

The Senate

Finance and Public Administration
References Committee

Staff employed under the *Members
of Parliament (Staff) Act 1984*

October 2003

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TERMS OF REFERENCE

On 19 March 2003, the Senate referred to the committee for inquiry and report by 8 October 2003 the following:

- (a) the adequacy and appropriateness of the framework for employment and management of staff under the *Members of Parliament (Staff) Act 1984* (the MoPS Act);
- (b) the role and functions of MoPS staff in assisting and advising their employers and interacting with the Australian Public Service and other stakeholder groups;
- (c) the remuneration and conditions of employment of MoPS staff;
- (d) the means by which MoPS staff are accountable to government, the Parliament and the public;
- (e) suitable means by which the accountability of MoPS staff could be enhanced;
- (f) the merits of introducing a code of conduct for MoPS staff reflecting the Values and Code of Conduct of the *Public Service Act 1999*, the key elements such a code should contain and the process by which such a code should be developed and introduced;
- (g) suitable means by which the accountability of the Government for the employment of MoPS staff can be enhanced;
- (h) the role of departmental liaison officers and their interaction with MoPS staff and departments; and
- (i) appropriate amendments to the MoPS Act flowing from the above.

(On the 8 October 2003 the Committee sought and was granted an extension of time to present its report to 16 October 2003).

TABLE OF CONTENTS

TERMS OF REFERENCE	v
EXECUTIVE SUMMARY	xi
Responsibility and accountability.....	xii
Appearance of ministerial staff before committees.....	xii
The regulation, management and oversight of MOPS staff.....	xiii
Code of conduct.....	xiv
MOPS staff and the APS	xv
LIST OF ABBREVIATIONS	xvii
RECOMMENDATIONS.....	xix
CHAPTER 1	
THE MEMBERS OF PARLIAMENT STAFF INQUIRY	1
Background to this Inquiry	1
Establishment of the Inquiry	3
Conduct of the inquiry.....	3
Acknowledgments	3
CHAPTER 2	
THE CREATION AND EVOLUTION OF MOPS STAFFING	5
Background to the MOPS Act.....	5
The MOPS Act	6
The growth of political staffing.....	9
The roles of ministerial staff.....	12
The changing roles of ministerial staff.....	13
Are ministerial staff more than extensions of the minister?.....	15
Conclusion.....	16
CHAPTER 3	
RESPONSIBILITY FOR AND ACCOUNTABILITY OF MINISTERIAL STAFF.....	19
The meanings and consequences of ‘responsibility’ and ‘accountability’	19
Responsibility for ministerial staff and their actions.....	20

Accountability of ministerial staff and their actions	22
Conclusion	24
CHAPTER 4	
MINISTERIAL STAFF AND THE PARLIAMENT.....	25
Introduction	25
The appearance of advisers before committees.....	25
Can advisers be compelled to appear?	27
Is compellability so important?	31
From principles to practice: when do advisers appear?	36
Conclusion	39
CHAPTER 5	
REFORMING THE REGULATION, MANAGEMENT AND OVERSIGHT OF MOPS STAFF	41
Separating ministerial staff from other MOPS staff.....	41
Enhanced Parliamentary oversight of the MOPS framework	43
Enhanced transparency of MOPS staffing	44
Improved record-keeping	47
Administrative reforms.....	51
Conclusion	53
CHAPTER 6	
A CODE OF CONDUCT?.....	55
What is actually meant by a ‘code of conduct’?	56
Should there be a code?	56
To whom should the code apply?.....	58
Where should the code be located?	60
Administering a ministerial staff code	62
What elements should be included in the code?.....	68
Monitoring the Code.....	71
CHAPTER 7	
MOPS STAFF AND THE APS	73
Relations between ministerial staff and the APS	73
Politicisation of the APS	74
Communication between ministers’ offices and departments.....	78
The role and management of Departmental Liaison Officers	81
Training and development to enhance the work of MOPS staff	83

GOVERNMENT SENATORS' DISSENTING REPORT

- | | |
|--|----|
| 1. Oversight of Ministerial Staff..... | 87 |
| 2. Ministerial Staff and the Australian Public Service | 88 |
| 3. Other Matters | 89 |

SENATOR ANDREW MURRAY: AUSTRALIAN DEMOCRATS: SUPPLEMENTARY REMARKS

- | | |
|--|----|
| Reforming the convention on parliamentary scrutiny of ministers..... | 91 |
| An office of an Ethics Commissioner | 92 |

APPENDIX 1

- | | |
|---|-----------|
| LIST OF SUBMISSIONS AND ADDITIONAL INFORMATION | 95 |
|---|-----------|

APPENDIX 2

- | | |
|-----------------------------|-----------|
| PUBLIC HEARINGS..... | 97 |
|-----------------------------|-----------|

APPENDIX 3

- | | |
|---|-----------|
| TABLED DOCUMENTS AND EXHIBITS..... | 99 |
|---|-----------|

APPENDIX 4

- | | |
|---|------------|
| MOPS EMPLOYMENT, 1983–2003 | 101 |
|---|------------|

APPENDIX 5

- | | |
|--|------------|
| EXTRACT FROM THE <i>REQUIREMENTS FOR ANNUAL REPORTS
FOR DEPARTMENTS, EXECUTIVE AGENCIES AND FMA ACT
BODIES</i>..... | 103 |
|--|------------|

- | | |
|------------------------|------------|
| APPENDIX 6..... | 105 |
|------------------------|------------|

Executive Summary

The purpose of this inquiry was to review aspects of the staffing provided to Members of Parliament, with a particular focus on issues of governance and accountability of ministerial staff. The focus on ministerial staff reflects the fact that the current Inquiry has its genesis in the Inquiry of the Senate Select Committee on a Certain Maritime Incident (CMI) (commonly referred to as the ‘children overboard’ affair). That Committee stated that ‘[t]he time has come for a serious, formal re-evaluation of how ministerial staff might properly render accountability to the parliament and thereby to the public’. The Committee recommended that:

... an appropriate parliamentary committee develop recommendations concerning suitable frameworks, mechanisms and procedures by which ministerial advisers may be rendered directly accountable to parliament in ways commensurate with those which currently apply to public servants.¹

Members of Parliament need staff. They need staff to assist them in dealing with their constituencies; to help them deal with policy issues and to liaise with their parties; and to help manage their parliamentary responsibilities. These are not roles to be undertaken by public servants, who serve the government of the day. Having political staff is intended to ensure these roles are adequately and professionally performed, and to help ensure that the public service does not become politicised. For the last twenty years, these staff have been employed under the Members of Parliament (Staff) Act (the MOPS Act), and are commonly referred to as MOPS staff.

The number of MOPS staff working both in Parliament and in members’ electorates has grown steadily over the past few decades. The total number of positions has grown from around 700 in the early 1980s to nearly 1200 in 2003. Around 680 of these are the electorate staff serving MPs of all parties. By 2003, there were over 370 government MOPS staff, and it has been the growth of this category—often referred to as ministerial staff—that has caused public concern.

Ministerial staff have a wide range of responsibilities, and have become pivotal to the interaction between government and bureaucracy. There is, however, little official guidance offered to ministerial staff regarding their roles. The distinctive roles of public servants and ministerial advisers need to be more clearly defined. Responsibility needs to be clearly allocated for ensuring that ministerial staff are aware of their roles, and of what they can and cannot do.

¹ Recommendation 10, *CMI Report*, p. xxxix.

Responsibility and accountability

Employing Members and Senators must take appropriate responsibility for the actions of their staff. There must also be adequate accountability for public expenditure in the area of political staffing, and to ensure that parliamentary accountability for the actions of ministerial staff is maintained. There is thus a difference between accountability (being required to give an account) and responsibility (attracting any credit or blame).

The Committee believes that confusion exists concerning the accountability and responsibility of ministerial staff. Concern has been expressed that if ministerial advisers were required to appear before Parliament this would imply that they would have some independent existence. The Committee understands this could be the case if they were being expected to take responsibility for their actions. Yet the current appearance of public servants before Parliament carries no such connotation. The reason is that they are there for *information* purposes: for *accountability*, not *responsibility*.

It is this distinction between accountability and responsibility that underpins the principle that ministers should be responsible ('censurable for') for their staff's actions, but that staff should be accountable ('required to give account') to Parliament for their actions in some circumstances. The appearance of ministerial staff before a parliamentary committee would be for the purpose of providing information—it is a matter strictly of accountability. *Responsibility* for the actions of ministerial staff rests always with their minister, and the Committee reaffirms this principle.

Appearance of ministerial staff before committees

An issue at the heart of the inquiry was the question whether ministerial staff can or cannot be called before parliamentary committees. While there are precedents for such staff appearing, on other occasions their appearance has been resisted. In general, the Senate has been reluctant to engage in what would prove to be drawn-out and expensive legal battles to force advisers to present themselves for questioning. Perhaps as a result, a view has begun to develop that they may in fact be immune from having to appear.

The Committee concludes that is not the case. Should either House of Parliament desire, it could compel ministerial staff to appear. At the same time, it is possible that this could lead to difficult and drawn-out conflict between the Parliament and the government of the day.

The Committee believes there is, however, nothing to prevent the Parliament and the government from reaching some agreement on circumstances in which ministerial staff will appear before parliamentary committees. A similar negotiated consensus has existed for the last quarter of a century in respect of public servants. This has operated with only minor glitches, and has operated despite the absence of guidelines approved by the Parliament.

The Committee considers that there are two main principles upon which to base the setting of parameters for the appearance of ministerial staff. The first is the principle of preserving ministerial responsibility. The second is the principle of maximising the accountability and transparency of government.

The Committee recommends that the government should make ministerial staff available to appear before parliamentary committees in the following circumstances:

- A minister has renounced, or distanced him or herself from, a staff member's action;
- A minister has refused to appear to answer questions regarding the conduct of a member of their staff;
- Critical or important information or instructions have emanated from a minister's office but not from the minister;
- Critical or important information or instructions have been received by a minister's office but not communicated to the minister; or
- A government program is administered to a significant extent by government MOPS staff.

The Committee recommends that guidelines be developed by the government in consultation with the parliament, based on the *Government Guidelines for Official Witnesses*, to provide a framework to guide the appearance of ministerial staff.

The regulation, management and oversight of MOPS staff

Currently the MOPS Act does not distinguish between the staff of government, opposition or minor party office holders. Ministerial advisers are employees of ministers, there to implement the government's policies. Their attachment to the executive arm distinguishes them from all other MOPS employees, who, even though they may have partisan loyalties, serve the needs of their employer as a Member of Parliament. The Committee accepts that a clear distinction should be drawn between ministerial staff and other MOPS staff. It believes the distinctive role of ministerial staff should be reflected in a reorganisation of the MOPS Act. The Act should have separate parts governing government staff, non-government office-holder staff and electorate staff.

Compared to other parts of the public sector, there is little information available about MOPS staffing. The Committee believes MOPS staffing information should be brought into line with the information provided on the public service and parliamentary service. To achieve this, there should be an annual report on staffing under the MOPS Act.

MOPS staff, particularly ministerial staff, have important responsibilities in relation to record keeping. It is obviously vital that Ministers' offices have effective record management systems, to ensure the efficiency and effectiveness of the ministers' work, and to avoid the negative consequences and publicity that can arise if there has

been a communication breakdown. Ministerial staff also have responsibilities in relation to records as a result of the Archives Act.

All ministers should ensure that their staff are maintaining adequate records and are aware of the obligations that arise under the Archives Act. Given the pressures that exist in ministers' offices, and the growing use of electronic communication, the Committee believes training in appropriate record keeping must be provided to new MOPS employees, particularly ministerial staff. It also believes that responsibility for record keeping in ministers' offices should be allocated to a senior staff member, and that record keeping should be identified in that staff member's duties and relevant performance review procedures.

Both this Committee, and the inquiry into the 'children overboard' affair, have received evidence that the management structure for ministerial staff has weaknesses that should be rectified. A systematic structure of management responsibility should exist within ministerial offices.

Code of conduct

The CMI Committee recommended that a code of conduct be implemented for ministerial staff. The Government has still not responded to this or any of the other recommendations made by the CMI Committee twelve months ago. This Committee finds the Government's failure to respond to be unacceptable.

There have been many suggestions that a code of conduct be put in place for ministerial staff and the Committee examined a number of models that exist in other jurisdictions. The Committee took particular note of evidence that suggests that, for the most part, codes of conduct are designed to create as well as support a culture of good conduct, partly through an educative function. This Committee recommends that the Prime Minister promulgate a code of conduct for ministerial staff. Further, a 'Statement of Values' that would apply to all MOPS employees should be included in the MOPS Act. Once the government has responded to the recommendations in this report, and the report of the CMI Committee, a process should be set in train to look at implementing a code of conduct for non-ministerial MOPS staff.

The Committee also considered arguments for and against embedding a code in legislation. The advantages of a legislated code are that it would ensure maximum transparency, and enforcement of the code would be given the force of law. It would also ensure a role for parliament in setting standards. The disadvantages, however, are significant. The central aim for a code of conduct for ministerial staff is to ensure that ministers take responsibility for the actions of their staff. Embedding the code within the MOPS Act might undermine this goal.

The Committee concludes that the most appropriate way to strike a balance between the competing principles is to have parliament amend the MOPS Act to require that the PM promulgate a code, while leaving the policing of the code as a matter for the Prime Minister and the employing ministers. This approach will preserve traditions of

ministerial responsibility. A position of ethics adviser should be created to provide education and advice for ministerial staff to help them adhere to the code.

A code of conduct for ministerial staff needs to cover similar issues as the code governing public servants. It also should specifically address the roles that ministerial staff can and cannot perform, and how they are to relate to the public service and party organisations.

MOPS staff and the APS

Effective relationships between ministers' offices and the public service require trust, professionalism and must be based on frank and fearless advice. These in turn require that the public service is not politicised, that there are clear and accurate lines of communication, and that training and professional development of both MOPS staff and public servants are adequate to ensure that everyone is clear about the roles and responsibilities of both groups of employees.

Currently, departmental secretaries are appointed on contracts for periods of up to five years, and can be dismissed at any time. Although they must be given reasons for their dismissal, there are no significant restrictions on what those reasons may be. The Committee accepts the need for flexibility in staffing arrangements. It believes the right balance must be found between that flexibility and the need to ensure that senior public servants feel their position is secure enough to underpin the offering of robust policy advice. Secretaries should have greater security than is presently the case. The current provision in the Public Service Act specifying a maximum contract length of five years should be removed.

The Committee is concerned that there appears to be growing ambiguity about what constitutes official communication and advice between agencies and ministers. An important factor causing this ambiguity has been the proliferation of communication media.

The Committee accepts that the time is past when all communication can be expected to be between the minister or the minister's chief of staff and the head of an agency. Ministers' offices need and want more open communication channels than that. Nevertheless, the Committee considers that as this proliferation of lines of communication continues, it needs to be matched by an increase in awareness of the need for those communications to be clear and properly documented.

Departmental Liaison Officers (DLOs) play an important role in maintaining effective communication between departments and ministers' offices. Most DLOs are middle-ranking public servants, and their numbers have grown steadily over the past two decades. As of September 2003 there were 70 DLO positions.

The Committee agrees that the roles and operations of this group need to be regularly scrutinised. DLOs are public servants performing departmental functions, regardless of where they are located. Accordingly, the Committee does not believe that governments should attempt to protect DLOs from appearing before parliamentary

committees using arguments that a government might seek to apply to ministerial staff.

The Committee is concerned that, while some departmental secretaries think that public servants and ministerial staff understand their respective roles, little is being done to ensure that this is the case. The Committee is particularly disappointed that, despite writing to all departments seeking input to this Inquiry on these issues, none other than the two agencies with MOPS-related administrative responsibilities (PM&C and DoFA) responded. The Committee recommends that all departments provide written guidance to staff regarding relations with minister's offices, and that all senior staff receive adequate training in this area.

The Committee is also concerned about the level and adequacy of the training provided to ministerial staff. Training needs to be radically boosted at the 'top end'. Training should be increased for senior staff, and there should be an increased emphasis on high-level skills and professional development. The Committee believes these training needs will be further increased by the need to ensure that a deep, enduring understanding of a code of conduct is bedded down in the staffing structure. The Committee recommends that the level and intensity of training for ministerial staff be increased, and be given a significantly higher priority by ministers. It recommends a mandatory induction training process for staff commencing in ministers' offices, which focuses on political ethics, relationships with the APS, and record keeping responsibilities.

