.

Complaints

22. Any civil servant who believes that the action of a special adviser goes beyond that adviser's authority or breaches the Civil Service Code should raise the matter immediately with the Secretary of the Cabinet or the First Civil Service Commissioner, directly or through a senior civil servant.

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