List of Abbreviations

ANAO	Australian National Audit Office
APS	Australian Public Service
AWA	Australian Workplace Agreement
CMI	Certain Maritime Incident
CPSU	Community and Public Sector Union
CSPL	Committee for Standards in Public Life (UK)
DLO	Departmental Liaison Officer
EL	Executive Level (APS classification)
DoFA	Department of Finance and Administration
JCPAA	Joint Committee of Public Accounts and Audit
MOPS	Members of Parliament (Staff)
NMLS	National Media Liaison Service
PM&C	Department of Prime Minister and Cabinet
PMO	Prime Minister's Office

Recommendations

Members of Parliament Staff

Recommendation 1

The Committee recommends that the disciplining of MOPS staff should not be allowed to detract from ministerial responsibility for staff actions. (Para 3.11)

Recommendation 2

The Committee recommends that the government should make ministerial staff available to appear before parliamentary committees in the following circumstances:

- a) A minister has renounced, or distanced him or herself from, a staff member's action that is relevant to the committee's Terms of Reference;**
- b) A minister has refused to appear to answer questions regarding the conduct of a member of their staff;**
- c) Critical or important information or instructions have emanated from a minister's office but not from the minister;**
- d) Critical or important information or instructions have been received by a minister's office but not communicated to the minister; or**
- e) A government program is administered to a significant extent by government MOPS staff. (Para 4.62)**

Recommendation 3

The Committee recommends that guidelines be developed by the government in consultation with the Parliament, based on the Government Guidelines for Official Witnesses, to provide a framework to guide the appearance of ministerial staff. Without in any way detracting from the Senate's powers to call any witness and ask any questions, the guidelines should indicate that:

- the scope of questioning should be confined to the circumstances which led to the appearance of the ministerial adviser;**
- advisers will not be asked to give opinions on matters of policy;**

- **advisers will not be asked about the content of any advice they may have given to a minister; and**
- **the Chair of any committee will make a statement encapsulating these points prior to an adviser giving their evidence. (Para 4.65)**

Recommendation 4

The Committee recommends that the MOPS Act be restructured to define the different categories of MOPS employment, in such a way as to distinguish between government staff (particularly ministerial staff), non-government office-holder staff, and electorate staff. (Para 5.7)

Recommendation 5

The Committee recommends that an annual report on MOPS staffing should be prepared, and should contain, at a minimum:

- **The existing information called for under section 31 of the MOPS Act in its current form;**
- **A summary of the structure of MOPS employment arrangements, along the lines of the Attachment prepared by DoFA to the PM&C submission to this inquiry;**
- **Any determinations, arrangements, or terms and conditions issued under the statutory provisions of the MOPS Act;**
- **A report of any significant changes to the structure of employment arrangements in the preceding year (for example, reforms to engagement procedures, introduction or extension of special salary categories, creation of a new category of employee);**
- **The numbers and levels of staff employed by all office holders (essentially in the same form as tables currently provided by DoFA in the estimates process), and an indication of changes since the previous year;**
- **The salary ranges under which all MOPS staff are employed, and the numbers employed in each range;**
- **The total salary costs of MOPS employment, broken down into the major categories of employment (ministerial, opposition, minor parties, electorate staff);**
- **The total non-salary costs of MOPS employment, broken down into the major categories of employment (ministerial, opposition, minor parties, electorate staff); and**

-
- **All information on staffing as currently required of agencies under the Joint Committee of Public Accounts and Audit Guidelines section 12.3 on the management of human resources. (Para 5.25)**

Recommendation 6

The Committee recommends that a staff and employer survey be conducted by the APS Commission and / or DoFA, and a report be published that outlines and analyses the results. (Para 5.26)

Recommendation 7

The Committee recommends that responsibility for ensuring proper record keeping in ministers' offices should be allocated to a senior staff member, and that record keeping should be identified in that staff member's duties and relevant performance review procedures. (Para 5.36)

Recommendation 8

The Committee recommends that, once the ANAO has completed its current MOPS-related audit, the government move swiftly to implement any recommended administrative reforms, and develop and implement a new management framework for ministerial staff. (Para 5.44)

Recommendation 9

The Committee recommends that a code of conduct for ministerial staff be developed and implemented. (Para 6.17)

Recommendation 10

The Committee recommends that ultimately a code for non-ministerial MOPS staff should be developed and implemented. The content and administration of such a code should be considered by the Senate Finance and Public Administration References Committee following response of the government to the recommendations in this report and the report of the Certain Maritime Incident Committee. (Para 6.20)

Recommendation 11

The Committee recommends that the MOPS Act be amended to include a statement of values for all MOPS staff. (Para 6.21)

Recommendation 12

The Committee recommends that the MOPS Act be amended to require that the Prime Minister promulgate a code of conduct for ministerial staff. (Para 6.35)

Recommendation 13

The Committee recommends that the Prime Minister take a leadership role in education and training of ministerial staff in regard to the code of conduct, and that resources be publicly committed to this objective. (Para 6.59)

Recommendation 14

The Committee recommends that a position of ethics adviser be created to educate and advise ministerial staff on their responsibilities under the ministerial staff code of conduct. It recommends that the position be either a statutory position under the MOPS Act, or a position in the Parliamentary Service. (Para 6.60)

Recommendation 15

The Committee recommends that the MOPS Act be amended to indicate that ministers must write to each staff member upon appointment outlining their responsibilities, including that they must uphold the MOPS Values and the ministerial staff code of conduct. (Para 6.66)

Recommendation 16

The Committee recommends that a code of conduct for ministerial staff cover similar issues as the code governing public servants, but that it also specifically address what roles ministerial staff can and cannot perform, and how they are to relate to the public service and party organisations. (Para 6.72)

Recommendation 17

The Committee recommends that a survey be conducted three years after the introduction of the code of conduct, to test employee knowledge of and attitudes toward the code. (Para 6.74)

Recommendation 18

The Committee recommends that departmental secretaries and agency heads be given a greater degree of security of employment than is currently the case, through:

- **longer-term contracts of employment;**
- **abolition of the maximum length for contracts for currently contained in the Public Service Act;**
- **insertion of a minimum length for contracts in the Public Service Act; and**
- **establishment of a protocol for the management of conflict between a minister and their secretary or agency head that focuses on resolving conflict in the first instance, on finding an alternative position for the secretary or agency head if the conflict cannot be resolved, with the termination of the person's services occurring only as a last resort. (Para 7.20)**

Recommendation 19

The Committee recommends that the numbers, locations, and seniority of Departmental Liaison Officers be published annually, preferably as an appendix to the annual report recommended by the Committee in Chapter 5. (Para 7.36)

Recommendation 20

The Committee recommends that all departments provide written guidance to staff regarding interactions with minister's offices, and that all senior staff receive adequate training in this area. (Para 7.44)

Recommendation 21

The Committee recommends that the level and intensity of training for ministerial staff be increased, and be given a significantly higher priority by ministers. It recommends a mandatory induction training process for staff commencing in ministers' offices, which focuses on political ethics, relationships with the APS, and record keeping responsibilities. (Para 7.54)

Chapter 1

The Members of Parliament Staff Inquiry

1.1 In 1984 the Parliament passed the *Members of Parliament (Staff) (MOPS) Act 1984*, creating a unique legislative framework for the employment of staff who work for Members and Senators, including Ministers and other Parliamentary office-holders (such as the leaders of the non-government parties). These staff are referred to collectively as MOPS staff.

1.2 MOPS staff have their counterparts in other places, but Australia appears to be the only place where a special Act exists solely for the purpose of employing such staff. Such a difference, however, is not as important as the similarities. In most jurisdictions, including Australia, this group are defined by four features:

- they work directly for individual Members of Parliament;
- their salaries come from the public purse;
- they have little security of employment; and
- unlike public servants, they may perform political functions.¹

Background to this Inquiry

1.3 This Inquiry concerns the employment, management and accountability of MOPS staff. Its main focus, reflecting public debate, the bulk of the submissions, and the history of those controversies involving MOPS staff, is on ministerial staff.

1.4 The focus on ministerial staff reflects in part a general perception that these staff have grown steadily in both numbers and power over the past few decades.² Although these issues were brought into focus by the ‘children overboard’ affair in 2001–02,³ they have been raised on previous occasions, such as during the ‘pay TV’ affair in 1993–94, and the ‘travel rorts’ affair in 1997.⁴ This inquiry is a timely

1 For a similar list of features, see Committee on Standards in Public Life, *Defining the Boundaries within the Executive: Ministers, Special Advisers and the permanent Civil Service*, Ninth Report of the Committee, Cm 5775, April 2003, p. 44.

2 See, for example, James Walter, *The Ministers’ Minders: Personal Advisers in National Government*, Oxford University Press, Melbourne, 1986, pp. 168, 177; John Halligan and John Power, *Political Management in the 1990s*, Oxford University Press, Melbourne, 1992, p. 81; Delmer Dunn, *Politics and Administration at the Top: Lessons from Down Under*, University of Pittsburgh Press, Pittsburgh, 1997, p. 74; Ian Holland, ‘Accountability of Ministerial Staff?’ *Research Paper No. 19 2001–02*, Department of the Parliamentary Library, Canberra.

3 Senate Select Committee on a Certain Maritime Incident, *Report*, October 2002.

4 Senate Select Committee on Matters Arising from Pay Television Tendering Processes, *First Report* (September 1993) & *Second Report* (December 1993); Ian Holland, *Accountability of*

opportunity to review the employment, management and accountability framework under which these staff are employed.

1.5 The focus on ministerial staff also reflects the fact that the current Inquiry has its genesis in the Inquiry of the Senate Select Committee on a Certain Maritime Incident (CMI) (commonly referred to as the ‘children overboard’ affair). That Committee stated that ‘[t]he time has come for a serious, formal re-evaluation of how ministerial staff might properly render accountability to the parliament and thereby to the public’.⁵

1.6 The Committee’s report also recommended:

... that an appropriate parliamentary committee develop recommendations concerning suitable frameworks, mechanisms and procedures by which ministerial advisers may be rendered directly accountable to parliament in ways commensurate with those which currently apply to public servants.⁶

1.7 Later recommendations of the CMI Report reveal the intention that the work of the parliamentary committee would then feed in to subsequent implementation processes:

The Committee recommends that the Australian Public Service Commission convene a Working Group of senior officials of the Department of Prime Minister and Cabinet and senior parliamentary officers of both Houses of Parliament, to develop a Code of Conduct for ministerial advisers incorporating a Statement of Values commensurate with Conduct and Values provisions that apply within the Australian Public Service. The report should also make any recommendations concerning mechanisms for dealing with any breaches of such a Code, or the handling of complaints arising from the actions of ministerial advisers.⁷

1.8 This Committee is disappointed that, almost twelve months since the CMI Committee made this recommendation, the Government has still not responded to it, or to any other recommendation from what was an important and high-profile inquiry.

1.9 The terms of reference for the current inquiry acknowledge the tasks identified during the CMI inquiry, but also recognise that this is an excellent opportunity to review the operation of the MOPS Act more generally.

Ministerial Staff, op. cit., p. 17; Ann Tiernan, ‘Problem or Solution? The Role of Ministerial Staff’, in Jenny Fleming and Ian Holland (eds), *Motivating Ministers to Morality*, Ashgate, Aldershot, 2001, pp. 91–103.

5 *CMI Report*, p. 183.

6 Recommendation 10, *CMI Report*, p. xxxix.

7 Recommendation 11, *CMI Report*, p. lx.

Establishment of the Inquiry

1.10 On 19 March 2003, the Senate referred to the Finance and Public Administration References Committee an Inquiry into Members of Parliament Staff (MOPS), to report by 8 October 2003.⁸ The Senate subsequently approved an extension of the reporting date to 16 October 2003.

Conduct of the inquiry

1.11 The Committee first advertised the inquiry in *The Australian* on 26 March 2003. It called for written submissions to be lodged with the Committee by 23 May 2003. The Committee also wrote to all Commonwealth departments, relevant agencies and authorities, academics interested in public administration, and some former senior public servants and ministerial advisers, drawing their attention to the inquiry and inviting submissions.

1.12 The terms of reference and other information about the inquiry were also advertised on the Committee's inquiry web page at: http://www.aph.gov.au/senate/committee/fapa_ctte/mops/index.htm.

1.13 Submissions were received from a total of 19 individuals or organisations. A list of submissions is contained in Appendix 1. Those submissions that were published can be accessed on the Committee's homepage.

1.14 After initial consideration of the submissions, the Committee held public hearings on 2 and 3 September 2003 in Canberra. Details of the hearings and the witnesses who appeared at them are contained in Appendix 2. The *Hansard* transcript of evidence taken at the hearings was made available on the internet.

1.15 During the course of the inquiry a number of APS agencies and other witnesses appearing before the Committee provided answers to questions taken on notice at hearings and/or supplementary questions, as well as further information provided at the request of the Committee. These were made available on the internet.

Acknowledgments

1.16 The Committee expresses its appreciation to everyone who contributed to the inquiry by making submissions, providing other information or appearing before the Committee at public hearings.

The assistance of the Department of the Parliamentary Library in preparing material used to inform the writing of this report is appreciated.

8 *Senate Journals*, No. 69, 19 March 2003, p. 1593.

Chapter 2

The creation and evolution of MOPS staffing

2.1 This chapter sets out the origins and nature of the Members of Parliament (Staff) (MOPS) Act, and the roles and functions of MOPS staff.¹ It focuses on ministerial staff, showing how their role in the system has changed significantly since the 1970s, and outlining the challenges this evolution presents.

Background to the MOPS Act

2.2 Members of Parliament need staff. They need staff to assist them in dealing with their constituencies; to help them deal with policy issues and to liaise with their parties; and to help manage their parliamentary responsibilities. These are not roles to be undertaken by public servants, who serve the government of the day. Having political staff is intended to ensure these roles are adequately and professionally performed, and to help ensure that the public service does not become politicised.²

2.3 Historically, staff of Members and Senators have generally been employed as a special category of public servant and in most jurisdictions (such as Canada and the UK) they still are.

2.4 Prior to 1984, political staff in Australia were employed under the *Public Service Act 1922*.³ Their existence in early years was confined to the role of ‘private secretary’, and it was expected they would usually, though not always, come from the public service.⁴ Their mobility was guaranteed by a special section inserted into the Act in 1930. That section, 48A, provided:

An officer seconded for duty as Private Secretary to a Minister or member of the Federal Executive Council or to the Leader of the Opposition in either House of the Parliament, shall, upon the termination of his employment in that capacity, be entitled to appointment to an office in the Service of such status and salary as are determined by the Board, having regard to the office held by the officer prior to his being seconded for such duty and to the period and nature of his employment as Private Secretary.

1 This chapter draws heavily on the following Parliamentary Library publications: Ian Holland, ‘Members of Parliament (Staff) Act: Background’, *Research Note* No. 14 2002–03, Department of the Parliamentary Library, Canberra; Ian Holland, ‘Members of Parliament (Staff) Act: Accountability Issues’, *Research Note* No. 5 2002–03, Department of the Parliamentary Library, Canberra; Ian Holland, ‘Members of Parliament (Staff) Act: Employment Issues’, *Research Note* No. 15 2002–03, Department of the Parliamentary Library, Canberra.

2 See *CMI Report*, p. 177; PM&C, submission no. 11, p. 3.

3 APS Commission, submission no. 10, pp. 3–4.

4 *House of Representatives Hansard*, 3 July 1930, p. 3680.

2.5 In 1951, section 8A was also inserted, parts of which stated:

The Governor-General may, on the recommendation of the Board, by order in writing under his hand, declare that the provisions of this Act and of the regulations specified in the order shall not apply to an officer or employee, or to the officers or employees included in a class of officers or employees, specified in the order.

...

The Board may determine the terms and conditions of employment (including rates of payment) of an officer or employee in relation to whom an order is in force under sub-section ...

This provision meant that public servants on secondment to a minister were known as exempt staff. Section 8A allowed employment conditions to be set for exempt staff that gave ministers control over their personal staff that would not normally be possible under the Public Service Act.⁵

2.6 During the 1970s and 1980s, reviews of the Australian Public Service (the APS), such as the Royal Commission into Australian Government Administration (known as the Coombs Royal Commission), recommended a wide range of reforms. Dominant themes underpinning the need for reform included a desire to make the APS more responsive to the government of the day, and to make it more open to mobility of employment, both across public service agencies, and between the public sector and other sectors.

2.7 As a result of these reviews, significant reforms were initiated in 1984. The legislation in which the reforms were contained comprised the Public Service Reform Bill, the Merit Protection (Australian Government Employees) Bill, and the Members of Parliament (Staff) Bill, the last of which became the Members of Parliament Staff Act (the MOPS Act).

The MOPS Act

2.8 The MOPS Act was designed to ‘empower Ministers and other members and senators to engage their own personal staff’ and to ensure ‘that Ministers should have assistance in key projects from able people who share the Government’s values and objectives or who can bring to government relevant specialised or technically advanced skills’.⁶

2.9 The MOPS Act classifies staff in three categories: ministerial consultants (Part II), staff of office-holders (Part III), and staff of senators and members

5 APS Commission, submission no. 10, p. 4.

6 Hon. J. Dawkins, *House of Representatives Hansard*, 9 May 1984, p. 2154.

(Part IV).⁷ Section 3 of the Act defines some office-holders automatically. Under section 12 of the Act, the Prime Minister gets to determine additional positions that qualify as office-holders under Part III, who will therefore get to employ staff other than electorate officers.

2.10 Section 3 of the MOPS Act defines several groups as office holders. They are:

- ministers;⁸
- the leader and deputy leader of the Opposition in each House;
- former Prime Ministers no longer in parliament; and
- the parliamentary leader and deputy leader of recognised political parties.

2.11 Under a determination made by the Prime Minister,⁹ the additional office holders recognised by the Prime Minister include:

- Government Whips;
- the convenor of the Government Members' Secretariat;
- the Presiding Officers in the Senate and the House;
- the Deputy President and Deputy Speaker;
- the Whips of recognised non-government parties in the Senate and House;
- shadow ministers;
- Australian Democrats; and
- independent senators and members not affiliated with a major party.¹⁰

2.12 Under the MOPS Act, Senators and Members (whether office-holders or not) employ staff directly, but only 'in accordance with arrangements approved by the Prime Minister' (ss. 13, 20). The arrangements under section 13 approved by the Prime Minister in November 2001 were that:

people shall be employed only in positions allocated by [the Prime Minister]; and

7 These paragraphs are adapted from Ian Holland, 'Members of Parliament (Staff) Act: Background', *Research Note* No. 14 2002–03, Department of the Parliamentary Library, Canberra.

8 'Ministers' includes parliamentary secretaries, by virtue of the fact that parliamentary secretaries are now members of Executive Council. See *Acts Interpretation Act 1901*, section 19; Department of Prime Minister and Cabinet, *Federal Executive Council Handbook*, chapter 2, <http://www.dpmc.gov.au/docs/DisplayContents1.cfm?&ID=1>.

9 A determination made under section 12 of the MOPS Act on 26 November 2001.

10 Letter from the Prime Minister to the Special Minister of State, delegating the exercise of the Prime Minister's authority under Parts II, III, IV and IV of the MOPS Act, 26 November 2001, p. 2.

salaries and conditions for positions at the level of Special Adviser and above shall be determined by [the Special Minister of State] in accordance with arrangements and parameters set out [by the Prime Minister].¹¹

2.13 In theory, the Act gives the Prime Minister almost complete control over MOPS employment. The powers assigned to the Prime Minister by the Act include, to:

- determine whether a Member may employ staff under Part III;¹²
- prescribe the arrangements under which an office-holder or Member may employ someone;¹³
- set conditions upon which an office-holder or Member may employ someone;¹⁴
- vary the terms and conditions of employees (other than certain conditions including some related to superannuation), either individually or for a class of persons;¹⁵ and
- revoke at any time the determination that a Member is an office-holder under Part III, causing the termination of their staff as a consequence.¹⁶

2.14 On top of these powers, the Prime Minister also issues *Prime Minister's Directions* under the Public Service Act.¹⁷ These *Directions* have been used to preserve a right of return to the public service of APS employees who have taken a position as a MOPS staffer.¹⁸

2.15 In practice, many MOPS staff have conditions of employment similar to those of public servants. All MOPS employees at the level of adviser or below are employed under conditions set out in a Certified Agreement. This includes all electorate officers. Most senior MOPS staff are employed on Australian Workplace Agreements (AWAs). As at September 2003, there were 94 government and 11 non-

11 Letter from the Prime Minister to the Special Minister of State, op. cit.

12 Section 12.

13 Sections 13(2) and 20(2).

14 Sections 13(2) and 20(2).

15 Sections 14(3), 21(3), 14(4) and 21(4).

16 Section 16(2).

17 Issued under section 21 of the *Public Service Act 1999*. See *Prime Minister's Public Service Directions 1999*, <http://scaleplus.law.gov.au/html/instruments/0/26/0/2003041101.htm>

18 Commonwealth Special Gazette no. S 584, 4 December 1999.

government staff on AWAs.¹⁹ Two senior staff declined to sign an AWA and are employed under special Determinations made under the Act.²⁰

2.16 Employment ceases if the staffer's employer dies or loses office, and a MOPS staffer can also have their employment terminated at any time by their employing Senator or Member (ss. 16, 23). Although this means a MOPS employee may be far more easily dismissed than a public servant, their employers are not exempted from anti-discrimination law or the unfair dismissal provisions of the *Workplace Relations Act 1996*. MOPS staff do therefore enjoy some basic protections as employees.

2.17 In practice, most of the powers are delegated to the Special Minister of State (other than for the staff of ministers and parliamentary secretaries). The instruments establishing the scope of the delegations for the current government were two letters from the Prime Minister, on 26 November and 6 December 2001, and these are reproduced at Appendix 6.

The growth of political staffing

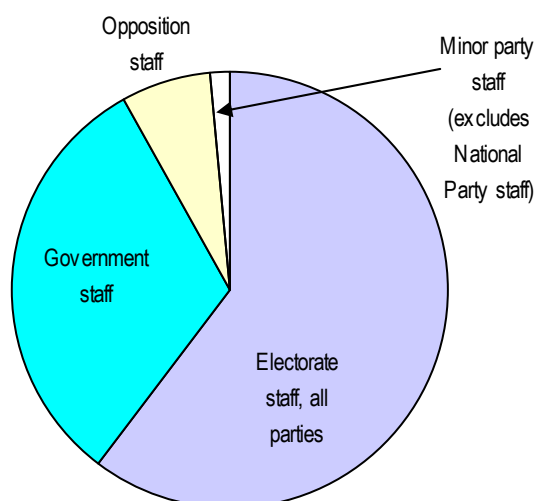
2.18 The number of political staff working both in parliament and in members' electorates has grown steadily over the last few decades. The total number of positions has grown from around 700 in the early 1980s to nearly 1200 in 2003.

2.19 The majority of MOPS employees are electorate staff. The next largest category is government staff, with smaller numbers of opposition staff, and staff employed by minor parties and independents (Chart 2.1).²¹

19 Additional Information, Department of Finance and Administration, 1 October 2003, question 9.

20 A Determination made under section 14(3) of the MOPS Act. Additional Information, Department of Finance and Administration, 1 October 2003, question 8.

21 This figure comes from Holland, 'Background', op. cit., p. 2.

Chart 2.1: Composition of MOPS staffing

2.20 The staffing of the electorates has changed little in two decades. Until 1985 there were two electorate staff for each Member and Senator. This was then increased to three. This meant the total numbers of electorate staff rose from 414 to around 680. Members serving large electorates are permitted a fourth electorate officer to staff a second electorate office.²² In other respects, electorate staffing arrangements have remained almost unchanged.

2.21 The situation with ministerial and party staffing has been very different. The numbers of such staff have changed every year and have, in general, followed a pattern of steady growth. By 2002 there were more government MOPS staff (364) than there were employees of the Department of the Prime Minister and Cabinet (345).²³

2.22 Just how many MOPS staff provide the government with advice depends on how they are counted. To give just a few examples of the way the numbers can vary:

- counting the number of ‘ministerial advisers’ excludes MOPS staff who have purely administrative functions;²⁴
- counting the ‘staff employed by ministers’, includes administrative staff but overlooks the staff of parliamentary secretaries, and staff serving the government but not attached to any individual minister;²⁵

22 In 2003 there were eight ‘large electorates’: Capricornia (Qld), Grey (SA), Kalgoorlie (WA), Kennedy (Qld), Leichardt (Qld), Lingiari (NT), Maranoa (Qld) and Parkes (NSW).

23 Based on APS Commission, *Australian Public Service Statistical Bulletin 2001–02*, Table 2; Submission no. 11, table of staff numbers. Both figures are for 2002.

24 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.

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- counting the ‘number of individuals employed’ has the effect of counting one position shared by two part-time staff as two employees; or
 - counting the ‘number of staff employed’ omits any positions that happen to be temporarily vacant.

2.23 These many different possibilities mean that figures are regularly quoted that seem mutually incompatible. In spite of these difficulties, it is clear that staff numbers have roughly doubled since the 1970s.²⁶ In 1983 there were 207 government staff, and by 2003 that had risen to 372.²⁷ Most ministers now have around six to eight advisers in addition to a number of other support staff.

2.24 Opposition staffing is calculated as a percentage of government staffing. For many years, convention has set a ratio of opposition staff numbers as 21 per cent of government numbers. In addition to opposition staff, other non-government parties receive additional resources. Because the number of minor parties and independents has varied over time, the number of non-government staff also fluctuates. In 1983 there were 63 non-government MOPS staff; in 2003 that had risen to 116. Typically the total non-government staffing level (including opposition staff) is around 30 per cent of that of the government.

2.25 The Prime Minister’s Office (PMO) has often played a prominent role in ministerial staffing. Even when Prime Ministers have cut back the total number of ministerial staff (as Prime Ministers Fraser and Howard did when first taking office), their own offices have grown in size, to the point where the PMO now has nearly 40 staff, not including Departmental Liaison Officers. At the same time, the Department of Prime Minister and Cabinet (PM&C) has shrunk considerably, from a peak of 700 staff under Prime Minister Whitlam, to fewer than 350 staff today.

2.26 The data shows a steady growth in ministerial staffing, both in the PMO and across the government generally. In recent years this growth has taken place against a background of declining numbers in the public service as a whole.

2.27 As already noted, MOPS staff, consistent with the situation of their employers, have little job security. A MOPS employee loses their job automatically if their employer dies or loses office, and can readily be terminated by the employing Member or Senator.²⁸ Under these rules, the greatest turnover is to be expected at the

25 For example, see Senate Estimates Committee E, *Committee Hansard*, 24 February 1994, pp. E83–4. For more detail on the format of questions about MOPS staffing numbers, see Ian Holland, ‘Accountability of Ministerial Staff?’ *Research Paper* No. 19 2001–02, Department of the Parliamentary Library, Canberra, Appendix 1.

26 This is supported by the data in Holland, ‘Accountability of Ministerial Staff’, op. cit., Maley, ‘Too many or Too Few?’, op. cit., and Departments of PM&C and DoFA, submission no. 11, Table of staff numbers.

27 More detailed annual figures for each category of staff are provided in Appendix 4.

28 Subject to the Workplace Relations Act’s protections against unfair dismissal, and anti-discrimination law.

time of a general election. At other times, however, the separation rate for MOPS staff is also relatively high. The separation rate refers to the number of staff who leave (for any reason) divided by the total number of staff employed. Data provided by DoFA for the 2002–03 financial year indicate that the separation rate for office-holder staff was 23.2 per cent and for electorate staff was 26 per cent.²⁹ These rates are well above the average for the public service as a whole (around 19.5%), which is higher again than the average for all industries (around 13%).³⁰

2.28 Turnover of staff can vary a lot between offices, and may vary between types of employment. In 2002–03, for example, electorate officers were more likely than office-holder staff to resign or be terminated, while the opposite pattern applied to MOPS staff returning to public service employment.³¹ Turnover of staff can also ‘be higher in some regions than others’.³²

The roles of ministerial staff

2.29 While there have been important developments since the 1960s in the roles of ministerial staff, two things appear not have changed, according to the limited data available. First, political staff have always been relatively young. Their youth was remarked upon in debate on the 1930 Public Service Bill,³³ and the main studies since that time have shown similar results.³⁴ Second, ministerial staff are diverse. They have come from the public sector, political party organisations, lobby groups, research organisations and the private sector. Though working directly for ministers, staff have not necessarily been active in politics.³⁵

29 Additional Information, Department of Finance and Administration, 1 October 2003, question 12. The figures, if one excludes terminations due to the employing member losing office during the period, are approximately 22.6% and 24.5% respectively.

30 ANAO, ‘Managing People for Business Outcomes Year Two’, *Audit Report* no. 50 2002–03, Table 3.1.

31 Additional Information, Department of Finance and Administration, 1 October 2003, question 12.

32 Dr Watt, *Committee Hansard*, 2 September 2003, p. 32.

33 Sir George Pearce, *House of Representatives Hansard*, 17 July 1930, p. 4225.

34 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; Maria Maley, *Partisans at the Centre of Government: The Role of Ministerial Advisers in the Keating Government 1991–96*, Unpublished PhD thesis, Australian National University, 2002, p. 11.

35 *Senate Hansard*, 9 May 1972, p. 1462; see also Public Service Board, *Background Information Submitted by the Public Service Board to the Royal Commission on Australian Government Administration*, Vol. 8 (Australian Government Employment outside the Normal Framework of Ministerial Departments), 1974, p. 72; Roy Forward, ‘Ministerial Staff Under Whitlam and Fraser’, *Australian Journal of Public Administration*, vol. 36, no. 2, 1977, pp. 159–66; James Walter, *The Ministers' Minders: Personal Advisers in National Government*, Oxford University Press, Melbourne, 1986, p. 122; Maley, *Partisans at the Centre of Government* op. cit., p. 11.

2.30 Australian ministerial staff play ‘an absolutely vital political role’.³⁶ The main roles for staff identified in a 1980s study of advisers were providing policy advice to the minister, liaising with the public service, and general troubleshooting.³⁷ More recent studies, approaching the issue differently, reached similar conclusions.³⁸ Dr Maley’s extensive study classified the roles of advisers as falling into five categories:

... agenda-setting; linking ideas, interests and opportunities; mobilizing; bargaining; and ‘delivering’. ‘Delivering’ refers to bringing the four other roles together in consistently working towards the achievement of a policy objective.³⁹

2.31 Ministerial staff thus have a wide range of responsibilities, and have become pivotal to the interaction between government and bureaucracy. There is, however, little official guidance offered to ministerial staff regarding their roles. The section of the Prime Minister’s *Guide on Key Elements of Ministerial Responsibility* concerning staff is about conflicts of interest, acceptance of gifts and the like, not the staffers’ work.⁴⁰ The MOPS Act and Certified Agreement do not set out the responsibilities of ministerial staff. As noted earlier in the chapter, most senior MOPS staff are employed on AWAs. DoFA advised the Committee that:

... the AWA template includes a standard statement of duties and obligations for each position (Chief of Staff, Senior Adviser, Media Adviser, Special Adviser). The statements outline in very general terms the duties the employee is required to perform.⁴¹

The changing roles of ministerial staff

2.32 Maley has identified four changes to the roles of staff since the 1970s. She observed that: the adviser’s job has been ‘confirmed as partisan’; advisers have become ‘mainly policy focussed’; their job is ‘increasingly professional’; and it is also

36 Dr John Uhr, *Committee Hansard*, 2 September 2003, p. 101.

37 Walter, *op. cit.*, p. 133.

38 Christopher Eriksson, *The Role of Ministerial Advisers in the Public Policy Process*, Unpublished Masters Thesis, University of Canberra, 1996, pp. 21–29, 39.

39 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, p. 455.

40 Prime Minister, *A Guide on Key Elements of Ministerial Responsibility*, 1998, pp. 20–21; see also Tiernan and Weller, submission no. 4, p. 5.

41 Submission no. 11, Attachment A, p. 11.

‘increasingly technical’.⁴² Respondents in Eriksson’s survey made some of the same observations.⁴³ There is also little doubt that advisers have become more powerful.

2.33 With that power has come a need for advisers and public servants to be clear about roles, responsibilities and lines of accountability. It has been argued, however, that that clarity is absent:

Many people within government do not know what their roles are. Worse, many of those who are certain of their role cannot convince others. Many of the conflicting stories before the [CMI] inquiry can be traced back to conflicting expectations of role ... too many powerful people have too little to guide them on what constitutes use and abuse of office.⁴⁴

2.34 Tiernan and Weller agreed:

The lack of a clear and shared understanding about an appropriate demarcation of roles between ministerial staff and the public service is a significant problem that undermines the quality of advice and support to Ministers.⁴⁵

2.35 Mr Barratt likewise observed:

[the 1984 amendments] to the Public Service Act [caused] confusion about the role and accountability of ministerial staff. It is relevant to the current inquiry that the role confusion introduced by the 1984 amendments was carried through into the Public Service Act 1999.⁴⁶

2.36 The Clerk of the Senate also felt that ‘There is an enormous disparity in roles and the way people see their roles amongst those staff’.⁴⁷

2.37 The MOPS Act thus may have formalized the employment framework for ministerial staff, but the system ‘has no formal role for them, no public charter of their responsibilities as public officials and their duties as public decision-makers’.⁴⁸ A similar problem exists in the UK, where the recent Interim Report of the review of government communications raised concerns that ‘there is potential for confusion over respective roles and responsibilities and for civil servants to depart from their neutral

42 Maria Maley, ‘Australian Ministerial Advisers and the Royal Commission on Government Administration’, *Australian Journal of Public Administration*, vol. 61, no. 1, 2002, pp. 105–107.

43 Eriksson, op. cit., p. 29.

44 John Uhr, ‘Role muddles leave officials all at sea’, *Public Sector Informant* [Canberra Times], June 2002.

45 Tiernan and Weller, submission no. 4, p. 7.

46 Mr Barratt, *Committee Hansard*, 3 September 2003, p. 179.

47 Mr Evans, *Committee Hansard*, 3 September 2003, p. 200.

48 John Uhr, ‘Role muddles leave officials all at sea’, op. cit.

and impartial position if special advisers are able to put pressure upon them'.⁴⁹ As a result the review team concluded that there needed to be '[c]learer guidelines on the respective responsibilities of civil servants and special advisers'.⁵⁰

2.38 The Committee notes that the distinctive roles of public servants and ministerial advisers need to be more clearly defined. Responsibility needs to be clearly allocated to ensure that ministerial staff are aware of their roles, and of what they can and cannot do. This issue is taken up in more detail in Chapters 6 and 7.

Are ministerial staff more than extensions of the minister?

2.39 A question of increasing concern has been whether, as one submitter put it, '[t]he ministers and their MOPS are one'.⁵¹ In his submission, Clerk of the Senate Harry Evans argued that the role of ministerial staff has changed. He said that:

Their role has long gone beyond advice and personal assistance. As active participants in the political process, they:

- control access to ministers
- determine the information which reaches ministers, particularly from departments and agencies
- control 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, including directions to departments and agencies
- manage media perceptions and reporting.⁵²

2.40 Some of these claims would be accepted without question by most commentators. Others are more controversial. Their role as a regulator within the office is well known. Dr Maley, for example, wrote of advisers in the Keating government:

Advisers had accrued considerable administrative authority in their dealings with departments. No brief went to the minister without being read and commented on by an adviser first. Advisers had the authority to check and question the department's work and to approve it to go forward to the minister ... The role of gatekeeper ... gave advisers considerable leverage in

49 Government Communications Review Group, *Interim Report*, August 2003, p. 3.

50 Government Communications Review Group, *Interim Report*, August 2003, p. 4.

51 Patricia Ivory, submission no. 15, p. 2.

52 Submission no. 3, p. 2.

their dealings with officials. They could get things decided or attended to. They could delay or block documents going to the minister.⁵³

2.41 Professor Weller reported on a former prime ministerial adviser commenting that the role of ministerial staff ‘is a bit like a coffee filter—a vast amount is poured in one end and is dripped out the other end on the basis of what the prime minister requires at any given moment’.⁵⁴

2.42 More controversial are the claims of decision-making and of directing public servants. Maley’s view is that the role of advisers as ‘surrogates’, taking minor decisions in the minister’s name, has grown.⁵⁵ Jack Waterford has observed that ‘the average staffer’ has become:

... much more than a mere conduit of information to the minister, or a filter helping the minister concentrate only on what is important. Staffers are actively involved in policy and program discussion with departments, and actively [sic] in formulating advice to the minister ... some ministers effectively delegate parts of their work to individual staffers, expecting them to make routine decisions and to process approvals without any need for consultation.⁵⁶

2.43 The Committee believes that ministers must take responsibility for their advisers’ actions, and this is addressed in more detail in later chapters. As a basic first step, the Committee urges nothing should occur in ministers’ offices that might encourage the perception that advisers exercise any authority independently of their ministers. MOPS staff should be careful to preserve this principle in all their communications, whether orally or in writing. This should be particularly scrupulously observed in the case of ministerial correspondence.

Conclusion

2.44 It has been widely argued that the increasingly important and visible role of ministerial staff calls for enhanced accountability of those same staff. Maj. Gen. (ret.) Alan Stretton commented that ‘the increasing role of ministerial advisers, with their lack of accountability, is one of the significant means by which ministers avoid public scrutiny’.⁵⁷ Suggestions to counter this trend have included that they should potentially appear before Parliamentary committees to answer certain questions. Mr Barratt for example argues that:

53 Maley, *Partisans at the Centre of Government*, op. cit., pp. 118, 122.

54 *Committee Hansard*, 2 September 2003, p. 79.

55 Maley, *Partisans at the Centre of Government*, op. cit., p. 123.

56 ‘Reining in political staff and outsiders’, *Public Sector Informer*, [Canberra Times], December 2001, p. 6.

57 *Committee Hansard*, 2 September 2003, p. 68.

Ministerial staff should be fully accountable for all actions undertaken by them outside the confines of the internal Ministerial advisory processes, for example, all transactions they conduct with the Department, with other agencies, with private companies and with the general public.⁵⁸

2.45 The Clerk of the Senate has also argued:

... 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 ...⁵⁹

2.46 Professor Lindell supports reform in this area, saying he cannot see ‘any principled policy reason, in this regard, for treating ministerial advisers differently from ordinary public servants’.⁶⁰ A similar view was expressed by the CMI Committee, which took the view that advisers should be ‘directly accountable to parliament in ways commensurate with those which currently apply to public servants’.⁶¹

2.47 The Committee examines this possibility in detail in Chapter 4. Before discussing enhanced accountability arrangements, however, the Committee needs, first, to examine what is actually meant by making staff ‘accountable’, and also what the *current* accountability arrangements are. These topics are the subjects of the next chapter.

58 Submission no. 7, p. 8.

59 Clerk of the Senate, Correspondence to Senator Cook, 22 March 2002, p. 4, included as an attachment to the *CMI Report*.

60 Submission no. 8, p. 2.

61 *CMI Report*, pp. xxxix; 187.

Chapter 3

Responsibility for and Accountability of Ministerial Staff

3.1 This chapter begins by setting out a distinction between *responsibility* and *accountability*. The Committee then describes existing ministerial staff responsibility and accountability arrangements. Recognising that one of the accountability issues is the appearance of ministerial staff before parliamentary committees, the following chapter deals specifically with that issue.

The meanings and consequences of ‘responsibility’ and ‘accountability’

3.2 ‘Accountability’ is a constantly-changing concept.¹ In his classic study of individual ministerial responsibility, Professor S. E. Finer highlighted the distinction between two uses of the word ‘responsible’. He pointed out that it may mean ‘answerable to’, implying the requirement to offer an explanation. But it also means ‘answerable for’, meaning censurable for something, or accepting responsibility.² The Cabinet Office in the UK officially described this in 1993 as a distinction between accountability (being required to give an account) and responsibility (being personally involved and therefore attracting any credit or blame).³

3.3 Questions about the accountability of MOPS staff (particularly ministerial staff) need to be approached with this distinction in mind. A number of submissions used the meanings, as well as the terms, interchangeably. Dr Russell referred to ministers accepting ‘responsibility’ for their staff and ‘what it implies’ (meaning attribution of blame), but also referred to the need for someone to appear before Parliament to ‘explain’ the conduct of staff.⁴ Ms Ivory referred to government attempts to ‘build a firewall around ministerial accountability’ and at the same time indicated that the basic principle is that ‘the minister is still responsible’.⁵ The two concepts are closely related, and both are relevant to the investigations of this Committee, but they have distinct meanings.

1 Richard Mulgan, “‘Accountability’: An Ever-Expanding Concept?”, *Public Administration*, vol. 78, pp. 555–73.

2 S. E. Finer, ‘The Individual Responsibility of Ministers’, *Public Administration*, vol. 34, 1956, p. 379.

3 See Diana Woodhouse, ‘The Role of Ministerial Responsibility in Motivating Ministers to Morality,’ in Jenny Fleming and Ian Holland (eds), *Motivating Ministers to Morality*, Ashgate, Aldershot, 2001, pp. 42–3.

4 Submission no. 9, pp. 5–6.

5 Submission no. 15, p. 2.

Responsibility for ministerial staff and their actions

3.4 In 1974 responsibility for ministerial staff was described by PM&C in the following terms:

Ministerial staff are under the direct control of the Minister ... They occupy positions of a special nature, outside the normal hierarchy and lines of responsibility of the Department ... In view of a Minister's own *absolute responsibility* for the functioning of his staff, he has an absolute discretion to recruit and remove individual members of his staff.⁶

3.5 At that time, therefore, ministers took complete responsibility for their staffs' actions, and as a result were given complete control over their employment. A similar statement is made in the Prime Minister's 1998 *Guide*:

Ministers (and parliamentary secretaries) are responsible for the conduct of members of their staff (including consultants), who act at the minister's direction and, to the extent that they have the minister's authorisation, take action on his or her behalf.

...

Ministers' direct responsibility for actions of their personal staff is, of necessity, greater than it is for their departments'. Ministers have closer day-to-day contact with, and direction of the work of, members of their staff. Furthermore, ministerial staff do not give evidence to parliamentary committees, their actions are not reported in departmental annual reports, and they are not normally subject to other forms of external scrutiny, such as administrative tribunals.

... Ultimately, ... ministers cannot delegate to members of their personal staff their constitutional, legal or accountability responsibilities. Ministers therefore need to make careful judgements about the extent to which they authorise staff to act on their behalf in dealings with departments.⁷

3.6 In recent years, it has been suggested that ministerial staff have become 'expedient political scapegoats who 'take the bullet' for their Minister when pressure gets too great or things get out of hand'.⁸ Similar views have been expressed in media analysis of the issue:

The controversial role of ministerial advisers is only such because the politicians have refused to take responsibility by being accountable for their actions. This lack of accountability by politicians is a cause for concern by

6 Emphasis added. PM&C, 29 March 1974, cited in R.F.I. Smith, *Ministerial Advisers*, Royal Commission on Australian Government Administration, 1975, p. 11.

7 Hon. John Howard MP, *Guide on Key Elements of Ministerial Responsibility*, 1998, http://www.dpmc.gov.au/pdfs/Key_Elements_Ministerial_Responsibility.pdf, pp. 13–14, 20.

8 Tiernan and Weller, submission no. 4, p. 10.

private sector executives considering a government post. They know it will be them – not the minister – who takes the fall.⁹

3.7 Thus there is a perception that ministers no longer take full responsibility for staff actions, but that responsibility now sometimes falls on individual employees. As one departmental submission noted, ‘there have been incidents where MOP(S) Act staff have been held more immediately accountable (through dismissal) than public servants’.¹⁰ In recent years these have included:

- the 1997 termination of two advisers to the Prime Minister in connection with the travel rorts affair;¹¹
- the 1998 sacking of a member of Minister for Resources Senator Warwick Parer's staff, for trading shares in breach of the Prime Minister's *Guide*;¹² and
- the 2001 sacking of two staff in the office of the Deputy Prime Minister, John Anderson, following the mis-handling of an Australian National Audit Office report on road funding.¹³

3.8 The evidence presented to the Committee demonstrates that responsibility for the actions of ministerial staff has evolved as their numbers and influence have grown. They are more likely than in the past to be seen to take responsibility for mistakes or errors of judgement. Ministers are also more likely than in the past to indicate that actions taken in their offices may have occurred without their knowledge and that they should not necessarily be held responsible as a result. Responsibility for MOPS staff actions appears to have become diffused.

3.9 In this regard, the Committee is concerned at the increasing degree to which MOPS staff are being held publicly responsible for their actions. Certainly, issues with the performance of MOPS staff should be addressed by their employer. However, the performance management of MOPS staff, including disciplinary action, should not detract from the ultimate responsibility of their employer for the actions of their staff. The Committee is particularly concerned that, in some cases, the errors of MOPS staff that have resulted in their sacking were not what would constitute a ‘sackable offence’ had the person been employed elsewhere. This suggests the sacking was not consistent with normal performance management or disciplining of an employee, but was being imposed as a substitute for sanctions against a responsible minister.

9 ‘Chanticleer: Bridging the Canberra divide’, *Australian Financial Review*, 16 August 2003.

10 PM&C, submission no. 11, p. 3.

11 Ann Tiernan, ‘Problem or Solution? The Role of Ministerial Staff’, in Jenny Fleming and Ian Holland (eds), *Motivating Ministers to Morality*, Ashgate, Aldershot, 2001.

12 Greg Roberts, ‘Parer sacks key adviser over shares’, *Sydney Morning Herald*, 6 August 1998.

13 Dennis Shanahan, ‘Anderson in the alien corn’, *The Australian*, 17 February 2001. This and the travel rorts case are also referred to by Professor Weller, *Committee Hansard*, 2 September 2003, p. 80.

3.10 Furthermore, some of the sackings have been illusory: one staffer, for example, was sacked by one minister and then re-employed by another.¹⁴ This again appears to be an example where the action was not truly disciplinary in nature, but designed to circumvent the responsibility a minister should have been taking.

Recommendation 1

3.11 The Committee recommends that the disciplining of MOPS staff should not be allowed to detract from ministerial responsibility for staff actions.

Accountability of ministerial staff and their actions

3.12 It is appropriate that much of the work of ministerial staff is not subject to public scrutiny. As Dr Maley found in her research, ‘trust, loyalty and confidence were fundamental to the relationship’ between ministers and staff.¹⁵ Protecting the confidentiality of advisory discussion between ministers and their staff is necessary to guarantee both the trust in the relationship and the robustness of the advice that staff provide.

3.13 The Committee also heard, however, that ‘there is a need for some sort of accountability for this large number of people on the public purse’.¹⁶ At present, the information provided to the parliament and to the public is limited. As the Prime Minister’s *Guide* points out, ‘ministerial staff do not give evidence to parliamentary committees, their actions are not reported in departmental annual reports, and they are not normally subject to other forms of external scrutiny, such as administrative tribunals’.

3.14 Currently, information about the numbers, remuneration and so on of staff is only forthcoming if questions are asked in parliament or through a parliamentary committee. DoFA and PM&C reported:

During the hearings in the life of the current Government information has been provided to Committee members on:

- staffing establishment, showing changes to Government and non-Government personal staff numbers – more recently, Committee members have been provided with handouts detailing staffing numbers, by classification, by Minister/Parliamentary Secretary or office holder and information has been provided by officials where sought on changes to overall numbers by classification; and

14 The Prime Minister reluctantly sacked Fiona McKenna, who was re-employed in the office of the Special Minister of State. See Ann Tiernan, ‘Problem or Solution?’, *op. cit.*

15 Submission no. 5, p. 2.

16 Professor Weller, *Committee Hansard*, 2 September 2003, p. 79.

- personal classifications of Government staff – more recently, Committee members have been provided with handouts detailing the number of Government staff with personal classifications by Minister/Parliamentary Secretary and questions have also been answered on salary ranges and the role of personal staff.¹⁷

3.15 Not all MOPS-related questions are answered, however. One of three questions on notice asked during the current parliament regarding MOPS staffing has gone unanswered in over a year;¹⁸ another MOPS-related question on notice languished unanswered on the notice paper for 1043 days of the 39th parliament.¹⁹ The answers to other questions may be incomplete.²⁰

3.16 Ministers may provide information to Parliament in response to questions that have concerned the actions of ministerial staff. Prime Minister Mr Howard, for example, reported to parliament in the wake of the children overboard incident, on communications involving Mr Jordana in the PMO²¹ and Mr Scrafton in the office of the Minister for Defence.²²

3.17 There have been occasions when governments have commissioned inquiries into issues, and have been willing to have ministerial staff appear before an independent investigator. Examples include:

- The cooperation in 1993 of the staff of Communications Minister Senator Bob Collins with an inquiry conducted by Professor Dennis Pearce into the pay TV licencing issue;²³ and
- Advisers providing evidence to the Bryant inquiry in late 2001, commissioned by the government to review advice provided to ministers during the children overboard incident.²⁴

3.18 These examples stand in contrast to the resistance of governments to having those same advisers appear before inquiries when they are conducted by Senate committees, sometimes into the very same issues. Only very occasionally have

17 Submission no. 11, p. 12.

18 Question on Notice no. 222, from Senator Faulkner to the Special Minister of State, notice given 8 April 2002.

19 Question on Notice no. 303, from Senator Ray to the Minister representing the Minister for Finance and Administration, notice given 30 November 1998.

20 See, for example, Senate Finance and Administration Committee, Answers to Questions on Notice, Additional Estimates Hearings, 28 & 29 May 2003, Question F43, *Estimates Hansard*, p. 421.

21 *House of Representatives Debates*, 19 February 2002, p. 416.

22 *House of Representatives Debates*, 19 February 2002, p. 432.

23 See Senator Collins, *Senate Hansard*, 11 May 1993, p. 375.

24 Jennifer Bryant, *Investigation into advice provided to ministers on 'SIEV 4'*, Department of Prime Minister and Cabinet, January 2002.

advisers appeared before parliamentary committees, but this has generally been resisted; it is the subject of the next chapter of the Committee's report.

Conclusion

3.19 Employing Members and Senators must take appropriate responsibility for the actions of their staff. There must also be adequate accountability for public expenditure in the area of political staffing, and to ensure that parliamentary accountability for the actions of ministerial staff is maintained.

3.20 The Committee believes that confusion exists concerning the accountability and responsibility of ministerial staff. Some submissions express concern that if ministerial advisers were required to appear before Parliament this would imply that they would have some independent existence.²⁵ The Committee understands this could be the case if they were being expected to take responsibility for their actions. Yet the current appearance of public servants before Parliament carries no such connotation. The reason is that they are there for *information* purposes: for *accountability*, not *responsibility*.

3.21 It is this distinction between accountability and responsibility that underpins the principle that ministers should be responsible ('censurable for') for their staff's actions, but that staff should be accountable ('required to give account') to Parliament for their actions in some circumstances.²⁶ The Committee considers in more detail in Chapter 4 the circumstances in which the appearance of ministerial staff before a parliamentary committee might be warranted. In doing so, however, the Committee emphasises that the purpose of any such appearance would be to provide information—it is a matter strictly of accountability. *Responsibility* for the actions of ministerial staff rests always with their minister, and the Committee reaffirms this principle.

25 Dr Maley, submission no. 5, p. 2.

26 See the submission and evidence of Dr Russell; also see Professor Lindell, submission no. 8, p. 2, and Attachment, p. 14.

Chapter 4

Ministerial Staff and the Parliament

Introduction

4.1 From time to time, there is debate about whether and how ministerial staff should give evidence to Parliament or one of its committees.¹ These have always been difficult debates. The current Committee report represents a unique opportunity to consider the issues involved away from the glare of any scandal or particular allegation. The purpose of the Committee has not been to revisit any particular incident. To the extent that it draws on past cases, the intention has been solely to draw out some of the main arguments and issues involved.

4.2 This chapter begins by reviewing instances where advisers have been called to, and sometimes have, appeared before parliamentary committees. It then looks at the question of whether advisers can be *compelled* to give evidence before the Parliament and, in particular, before Senate committees.

The appearance of advisers before committees

4.3 There have been a number of occasions when the appearance of ministerial staff before parliamentary committees has been sought. They fall into two groups: those that have resulted in the appearance of ministerial staff, and those calls for their appearance that were unsuccessful. Examples in the first category are:

- In October 1975, the Private Secretaries to the Prime Minister and to the Minister for Labor and Immigration gave evidence to a Senate Foreign Affairs and Defence Committee inquiry into South Vietnamese Refugees, with the government's approval.²
- In 1989, a MOPS staffer who directed the activities of the National Media Liaison Service (NMLS) appeared before Senate Estimates Committee D.

1 These include debates about: the National Media Liaison Service in 1989 and 1995; the Pay TV affair in 1992–93; the Community Grants Scheme in 1993–94; the inquiries of the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media in 1993–94; and the ‘children overboard’ affair in 2001. See, for example, the Senate Select Committee on Matters Arising from Pay Television Tendering Processes, *First Report*, September 1993, dissenting report, paras 60–68.

2 *Odgers Australian Senate Practice* (OASP), 10th edition Supplement, p. 20; Senate Foreign Affairs and Defence Committee, *Committee Hansard*, 17 October 1975, pp. 410–514.

- In 1995, the Senate successfully compelled a MOPS staffer to appear (see also further discussion below).³

4.4 More frequent have been the unsuccessful attempts to have ministerial advisers appear and respond to questions from parliamentary committees:

- In May 1992, it was suggested that an adviser to the Minister for Foreign Affairs and Trade could give evidence to a Senate committee concerning the ‘Marshall Islands affair’.⁴
- In September 1993, it was proposed that an adviser to the Minister for Transport and Communications give evidence to a Senate committee. The Committee minority report rejected the argument that advisers should appear ‘only in exceptional circumstances’.⁵
- In 1994, members of the House of Representatives Standing Committee on Environment, Recreation and the Arts unsuccessfully sought evidence from a ministerial adviser in connection with the Community Cultural, Recreational and Sporting Facilities Program (the so-called ‘sports rorts’ affair).⁶
- As noted in the CMI report, in 1994, during Senate debate about the same Community Facilities Program, it was argued that ministerial staff should be called by a Senate committee.⁷
- In 2001, the Senate Select Committee on a Certain Maritime Incident sought evidence from advisers to a former Minister for Defence and the current Prime Minister. Their appearance was sought on the grounds that their evidence was necessary to determine ministerial responsibility for actions related to the ‘children overboard’ affair.⁸

4.5 There have thus been regular calls for ministerial staff to appear. Those calls have only sometimes resulted in the appearance of staff. Further, on only one occasion has the appearance been the result of the Senate ordering a witness to appear. In general, the Senate has been reluctant to engage in what would prove to be drawn-out and expensive legal battles to force advisers to present themselves for questioning.

3 For details see Ian Holland, ‘Accountability of Ministerial Staff?’ *Research Paper* No. 19 2001–02, Department of the Parliamentary Library, Canberra, pp. 15–16.

4 *Senate Hansard*, 27 May 1992, p. 2753.

5 Senate Select Committee on Matters Arising from Pay Television Tendering Processes, *First Report*, September 1993, Dissenting Report, p. 48.

6 House of Representatives Standing Committee on Environment, Recreation and the Arts, *The Community Cultural, Recreational and Sporting Facilities Program: A Review of a Report on an Efficiency Audit by the Auditor-General*, February 1994, Dissenting Report, p. 2.

7 *Senate Hansard*, 3 March 1994, p. 1417; *CMI Report*, pp. 178–9.

8 *CMI Report*, pp. xiv–xv.

Perhaps as a result, a view has begun to develop that they may in fact be immune from having to appear.⁹

Can advisers be compelled to appear?

4.6 It is important to understand that there are two separate points around which the debate about the summoning of ministerial staff turns. The *first* concerns the relationship between a minister (and by implication his or her staff) and the house of which they are *not* a member. This has been referred to as a matter of constitutional power¹⁰ or of comity between the houses.¹¹ The *second* concerns the balancing of the public interest in the process of ensuring accountability to the legislature for activities within the executive. This is generally referred to as a question of executive privilege or public interest immunity.¹² Only the first of these played a significant role in debate during the ‘children overboard’ affair, in connection with the appearance of former minister for defence Peter Reith and his staff. It is to this question the Committee first turns.

Ministerial staff and the independence of the Houses

4.7 The Senate has the power to compel any witness to appear before it.¹³ One of the only exceptions is that it is generally accepted that each House of Parliament cannot compel the attendance of a member of the other House.¹⁴ This can be thought of as a power or as an immunity: the *power* of each house to have exclusive jurisdiction over its own affairs, or, as a consequence, the *immunity* of the members of each house from being subject to the jurisdiction of the other chamber.

4.8 During the CMI Inquiry, the Clerk of the House of Representatives, drawing on the advice of Professor Lindell, attempted to suggest that the immunity of a minister who was a member might be extended to their staff. He stated:

9 Harry Evans, submission no. 3, p. 5.

10 See for example Alan Robertson’s legal opinion of 26 June 2002, included as an attachment to the *CMI Report*.

11 See for example OASP, 2001, p. 442.

12 See for example Senator Brandis, Senate Select Committee on CMI, *Committee Hansard*, 18 April 2002, p. 1199; Clerk of the Senate, Correspondence to Senator Cook, 22 March 2002, p. 5, included as an attachment to the *CMI Report*.

13 OASP, 2001, p. xx.

14 Although this matter has never been litigated. See OASP, 2001, p. 56, 440–442; Alan Robertson, *op cit.*, p. 7; Bret Walker, legal opinion of 16 May 2002, p. 7, included as an attachment to the *CMI Report*; Geoffrey Lindell, advice to the Clerk of the House of Representatives, 22 March 2002, p.3, included as an attachment to the *CMI Report*; Geoffrey Lindell, ‘Parliamentary Inquiries and Government Witnesses’, *Melbourne University Law Review*, Vol. 20, No. 2, p. 395.

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.¹⁵

4.9 The Committee notes, however, that Professor Lindell himself thought that, while such an immunity for ministerial staff *might* exist, it was 'much more doubtful' than the immunity enjoyed by a minister.¹⁶

4.10 The Clerk of the Senate, supported by the legal advice of Bret Walker,¹⁷ pointed out that the nature of the immunities recognised by the Senate:

... make it clear that there is no such recognised immunity in respect of ministerial advisers and personal staff. The existence of such an immunity has not been recognised by the legislature, and there is no ground for concluding that such an immunity might be recognised by the courts in respect of legislative inquiries.¹⁸

4.11 There have been incidents that indicate that the independence of the houses has not in the past been an impediment to the appearance of ministerial staff. If the independence of the houses was an important principle of relevance, it would have been raised on several previous occasions, including:

- The appearance of Mr Delaney before a Senate committee in 1975 despite the fact that he worked for a lower house minister (the Prime Minister).
- The appearance before a Senate committee of Mr David Epstein in 1995,¹⁹ although he was employed under the MOPS Act by a lower house minister (the Minister for Finance). The government of the day protested the appropriateness of his appearance, but did not question the Senate's power to compel it.
- The case in 1994 when some Senators called for a Senate Select Committee to inquire into the Community Facilities Program. They argued that if the Senate Committee were established, it would be able to hear from the staff of a House

15 Clerk of the House of Representatives, Correspondence to Mr Brenton Holmes, Secretary to the Committee, 3 April 2002, p. 10, included as an attachment to the *CMI Report*.

16 Geoffrey Lindell, advice to the Clerk of the House of Representatives, 22 March 2002, p. 10.

17 Bret Walker, legal opinion of 16 May 2002, p. 7, included as an attachment to the *CMI Report*.

18 Clerk of the Senate, Correspondence to Senator Cook, 22 March 2002, pp. 2–3, included as an attachment to the *CMI Report*.

19 Mr Epstein was invited by the Senate Finance and Public Administration Committee to appear at its estimates hearings to answer questions regarding the National Media Liaison Service. However, Mr Beazley wrote to the Senate Committee, stating that 'as Mr Epstein's employer I am not prepared to accede to this request'. For more information, see Ian Holland, 'Accountability of Ministerial Staff?' *Research Paper* No. 19 2001–02, Department of the Parliamentary Library, Canberra, pp. 15–16; *Senate Hansard*, 7 February 1995, p. 606.

of Representatives Minister, implying that they did not believe that the independence of the houses was at issue.

4.12 The powers of the houses to regulate their own affairs are not relevant to parliament's capacity to call ministerial staff to give evidence. Past practice has borne this out. However, there is a separate objection sometimes raised against the giving of evidence by ministerial staff, based on the grounds of 'executive privilege'.

Ministerial staff and executive privilege

4.13 This second type of argument made against having ministerial staff appear is that '[t]he concept of "executive privilege" is important and needs to be protected'.²⁰ 'Executive privilege', 'Crown privilege' and 'public interest immunity' are generally interchangeable terms.²¹ 'Executive privilege' refers to the view that certain government persons or documents should be shielded from public or parliamentary scrutiny in order to assist governments to govern in the public interest.

4.14 Maley has argued that executive privilege is the basis for protecting advisers from interrogation by Parliament. She wrote:

Contrary to what John Howard has stated in Parliament, the convention is not based on ministerial responsibility—that 'ministerial staff are accountable to the minister and the minister is accountable to the Parliament and, ultimately, the electors.' (*Hansard*, March 12, 2002). In fact, what underpins the convention of not compelling staff to appear before committees is the notion of 'executive privilege', a doctrine which developed in the US.²²

4.15 Executive privilege, Maley suggests, is intended as a protection of the confidentiality of discussions within the executive arm of government.

4.16 Certainly, increasing use has been made by Australian governments of claims of executive privilege as a reason for 'the failure of government witnesses to comply with requests for information or documents sought by the Senate'.²³

4.17 During hearings, the Clerk of the Senate expressed the view that executive privilege is not a doctrine relevant to the question of the appearance of ministerial staff.²⁴ This was supported by discussions the Committee had with witnesses about the appearance of ministerial staff. When executive privilege was raised as an issue, it was always in the context of possible limitations on the kinds of evidence they might

20 Dr Maley, submission no. 5, p. 3. See also APS Commissioner, submission no. 10, pp. 13–14.

21 See OASP, 10th edition, p. 482; Professor Lindell, submission no. 8, Attachment, p. 15.

22 Maria Maley, 'Political advisers should be protected', *Canberra Times*, 19 March 2002.

23 Geoffrey Lindell, 'Parliamentary Inquiries and Government Witnesses', *op. cit.*, p. 392.

24 *Committee Hansard*, 3 September 2003, p. 207.

give or the kinds of questions they might answer. It was never suggested that it might be a basis for them to not appear in the first place.²⁵

4.18 All witnesses recognised the view expressed by the Clerk of the Senate, that executive privilege is a claim that is made in relation to *information*, not in relation to *a class of persons*. It is a claim that concerns the question of whether revealing something would for some reason be detrimental to the public interest. As the Clerk of the Senate has pointed out, executive privilege is a claim to be made, to which the Parliament can then respond.²⁶

4.19 Thus executive privilege might be relevant to what a witness says when appearing before a committee, but it is not relevant to whether they should appear in the first place. It is also not a doctrine that covers some general class of situation, with the partial exception of documents recording the deliberations of cabinet.²⁷ In this respect it is similar in application both in Australia and in the US. Lindell concludes that executive privilege is unlikely to, and should not, operate as a restriction on the powers of the houses to compel witnesses to appear or for documents to be produced.²⁸

4.20 Executive privilege is irrelevant to the question of the power of the houses to compel a witness, including a ministerial staffer, to appear before them to answer questions. Once a witness is present, then if they decline to answer a question, it will be for the committee to determine, as Lindell puts it:

... whether the Houses of Parliament have an overriding interest in being informed by the Executive and whether it is safe to allow Ministers to be the sole judges of what the public interest requires not to be disclosed.²⁹

Ministerial staff can be compelled to appear

4.21 The Committee concludes that the independence of the houses presents no legal barrier to the appearance of any ministerial staff before a parliamentary committee. In any case, this issue does not even arise in the case of the staff of ministers called before a committee drawn from the chamber of which their minister is a member.

25 See for example, Dr Seth-Purdie, *Committee Hansard*, 3 September 2003, pp. 147–48; Dr Russell, *Committee Hansard*, 3 September 2003, p. 168.

26 Clerk of the Senate, Correspondence to Senator Cook, 22 March 2002, op. cit., p. 5. See also the extended discussion in OASP, 2001, pp. 481–500.

27 *Commonwealth v Northern Land Council*, (1993) 67 ALJR 405. See discussion and other cases in OASP, 2001, pp. 484–85.

28 Lindell, advice to the Clerk of the House of Representatives, 22 March 2002, op. cit., p. 10.

29 Lindell, ‘Parliamentary Inquiries and Government Witnesses’, op. cit., p. 396.

4.22 The Committee also concludes that executive privilege does not present a barrier to compelling the appearance of ministerial staff before parliamentary committees (just as it does not present a barrier to the appearance of public servants).

4.23 The Committee notes that a view has been expressed that it is for the government to control the appearance of public servants and MOPS staff:

(Senator Murray) ... are you, in principle, supportive of the view that anyone who acts in an executive or administrative capacity should be accountable for their actions ... to the Senate?

Dr Shergold—In principle, I believe that all those in the positions to which you refer should be accountable. I believe that public servants are accountable through our minister and that advisers are accountable through their minister. The question—and it is for the government to decide—is whether the government want to move beyond that.³⁰

4.24 The Committee does not believe Dr Shergold's response reflects either the powers of the Houses or a desirable approach to the issue. It is for each House to decide to exercise its powers to call witnesses, including public servants, to give evidence. It is not a matter for the government to determine who should appear. To do otherwise, as well as contravening the known powers of the Houses, would be to subordinate parliament to the executive, whereas the proper relationship is the reverse. Government is an instrument of the parliament, not vice versa.

4.25 Should either house of parliament desire, it could compel ministerial staff to appear. At the same time, it is possible that this could lead to a difficult and drawn-out process, with conflict between the parliament and the government of the day. Compulsion is not the only option, and the Committee now turns its attention to defining an alternative approach.

Is compellability so important?

4.26 There is nothing to prevent the parliament and the government from reaching some agreement on circumstances in which ministerial staff will appear before parliamentary committees. If the parties could come to an agreement about the circumstances in which ministerial staff would appear, the question of compellability need not arise. A similar negotiated consensus has existed for the last quarter of a century in respect of public servants. This has operated with only minor glitches, and has operated despite the absence of guidelines approved by the parliament.³¹

30 *Committee Hansard*, 2 September 2003, pp. 42–3.

31 The *Government Guidelines for Official Witnesses* have been used for many years to guide the giving of evidence by public servants, but have never been officially endorsed by parliament, a common misconception.

4.27 The Committee believes there are two main principles upon which to base the setting of parameters for the appearance of ministerial staff. The first is the principle of preserving ministerial responsibility. The second is the principle of maximising the accountability and transparency of government.

Preserving ministerial responsibility

4.28 The convention under which our system of government operates is one of ministerial responsibility. In respect of ministerial staff, the approach enunciated by Senator McMullan in 1995 (at that time Minister for Trade), and in 2002 endorsed by Prime Minister Howard, is that ‘ministerial staff are accountable to the minister and the minister is accountable to the Parliament’.³² The Committee agrees that individual ministerial responsibility to Parliament should underpin the approach taken to ministerial staff

4.29 However, there are several factors that limit the extent to which the principle is fulfilled in practice. First, only one House can hold ministers responsible. The other cannot compel their appearance,³³ nor do censure motions in the Senate have a direct effect on the tenure of a minister. Second, the nature of accountability is different between the houses. The House of Representatives does not have estimates hearings in its committee system, and only the Senate uses Returns to Order. Third, as Professor Weller has argued, it may be that ministerial staff can no longer be assumed to be answerable through the minister.³⁴ Ministers no longer always take responsibility for their staffs’ actions.

4.30 Consistent with the principle of ministerial responsibility, the Committee believes one of the desirable features of any framework governing ministerial staff should be that it reinforces the lines of responsibility. This would involve ministers accounting for the actions of staff, and taking responsibility for them.³⁵

4.31 It was with this idea in mind that some witnesses advocated that ministerial staff should appear before committees if their minister does not take responsibility for them. The intention is to increase the incentive for ministers to retain ownership of their staffs’ actions. Thus Dr Russell argued:

32 Senator McMullan, *Senate Hansard*, 7 February 1995, p. 610; Mr Howard, *House of Representatives Hansard*, 12 March 2002, p. 995.

33 The Committee recognises that the system of ministers representing ministers in the other chamber is designed to overcome this problem, but it is only partly successful, and only routinely operates for questions and estimates.

34 Patrick Weller, *Don’t Tell the Prime Minister*, Scribe Publications, Melbourne, 2002, p. 73; Dr Russell, *Committee Hansard*, 3 September 2003, p. 156.

35 For example, in 1992 Senator Bishop suggested that the Minister for Foreign Affairs and Trade stand aside in connection with the Marshall Islands affair, because he was ‘not informed by his staff as to what is going on’. *Senate Hansard*, 28 May 1992, p. 2917.

If ministers disown their staff or seek to use the failings of their office to explain their own behaviour then their principal/senior adviser and potentially the Prime Minister's Principal Adviser should appear before the Parliament to explain.³⁶

4.32 Similarly, Dr Maley supported an approach that 'creates incentives for ministers to account for, and take responsibility for, the actions of their staff'.³⁷ She regards the key principle to be maintained as being that 'advisers are extensions of ministers and that therefore ministers should account for, and be responsible for, their actions'.³⁸

4.33 As Dr Maley noted, Dr Russell's approach recognises two distinct possibilities: one where a minister might renounce their staff's actions; and a quite different one where the minister's office might fail to operate, but where that failure is not criticised by the minister.

4.34 The examples noted by the Committee in Chapter 3, where staff were in fact sacked for their actions, fall into the first category. Other examples fall into the second category. In 1992, Parliament heard of a case where an adviser had not informed their minister about something, and the minister defended the adviser's actions:

In 1992 Senator Gareth Evans was accused of misleading Parliament when he denied knowledge of some of Senator Graham Richardson's activities in the 'Marshall Islands Affair', yet it was found that a fax had been sent to his office communicating this information. One of his advisers had not passed on the information to the minister. In this case Evans explained in Parliament^[39] what had occurred and gave reasons why the adviser had failed to pass on the information ... While Evans was willing to provide a full account of his staff's actions ... he felt the adviser's actions were not a case of 'wrongdoing' or 'blameworthy conduct'. In this case, Evans did not disown his staff, but he did claim his staff had failed in some task.⁴⁰

4.35 In this example, it was clear that telling an adviser was not the same thing as telling their minister, and in these circumstances, parliamentary scrutiny was directed at ensuring the minister was accountable for his adviser's actions.

4.36 Leading parliamentary scholar, Professor Enid Campbell, has succinctly set out the link between ministerial responsibility and the appearance of ministerial staff:

The primary target of a parliamentary inquiry may be the conduct of a minister, and in the course of that inquiry it may be most important to

36 Submission no. 9, p. 6.

37 Dr Maley, supplementary submission no. 5A, p. 1.

38 *ibid.*

39 See *Senate Hansard*, 26 and 27 May 1992.

40 Dr Maley, supplementary submission no. 5A, p. 2.

ascertain precisely what occurred within the ministers' personal office. For example, if the allegation under investigation is whether the minister misled the parliament or failed to correct public statements made by him or her, it may be highly relevant to ascertain whether the minister was ever alerted by personal staff to the fact that correspondence addressed to the minister suggested that the minister's statements were false or misleading, and should have been corrected...

[The principles of ministerial responsibility and parliamentary supremacy] must surely be undermined if the parliamentary arms of government are, effectively, precluded from inquiring into conduct which has preceded ministerial actions.⁴¹

4.37 Professor Campbell's comments encapsulate the relationship between doctrines of ministerial accountability and the work of committees in seeking evidence from ministerial staff. Ministerial staff should be available to give evidence in circumstances where their availability will clearly assist a committee's inquiries to ascertain facts, and ultimately enhance the principles of ministerial accountability and responsibility.

4.38 The Committee supports an approach that encompasses the circumstances envisaged by witnesses such as Ms Tiernan, Professor Weller and Dr Russell, which would cover cases for example where:

- A minister has renounced or distanced him or herself from a staff member's action;
- A minister has refused to appear to answer questions regarding the conduct of a member of their staff;
- Critical or important information or instructions have emanated from a minister's office but not from the minister; or
- Critical or important information or instructions have been received by a minister's office but not communicated to the minister.

4.39 Such an approach will enhance ministerial responsibility in two ways. First, it will ensure that Parliament will receive first-hand evidence on information flows in ministers' offices, which will be relevant to establishing ministers' responsibilities for their actions. Second, by indirectly reinforcing the principle that telling a staff member ought to be the same thing as telling a minister this approach will give ministers further incentives to take responsibility for their staff's actions.

Accountability

4.40 The second point to draw on in designing a framework for the appearance of ministerial staff is the general principle in favour of accountability and transparency of government actions.

41 Enid Campbell, *Parliamentary Privilege*, Federation Press, Sydney, 2003, p. 175.

4.41 Some witnesses expressed the view that because MOPS staff are on the public payroll, there should be public accountability for that expenditure:

Senator WATSON —Do you believe that advisers should appear before parliamentary committees?

Dr Seth-Purdie —Yes.

Senator WATSON —Why?

Dr Seth-Purdie —Because they are on the public payroll and they are making decisions that impact upon the development and implementation of public policy. I see no value in allowing them to hide behind a veil of secrecy.⁴²

4.42 Ms Tiernan and Professor Weller likewise stated:

... there must be greater transparency in staffing arrangements ... Like any publicly funded political institution, the Australian community has a right to expect transparency from the ministerial staffing system.⁴³

4.43 Other witnesses were more cautious, still suggesting that advisers should appear, but in more limited circumstances:

The general principle should be that staff are an extension of the minister and that the minister accepts responsibility for his or her staff. If the minister accepts this and what it implies, then the matter stops there. There is no need for ministerial staff to appear before Committees of the Parliament. If the minister disowns his or her staff or claims that his or her office failed in some task, then the principal/senior adviser should appear before the Parliament to answer questions on this matter.⁴⁴

Where the activities of Ministerial staff are confined to the provision of advice to the Minister, the confidentiality of that advice should be sacrosanct to the extent that it is today ... Ministerial staff should be fully accountable for all actions undertaken by them outside the confines of the internal Ministerial advisory processes, for example, all transactions they conduct with the Department, with other agencies, with private companies and with the general public.⁴⁵

4.44 Another reason for their appearance may be to help resolve particular questions regarding government actions. Mr Harry Evans suggested:

42 *Committee Hansard*, 3 October 2003, p. 147.

43 Submission no. 4, p. 10.

44 Dr Russell, submission no. 9, p. 6.

45 Mr Barratt, submission no. 7, p. 8.

... there may be circumstances in which parliamentary inquiries need to take evidence from personal staff to clarify circumstances of fact or to confirm the evidence of others. There should be no barrier in principle to the giving of such evidence by personal staff.⁴⁶

4.45 This may be particularly important in those rare cases where a government program, or some part thereof, is administered by government MOPS staff rather than, as is normally the case, by the public service.⁴⁷

4.46 When asked about reforming the rules for ministerial staff, the then Minister Assisting the Prime Minister for the Public Service, Mr Abbott, remarked that 'like public servants, ministerial staff are accountable through ministers to the Parliament and to the people'.⁴⁸ However, public servants currently assist ministers in the maintenance of accountability for departmental activities and public expenditure by appearing before and assisting parliamentary committees within a set of government-issued guidelines. These state:

The duty of the public servant is to assist ministers to fulfil their accountability obligations by providing full and accurate information to the Parliament about the factual and technical background to policies and their administration.⁴⁹

4.47 Ministerial staff, however, do not appear in a similar way. Mr Abbott's remark was not an accurate description of the current arrangements: the accountability of ministerial staff is presently not like that of public servants.

From principles to practice: when do advisers appear?

4.48 The two principles just discussed (ministerial responsibility, and accountability) have strongly influenced past and present practices regarding the appearance before committees by both public servants and ministerial staff. Analysis of past practice can help provide a set of guidelines that could be agreed to govern the appearance of ministerial staff.

4.49 One of the keys to the appearance of any government witness, whether public servant or ministerial staffer, is that the scope of questioning must not undermine the trust between minister and public servant or staffer.

46 Submission no. 3, p. 5.

47 Examples include the Saigon airlift in 1975 and aspects of the work of the National Media Liaison Service, discussed below.

48 'Abbott against rules for staffers', *Canberra Times*, 23 May 2002.

49 *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*, 1989, section 1.1.

4.50 Maj. Gen. (ret.) Alan Stretton argued that MOPS employees should give evidence where appropriate, but that:

Obviously some limit should be set on what political staff can be compelled to answer. These limits should apply to such matters as Cabinet discussions or matters relating to national interest or security.⁵⁰

4.51 Mr Barratt made a similar suggestion, though on different lines, suggesting ministerial staff advice should be held in confidence, but that they should be:

... accountable for all actions undertaken by them outside the confines of the internal ministerial advisory processes—for example, all transactions they conduct with the department, with other agencies, with private companies and with the general public. What I am saying is that they should be able to be tested on who they spoke to and when it happened—questions of that nature.⁵¹

4.52 Dr Seth-Purdie argued that the need to protect robust ministerial advice must be balanced against the need to preserve public confidence in the integrity of government decision-making processes.⁵²

4.53 The solution to balancing such concerns lies in the practice adopted both for public servants generally, and for the appearances of ministerial staff in 1975 and 1995. When ministerial advisers appeared before a Senate Committee in 1975, the Chair of the Committee before which they appeared began by indicating to them:

You will not be asked to comment on the reasons for certain policy decisions or the advice you may have tendered in the formulation of policy or to express a personal opinion, on matters of policy.⁵³

4.54 These advisers gave evidence about a government program that was formulated and administered primarily within the ministerial office rather than in the department. A similar logic underpinned the calling of Mr Epstein to give evidence in estimates hearings in 1995. He was similarly giving evidence on an ‘agency ... set up by the government to perform a number of functions’ but which lay outside the public service.⁵⁴

4.55 The *Government Guidelines for Official Witnesses* state:

50 Submission no. 14, p. 2.

51 *Committee Hansard*, 3 September 2003, p. 180.

52 *Committee Hansard*, 3 September 2003, p. 152.

53 Senate Foreign Affairs and Defence Committee, *Committee Hansard*, 17 October 1975, p. 410.

54 Senator Kemp, Senate Finance and Public Administration Committee, *Estimates Hansard*, 9 February 1995, p. 51.

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:

- (a) matters of policy;
- (b) public interest immunity; and
- (c) confidential material where in camera evidence is desirable.

4.56 Privilege resolution 1(16) of the Senate enunciates a similar principle to (a):

An officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister.

4.57 Ms Tiernan and Professor Weller likewise argued that ministerial staff should appear before committees in some circumstances but, like public servants, should not have to answer questions of policy.⁵⁵ It may be appropriate to limit the scope of questioning of certain witnesses in this way, although it relies on the legitimate interpretation of terms such as ‘questions of policy’. As the Clerk of the Senate has argued, there appears to be an increased use by governments of diverse justifications for not satisfying Senate requests for information.⁵⁶ This trend has created increased controversy in relation to conventions such as that relating to policy advice, as the following interchanges during 2003 show. The first was during estimates hearings:

Mr G. Smith—No—the components of our costings and forecasts are not published and the government has taken the view over many years that that information is policy advice.

Senator CONROY—I appreciate that that is your catch-all when you do not want to answer the question—that it constitutes policy advice.

...

Mr G. Smith—It is about the provision of policy advice. In addition to the rules that you have about public servants not providing their opinions about government policy or other policy, there is a longstanding convention that we do not provide our policy advice. Policy advice is objective, factual material; it is not an opinion of a public servant necessarily.

55 Submission no. 4, p. 10.

56 Clerk of the Senate, Correspondence to Senator Cook, 22 March 2002, *op. cit.*, p. 7.

CHAIR—Part of the problem is that this policy advice rule is very badly framed.⁵⁷

4.58 And again, this time during a reference inquiry:

CHAIR — ...To what extent are high marginal tax rates drivers of the cash economy? Can you tell us that?

Ms Granger —I am not in a position to answer. That is more a policy oriented question. I am sorry, I am not in a position to comment on that.

...

Senator MURRAY —It goes to the psychology question. It goes to why. It is not a policy issue at all; it is a question of knowing why people do things. It is part of the profiling development.

Senator BRANDIS —I would have thought that is right. It is almost an empirical question—the establishment of a relationship between two phenomena.⁵⁸

4.59 The issue also came up during this Committee's hearings:

Dr Shergold — ... If I have a problem it is that too often the questions move away from issues of estimates, budgets, administration and decision making into the making of public policy. I do not believe that is healthy, because the system does depend upon the fact that public servants are able to provide advice to the elected government of the day in confidence.

CHAIR—The estimates committees do not just primarily deal with budget estimates. They also involve examination of annual reports, which often contain a lot of policy information.⁵⁹

4.60 The effectiveness of the appearance of both public servants and ministerial staff in ensuring parliamentary accountability of government will depend on the satisfactory resolution of conflicts such as these.

Conclusion

4.61 The Committee considers that ministerial advisers should be available to appear before parliamentary committees in circumstances where that appearance will reinforce conventions of ministerial responsibility and accountability.

57 Senate Economics Legislation Committee, *Estimates Hansard*, 4 June 2003, pp. 408–9.

58 Senate Economics References Committee, Inquiry into the Structure and Distributive Effects of the Australian Taxation System, *Committee Hansard*, 12 September 2003, p. 43.

59 *Committee Hansard*, 2 September 2003, p. 45.

Recommendation 2

4.62 The Committee recommends that the government should make ministerial staff available to appear before parliamentary committees in the following circumstances:

- a) A minister has renounced, or distanced him or herself from, a staff member's action that is relevant to the committee's Terms of Reference;**
- b) A minister has refused to appear to answer questions regarding the conduct of a member of their staff;**
- c) Critical or important information or instructions have emanated from a minister's office but not from the minister;**
- d) Critical or important information or instructions have been received by a minister's office but not communicated to the minister; or**
- e) A government program is administered to a significant extent by government MOPS staff.**

4.63 The Committee sees these circumstances as a general guide to the appearance of ministerial staff. They are not an exhaustive list, nor are they intended in any way to detract from the Senate's powers to call any witness and ask any questions.

4.64 The Committee also considers that guidelines are required to help set the scope of questioning to which advisers may or may not be subject. The *Government Guidelines for Official Witnesses* provide a suitable model upon which such guidelines might be based.

Recommendation 3

4.65 The Committee recommends that guidelines be developed by the government in consultation with the Parliament, based on the *Government Guidelines for Official Witnesses*, to provide a framework to guide the appearance of ministerial staff. Without in any way detracting from the Senate's powers to call any witness and ask any questions, the guidelines should indicate that:

- the scope of questioning should be confined to the circumstances which led to the appearance of the ministerial adviser;**
- advisers will not be asked to give opinions on matters of policy;**
- advisers will not be asked about the content of any advice they may have given to a minister; and**
- the Chair of any committee will make a statement encapsulating these points prior to an adviser giving their evidence.**

Chapter 5

Reforming the regulation, management and oversight of MOPS Staff

5.1 This chapter outlines a range of possible reforms that the Committee believes will improve the administration and performance of MOPS staff. The subsequent chapter then deals with the possibility of implementing a code of conduct.

Separating ministerial staff from other MOPS staff

5.2 There was strong support for the separation of ministerial staff from other categories of MOPS employee. Ms Tiernan and Professor Weller argue that ‘the ministerial staffing system requires its own regulatory framework’.¹ This distinction is implicit in other submissions, which focus exclusively on ministerial staff, recognising that they present a different issue to all other MOPS staff.²

- Mr Barratt explicitly recognises the distinction between the ministerial role and the electoral representative role of ministers, and that the staff responsible for these roles should be ‘divided into two distinct groups’.³
- Mr Harry Evans, Clerk of the Senate, comments that more stringent regulation should apply to ministerial staff ‘because of the place of [ministerial staff] in the executive government and the greater accountability of the executive government to Parliament’, in contrast to ‘non-ministerial personal staff’.⁴
- The Australian Public Service (APS) Commissioner suggests that ‘[a]s Ministerial advisers and staff of Members of Parliament work within different arms of government (the Executive and the Parliament), there is also a case for a clearer distinction between these two’.⁵

5.3 The Department of the Prime Minister and Cabinet (PM&C) alludes to a slightly different distinction, focussing on the difference between electorate staff and others, when it remarks that one possibility for a code of conduct ‘would be to apply a

1 Submission no. 4, p. 5.

2 Mr Barratt, submission no. 7; Professor Lindell, submission no. 8.

3 Submission no. 7, p. 6.

4 Submission no. 3, p. 4.

5 Submission no. 10, p. 7.

code only to non-electorate staff.⁶ This distinction was in fact implicit in a Senate House Committee recommendation thirty years ago. It recommended:

That it is inconsistent with the constitutional relationship between Parliament and the Executive Government that the need or justification for the provision of any staff or other facilities for members of Parliament, necessary for the discharge of their parliamentary duties, should be determined by an agency of the Executive Government ...

That the proper course is that the appropriation by Parliament for such staff and other facilities for the Senate, its members and office bearers, should be administered by the President acting, where necessary with the advice of the Senate House Committee and subject to any direction of the Senate ...⁷

5.4 The approach outlined in this Senate resolution was similar to that adopted in the UK, where non-government political staff are employed under resolutions of each of the houses of parliament,⁸ thus distinguishing these staff from ministerial advisers.

5.5 Ministerial advisers are in many ways functionally the same as public servants: they are employees of the executive arm of government, there to implement the government's policies. This is why in most jurisdictions (and in Australia prior to 1984), ministerial staff are public servants subject to a number of special conditions. It is their attachment to the executive arm that distinguishes them from all other MOPS employees, who, even though they may have partisan loyalties, serve the needs of their employer as a Member of Parliament.

5.6 The Committee accepts that a clear distinction should be drawn between ministerial staff and other MOPS staff. It believes the distinctive role of ministerial staff should be reflected in a reorganisation of the MOPS Act. The Act should reflect the differences between government staff, particularly ministerial staff, and other MOPS employees, such as the staff of non-government office holders, and electorate staff.

Recommendation 4

5.7 The Committee recommends that the MOPS Act be restructured to define the different categories of MOPS employment, in such a way as to distinguish between government staff (particularly ministerial staff), non-government office-holder staff, and electorate staff.

6 Submission no. 11, p. 4.

7 *Senate Hansard*, 9 May 1972, p. 1462; see also Public Service Board, *Background Information Submitted by the Public Service Board to the Royal Commission on Australian Government Administration*, Vol. 8 (Australian Government Employment outside the Normal Framework of Ministerial Departments), 1974, pp. 75–6.

8 House of Commons, *Debates*, Vol. 888, 20 March 1975, c. 1869; House of Lords, *Debates*, Vol. 576, 27 November 1996, cc. 267–72.

Enhanced Parliamentary oversight of the MOPS framework

5.8 In comparative terms, it is unusual for Parliament to have as small a role in staffing as is the case in Australia. In the UK, maximum numbers of electorate staff have been determined by Parliamentary resolution. It has also been proposed, by the Committee on Standards in Public Life amongst others, that the maximum number of Special Advisers be legislated, so that variations are subject to Parliamentary approval and scrutiny.⁹ The British Parliament also sets total employment budgets, and the salary ranges attaching to position descriptions. An upper limit to the number of electorate staff is set by the UK House of Commons, but within these parameters, MPs can employ who they wish, at whatever is the appropriate level.¹⁰

5.9 In the United States, total staffing is a Congressional matter, and individual politicians' offices are staffed at a far higher level than in Australia.

5.10 In Ireland, the *Public Service Management Act 1997* sets a maximum number of ministerial staff for each cabinet minister and non-cabinet minister, at two and one respectively.¹¹ The Act exempts the offices of the Taoiseach (prime minister) and Tánaiste (deputy prime minister) from a limit on numbers. Although this has meant that there are far fewer advisers in Ireland than in Australia,¹² the exemption has certainly meant that the number in the Prime Minister's office has grown well beyond those in his ministers' offices.

5.11 In Australia, in contrast, current arrangements are at Prime Ministerial discretion, and Parliament plays no role. The ratio of government to opposition staff has been set by convention at 'approximately 21% of the Government's total (non-electorate) staffing',¹³ but there is no transparent instrument underlying this or any other arrangement for the allocation of resources. Parliament's only access to information about staffing establishment levels and staff classifications is through the Senate Legislation Committee hearings.¹⁴

5.12 The Committee received little evidence about how the role of Parliament in overseeing the MOPS framework could be enhanced, other than in connection with greater levels of transparency, which is dealt with in the next section, or through a code of conduct, which is the subject of Chapter 6.

9 Oonagh Gay, 'Advisers to Ministers', *Research Paper 00/42*, House of Commons Library, April 2000, p. 23.

10 Pat Strickland, 'Members; Office Costs – The New System', *Research Paper 01/88*, House of Commons Library, November 2001, pp. 13–14.

11 *Public Service Management Act 1997* (Ireland), section 11(1).

12 For comparative estimates of numbers, see Simon King, *Regulating the Behaviour of Ministers, Special Advisers and Civil Servants*, The Constitution Unit, University College London, 2003, p. 10.

13 PM&C, submission no. 11, p. 1.

14 PM&C, submission no. 11, Attachment A, p. 12.

5.13 The Committee recognises that the Australian Parliament has less of a role in the staffing arrangements of its members than is the case in many jurisdictions. There are no indications that this presents a problem at present. At the same time, the Committee notes that the Department of Finance and Administration (DoFA) declined the Committee's request that it be allowed to examine many of the instruments issued by the Special Minister of State under the MOPS Act.¹⁵ This approach to requests from parliamentary committees has the potential to further curtail Parliament's already limited role in relation to MOPS staffing. The issue of whether reforms are necessary to improve Parliamentary oversight of MOPS staffing will depend on the maintenance of a constructive relationship between the government and Parliament, particularly the Senate's committees. Changes beyond those recommended in this report could be examined in future if necessary by this Committee.

Enhanced transparency of MOPS staffing

5.14 Some witnesses, including Ms Tiernan, have suggested that there currently is a 'lack of transparency about the system' and that 'transparency is a crucial issue'.¹⁶ Ms Tiernan noted that there is no routine public disclosure of:

... how many people are there, what their roles are, what they are doing, and what their qualifications and experience are to have these roles ... We do not know how many of the current staff have a public service background; we have no idea, although that information would be easily obtained by doing some sort of analysis of that. Senator Murray asked some questions about analysing retention, turnover and those kinds of things.¹⁷

5.15 Aggregate workforce data is available for all other public sector employees, through agency annual reports. It is also subject to overall analysis by the APS Commission through its State of the Service publications.

5.16 In addition to this kind of employment information, there is the issue of whether other checks and balances should be put in place to deal with public sector ethics issues arising in the case of MOPS staff, such as potential conflicts of interest. In Ireland, the *Ethics in Public Office Act 1995* requires ministerial staff (known, as in the UK, as special advisers) to provide a statement of interests to their employing minister.¹⁸ That Act also requires that the minister table the statement of interests in parliament, as well as a copy of the contract of employment.¹⁹ In addition, the

15 Additional Information, Department of Finance and Administration, 1 October 2003, questions 1, 3, 4, 5, 10.

16 *Committee Hansard*, 2 September 2003, p. 80. See also Tiernan and Weller, submission no. 4, p. 10.

17 *Committee Hansard*, 2 September 2003, p. 95.

18 *Ethics in Public Office Act 1995* (Ireland), section 19(3), <http://www.irishstatutebook.ie/ZZA22Y1995S19.html>.

19 *ibid.*, section 19(4).

personnel and their exact salaries are routinely provided in response to questions on notice in the parliament.²⁰

5.17 Currently, the only reporting required under the MOPS Act is an annual report on the employment of consultants.²¹ It requires that the report, which is tabled in Parliament, indicate in respect of each consultant their:

- name;
- period of employment;
- the tasks for which they were employed; and
- the kind of employment arrangement under which they were contracted (ie. Who they were answerable to).²²

5.18 Ironically, however, this is the one part of the MOPS Act under which almost no-one is employed.

5.19 Professor Weller and Dr Seth-Purdie, amongst others, argued that ‘the bias should be towards transparency unless there is a good reason why it should not be’.²³ There should be sufficient transparency to:

- give Members of Parliament confidence that they know what their staffing entitlements are, how they compare to those of their colleagues, and how they may have changed over time;
- allow a reasonable level of public scrutiny of the staffing system;
- facilitate informed parliamentary and public discussion about arrangements under the MOPS Act; and
- establish as much consistency as possible between reporting on all categories of staff employed using taxpayers’ funds, whether they are employed under the Public Service Act, Parliamentary Service Act, Members of Parliament (Staff) Act, or other statutory instrument.

5.20 Currently all public service agencies and parliamentary departments generate annual reports under a common standard, established by the Joint Committee of Public Accounts and Audit (JCPAA).²⁴ The Committee recognises that MOPS staffing

20 See, for example, Dáil Éireann, *Parliamentary Debates*, vol. 554, 9 October 2002, Written Answers, items 839–40; vol. 551, 26 March 2002, Written Answers, item 511; vol. 480, 30 September 1997, Written Answers, item 541.

21 *Members of Parliament (Staff) Act 1984*, section 31.

22 *ibid.*

23 Professor Weller, *Committee Hansard*, 2 September 2003, p. 99. See also Dr Seth-Purdie, *Committee Hansard*, 3 September 2003, pp. 147–48.

24 *Requirements For Annual Reports For Departments, Executive Agencies And FMA Act Bodies*, Approved by the Joint Committee of Public Accounts and Audit under subsections 63(2) and 70(2) of the *Public Service Act 1999*. <http://www.pmc.gov.au/pdfs/annualreportrequirements.rtf>

does not take place under an agency in the same way as staffing of a department of the Parliament or the public service. It does not therefore believe the annual report should cover the full range of matters covered in an agency report. Accordingly, it does not recommend that a report be prepared that follows the entire JCPAA guidelines. However, the section of those guidelines concerning management of human resources would be appropriate to apply to MOPS staffing, and would have the effect of producing much of the information that witnesses felt was currently absent.

5.21 The Committee is aware of contradictory evidence provided to it on many aspects of MOPS staff employment and activities. Some have expressed concern about burnout amongst MOPS staff; others say it is not a problem. Some say MOPS staff have adequate training, while others are not convinced (see also Chapter 7). Some say MOPS staff are clear about their relationship with departments, while others deny this.

5.22 Mr Podger drew the Committee's attention to surveys of APS employees being administered by the APS Commission.²⁵ The surveys 'will provide important data on employee attitudes to, and understanding of, the APS Values and their perceptions of the application of the APS Values in their agencies'.²⁶ The survey covers issues such as work-life balance, workplace participation, diversity, career planning, the availability and use of training and development opportunities, and so on.

5.23 The Committee believes it would be a great help to understanding how these sorts of issues are perceived amongst MOPS staff if the staff and their employers were actually asked for their views. Knowledge of conditions and issues amongst MOPS staff would be enhanced if the APS Commission or DoFA were to conduct and report on survey amongst MOPS employees and employers, similar to those being pursued by the APS Commission for public servants. The Committee suggests this be undertaken periodically to give a picture of MOPS employment and to help identify strategic planning needs.

5.24 The Committee believes MOPS staffing information should be brought into line with the information provided on the public service and parliamentary service. To achieve this, there should be an annual report on staffing under the MOPS Act.²⁷ The Committee believes that such a report needs to go further than merely extending the application of section 31 of the MOPS Act to cover all MOPS staff.

Recommendation 5

5.25 The Committee recommends that an annual report on MOPS staffing should be prepared, and should contain, at a minimum:

25 *Committee Hansard*, 2 September 2003, p. 119.

26 *2002/03 State of the Service APS 1-6 and Executive Level Employee Survey*, May 2003, p. 1.

27 Ms Tiernan and Professor Weller, *Committee Hansard*, 2 September 2003, p. 96.

-
- **The existing information called for under section 31 of the MOPS Act in its current form;**
 - **A summary of the structure of MOPS employment arrangements, along the lines of the Attachment prepared by DoFA to the PM&C submission to this inquiry;²⁸**
 - **Any determinations, arrangements, or terms and conditions issued under the statutory provisions of the MOPS Act;**
 - **A report of any significant changes to the structure of employment arrangements in the preceding year (for example, reforms to engagement procedures, introduction or extension of special salary categories, creation of a new category of employee);**
 - **The numbers and levels of staff employed by all office holders (essentially in the same form as tables currently provided by DoFA in the estimates process), and an indication of changes since the previous year;**
 - **The salary ranges under which all MOPS staff are employed, and the numbers employed in each range;**
 - **The total salary costs of MOPS employment, broken down into the major categories of employment (ministerial, opposition, minor parties, electorate staff);**
 - **The total non-salary costs of MOPS employment, broken down into the major categories of employment (ministerial, opposition, minor parties, electorate staff); and**
 - **All information on staffing as currently required of agencies under the Joint Committee of Public Accounts and Audit Guidelines section 12.3 on the management of human resources.²⁹**

Recommendation 6

5.26 The Committee recommends that a staff and employer survey be conducted by the APS Commission and / or DoFA, and a report be published that outlines and analyses the results.

Improved record-keeping

5.27 Record-keeping in ministerial offices has been a subject of controversy for a long time. Examples of political fallout from failures in record keeping and communication go back at least to Prime Minister Gorton's era, described in the late Prime Minister's biography:

28 Submission no. 11, Attachment A.

29 Section 12.3 of the Guidelines is reproduced in Appendix 5.

[T]he [VIP aircraft use] 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.³⁰

5.28 In many cases³¹ there have been questions raised about the appropriate creation and transmission of written briefings, advice and correspondence into and out of ministers' offices. After investigating the administration of policy development and implementation in relation to Magnetic Resonance Imaging equipment, the ANAO argued:

On key issues, and where sufficient time is available, it is good practice for departments to use written briefings to provide assurance that the issues and options are clearly presented to the Minister and that any decisions taken by the Minister are understood and recorded. Such documentation also would have assisted in better informing senior departmental management of the progress with the development of policy proposals, and identification and treatment of associated risks, in view of their departmental management responsibilities. In addition, it is also good practice for departments to maintain a record of oral briefing of significant issues and any resulting discussions and decisions.³²

5.29 The APS Commission subsequently remarked that '[t]his is evidently proving to be a continuing challenge for most agencies'.³³ The Committee accepts that

30 Ian Hancock, *John Gorton: He did it his way*, Hodder, Sydney, 2002, p. 131.

31 Cases include the Pay TV affair (Professor Dennis Pearce, 1993, *Independent inquiry into the circumstances surrounding the nonrequirement of a deposit for satellite pay-TV licences, and related matters*, Report to the Secretary of the Department of Transport and Communications, Canberra); the administration of the Community, Cultural, Recreational and Sporting Facilities Program (ANAO, 'Community Cultural, Recreational and Sporting Facilities Program', *Audit Report* no. 9, 1993–94); the administration of the Federation Cultural and Heritage Projects Program (ANAO, 'Examination of the Federation Cultural and Heritage Projects Programme', *Audit Report* no. 30 1999–2000); the implementation of Magnetic Resonance Imaging services policy (ANAO, 'Magnetic Resonance Imaging Services—effectiveness and probity of the policy development processes and implementation', *Audit Report* no. 42 1999–2000); the children overboard affair (CMI Report).

32 ANAO, 'Magnetic Resonance Imaging Services—effectiveness and probity of the policy development processes and implementation', *Audit Report* no. 42 1999–2000, p. 26.

33 APS Commission, *State of the Service Report 2001–02*, p. 28.

responsibility for effective and thorough creation and maintenance of records is a matter for both the public service and ministerial offices. It supports the ANAO, the APS Commission and the National Archives in their efforts to try and improve standards in this area.

5.30 The importance of effective record keeping has been further emphasised by the greatly expanded use of electronic communications. Head of the Department of the Prime Minister and Cabinet, Dr Shergold, recently said that it has become more critical than ever to:

... ensure that everyone within the organisation understands the need to retain and manage the records of decision-making. In a world of real-time policy development by telephone and e-mail, the need to keep file notes and retain records (on paper or on-screen) becomes more, not less, important.³⁴

5.31 Several submissions also made this point, primarily, but not only, in relation to communication between ministers' offices and departments.³⁵ In 2002, the National Archives commissioned a study of Commonwealth record keeping that revealed that many APS staff believed that their organisation did not have record management systems for electronic documents and email.³⁶ There is clearly an issue with the effective management of electronic information. A key strategic response to this issue has been the development by Archives of the e-permanence suite of standards and policies.³⁷

5.32 MOPS staff, particularly ministerial staff, have important responsibilities in relation to record keeping. First and foremost, it is obviously vital that Ministers' offices have effective record management systems, to ensure the efficiency and effectiveness of the ministers' work, and to avoid the negative consequences and publicity that can arise if there has been a communication breakdown.

5.33 Ministerial staff in particular also have responsibilities in relation to records as a result of the Archives Act, as outlined by National Archives in their submission:

(a) records created or received by an officer of a Commonwealth institution (for example a departmental liaison officer) in the course of carrying out their official functions are prima facie the property of the

34 Dr Peter Shergold, *Two Cheers for the Bureaucracy: Public Service, Political Advice and Network Governance*, Speech to APS Commission lunchtime seminar, 13 June 2003, <http://www.pmc.gov.au/docs/Shergold1306.cfm>

35 National Archives of Australia, submission no. 2; Mr Barratt, submission no. 7; Maj. Gen. (ret.) Stretton, submission no. 14.

36 National Archives of Australia, *Report on a Survey of the State of Recordkeeping in the Commonwealth Government*, conducted for NAA by Orima Research, November 2002, p.6, http://www.naa.gov.au/recordkeeping/overview/rksurvey_2002.pdf

37 See national Archives of Australia website, *Recordkeeping: A New Approach*, http://www.naa.gov.au/recordkeeping/overview/new_approach.html

Commonwealth and must be managed in accordance with the Archives Act;

...

(d) where a Member of Parliament is also a Minister, records created or received in their official capacity as Minister are prima facie the property of the Commonwealth and must be managed in accordance with the Archives Act. This does not include personal papers, party political records, or records relating to constituents. However, in some cases, a record may have both official and personal elements, for example, (i) a Minister's appointment diary may contain details of official meetings with agency staff and also family commitments, and (ii) a subject file may contain papers relating to ministerial responsibilities as well as party political material and representations from constituents; and

(e) in the case of a Member's staff, records are prima facie the personal property of the staff or of the Member except where the Member is also a Minister or member of a parliamentary committee.³⁸

5.34 The National Archives provides advice and support to MPs and staff, to help ensure compliance with the Archives Act, by:

- participating in induction seminars for new parliamentarians and staff;
- contributing to the Department of Finance and Administration's *Senators and Members Electorate Office Handbook* as well as the DOFA website restricted to parliamentarians;
- visiting parliamentarian offices and responding to telephone requests to provide advice on records management; and
- providing written advice on records management (including the creation, control, preservation and disposal of records) to parliamentarians and their staff.³⁹

5.35 The Committee endorses the work of National Archives in this area. All ministers should ensure that their staff are maintaining adequate records and are aware of the obligations that arise under the Archives Act. Given the pressures that exist in ministers' offices, and the growing use of electronic communication, the Committee believes training in appropriate record keeping must be provided to new MOPS employees, particularly ministerial staff. It also believes that responsibility for record keeping in ministers' offices should be allocated to a senior staff member, and that record keeping should be identified in that staff member's duties and relevant performance review procedures.⁴⁰

38 Submission no. 2, p. 4.

39 Submission no. 2, p. 5.

40 See also National Archives of Australia, submission no. 2, p. 8.

Recommendation 7

5.36 The Committee recommends that responsibility for ensuring proper record keeping in ministers' offices should be allocated to a senior staff member, and that record keeping should be identified in that staff member's duties and relevant performance review procedures.

Administrative reforms

5.37 The Committee received evidence that the growing size and power of ministerial offices calls for new management arrangements to ensure the structure operates smoothly and professionally. Ms Tiernan pointed out:

The staff need to be managed. Any organisation needs an appropriate set of governance arrangements – a big complex one working in a political way certainly needs to have those arrangements. The current system makes ministers responsible for that management – creating an additional burden on ministers to do something they do not have the time to do ... A lot of the issues that we were emphasising in the submission were about the need for management, the need for a more robust system of management of the ministerial staff.⁴¹

5.38 Currently, responsibility for MOPS staff is divided between the Prime Minister and the Special Minister of State. Some functions are administered within the Department of the Prime Minister and Cabinet, while others are administered in the Department of Finance and Administration. Ms Tiernan and Professor Weller suggested a solution based on reforming the structure of MOPS management generally, and within the ministers' offices:

Given the size of the ministerial staffing complement, and the quantum of resources now devoted to personal staffing for Ministers and Office-holders, it would seem reasonable to create a single point of responsibility for administration and management of the ministerial staffing system, through the appointment of a responsible minister and an administering agency. This would require clear delegation of the Prime Minister's authority under the MOPS Act, and the establishment of appropriate accountability and reporting arrangements. Given their seniority and experience, it is our view that Chiefs of Staff could be delegated this authority. We think it would be appropriate for the occupants of these positions to be answerable to parliament for the conduct of the staff in their offices.⁴²

41 *Committee Hansard*, 2 September 2003, pp. 79, 80.

42 Submission no. 4, p. 6.

5.39 Dr Russell likewise recommended that the Chief of Staff in each ministerial office be given responsibility for the working of that minister's office, and the Chief of Staff in the PM's Office have responsibility for the system overall.⁴³ He said:

... a very useful way of starting this process is to make somebody responsible for the management of the day-to-day operations of the staff ... We now have something like 370 ministerial staff at the federal level. It has got to the point where we have to institutionalise the ministerial staff in some way. At the moment, the current arrangements make it very easy for staff to operate essentially as mavericks or cowboys. There is very little oversight of what staff actually do ... While the staff are extensions of the minister, it is not plausible to believe that the minister can manage the day-to-day operations of a 50-member staff, for example. So I think we need to put in place, possibly through the MOP(S) Act, an accountability structure which has the chief-of-staff of each minister responsible for the operations of that minister's office.⁴⁴

5.40 The Committee notes that the Auditor-General is currently undertaking an audit that will:

- Review the effectiveness of the internal control structures in [the Department of] Finance concerning the administration of entitlements for MoPS staff;
- Review the effectiveness and efficiency of the procurement and support services Finance provides in relation to MoPS staff; and
- Identify principles of sound administrative practice to facilitate improved administrative arrangements for the future.⁴⁵

5.41 This audit builds on the work conducted by the ANAO in its previous audit of parliamentarians' entitlements.⁴⁶ It was initiated by the Senate, driven by concerns about the way in which MOPS entitlements were being administered. The administration of entitlements, while having improved, remains an area of concern. The Committee is concerned at the time it is taking for these audit processes to be undertaken. It notes that the process has already been delayed due to 'slower than anticipated progress being made by the ANAO in securing access to relevant Commonwealth records'.⁴⁷ The Committee and the ANAO had expected the report to be tabled 'early in the Spring session' of Parliament,⁴⁸ and its availability would have

43 Submission no. 9, pp. 4, 5.

44 *Committee Hansard*, 3 September 2003, p. 157.

45 ANAO, submission no. 1, pp. 1–2.

46 ANAO, 'Parliamentarians' Entitlements', *Audit Report* no. 5 2001–02.

47 ANAO, submission no. 1, p. 1.

48 *ibid.*

assisted the Committee fully to discharge its responsibilities under its terms of reference.

5.42 These audits should form the foundation of a broader review by the government of the administration of MOPS in general, and the management framework for ministerial staff in particular. A systematic structure of management responsibility should exist within ministerial offices. Both this committee, and the inquiry into the ‘children overboard’ affair, have received evidence that the management structure for ministerial staff has weaknesses that should be rectified.

5.43 The Committee believes that a more comprehensive management framework for ministerial staff should be reflected in a range of policies and guidelines. The Committee believes there must be genuine performance management processes,⁴⁹ particularly for senior staff and office managers who can be expected to have responsibility for key information flows and for implementing codes of conduct.

Recommendation 8

5.44 The Committee recommends that, once the ANAO has completed its current MOPS-related audit, the government move swiftly to implement any recommended administrative reforms, and develop and implement a new management framework for ministerial staff.

Conclusion

5.45 The Committee has concluded that a number of reforms, just described, could be implemented to improve the governance of MOPS staff. There have also been suggestions that there should be improved induction and training for MOPS employees, and this is discussed in Chapter 7. However, one reform has received stronger endorsement, and more coverage, than any other: the introduction of a code of conduct. The Committee turns to this issue in Chapter 6.

49 See Tiernan, supplementary submission 4A, p. 3.

Chapter 6

A code of conduct?

6.1 The Committee's terms of reference require it to examine 'the merits of introducing a code of conduct for MOPS staff'. This reference has its origin in the recommendation by the CMI Committee that there be a code for ministerial staff. It should also be seen in the broader context of:

- the introduction of legislated codes of conduct for public servants and the parliamentary service in 1999;
- broader debate about the appropriate operation and accountability of ministerial offices over the decade prior to the children overboard affair;
- the introduction of codes covering ministerial staff in some Australian states in recent years; and
- the application of a code for ministerial advisers in both Canada and the UK.

6.2 The Committee notes that it is nearly a year since the CMI Inquiry made its recommendation that:

... the Australian Public Service Commission convene a Working Group of senior officials of the Department of Prime Minister and Cabinet and senior parliamentary officers of both Houses of Parliament, to develop a Code of Conduct for ministerial advisers incorporating a Statement of Values commensurate with Conduct and Values provisions that apply within the Australian Public Service. The report should also make any recommendations concerning mechanisms for dealing with any breaches of such a Code, or the handling of complaints arising from the actions of ministerial advisers.¹

6.3 The Government has given no indication that it is responding to this recommendation, and the secretary of PM&C was unable to give the Committee any indication as to the Government's timeframe for responding to any of the recommendations.² The Committee believes this situation is unacceptable. It hopes that, by addressing a number of the issues identified in the CMI report, it will facilitate a swift implementation by government of MOPS staffing reforms, including the implementation of a code of conduct along the lines suggested in this chapter.

1 *CMI Report*, p. xl.

2 *Committee Hansard*, 2 September 2003, p. 52.

What is actually meant by a ‘code of conduct’?

6.4 There are two types of guidance offered to public servants in the Public Service Act. They take the form of a set of values, and a code of conduct. The values express the kinds of ethical and professional aspirations that mark a professional public service. The code describes behaviours. The former can be seen as a code of ethics, the latter as a code of conduct. Andrew Brien describes the difference in these terms:

Code of ethics and code of conduct are often used interchangeably. There is, however, an important distinction. A code of ethics identifies those ethical principles and values that are regarded as the foundation of an organisation. They are often expressions of the values of an organisation, within a particular culture, time and place. Typically, codes of ethics will embody ethical values that are cross cultural, such as justice, fairness and impartiality. Such codes are usually aspirational, rather than prescriptive, and they do not often have implementation and enforcement mechanisms ...

Codes of conduct specify certain rules for behaviour, or standards to which a person's behaviour must comply. They are more specific than a code of ethics, in terms of the actions prescribed and proscribed. They leave less to discretion; they are less aspirational and more prescriptive. Further, codes of conduct are usually more focused on the core functions of the organisation, rather than general ethical ideals that any decent person ought to abide by, as a matter of course.³

6.5 In the Australian *Public Service Act 1999*, this distinction is evident in the difference between the Values and the Code of Conduct. It is also evident in the Queensland arrangements whereby general ethical values are enshrined in the Queensland Public Sector Ethics Act, while the code of conduct is drafted at the level of each agency and is more specific about behaviour.

Should there be a code?

6.6 There have been widespread suggestions that a code of conduct be put in place for ministerial staff which, as noted earlier, was a course of action recommended by the CMI Committee. While cautioning against ‘a highly prescriptive approach’, the APS Commissioner has argued that ‘there is a need for some more explicit guidance, particularly for ministerial advisers’⁴ and that this should take the form of ‘some statement of values and a code of conduct’.⁵ He has suggested drawing on the approach currently used for the APS and Parliamentary Service, saying that:

3 Andrew Brien, ‘A Code of Conduct for Parliamentarians?’, *Research Paper* no. 2 1998–99, Parliamentary Library, Canberra, p. 12.

4 Andrew Podger, *Governance Network Three: The Values Challenge and Politicisation*, Speech given at National Institute for Governance Seminar, 7 August 2002, p. 8.

5 *Committee Hansard*, 2 September 2003, p. 59.

Such an articulation of values, and a code of conduct, could be included in the Prime Minister's Guide, or in legislation in a similar way to the PS Act and the Parliamentary Service Act.⁶

6.7 Dr Seth-Purdie recommended that there be a code, and suggested the Queensland model, which will be further discussed below. The CPSU expressed concern that '[t]he lack of any codification or an accountability framework for ministerial staff leaves a significant area of ambiguity over the critical issue of transparency in public service accountability' and that consideration should be given to a code of conduct for ministerial staff.⁷

6.8 The Clerk of Senate in his submission argued:

It would be appropriate to make a statutory prescription of the tasks that personal staff may and may not perform, to provide a code of conduct and to provide some enforcement procedure.⁸

6.9 Ms Susanne Tongue's submission recommended a code, suggesting that many of its provisions be modelled on those of the Public Service code of conduct.⁹ Mr Paddy Gourley has suggested that introducing both a code and guidelines for accountability to parliamentary committees were 'steps that could be taken with comfort'.¹⁰ Dr John Uhr also considered that there needs to be 'some codification of professional conduct for ministerial staff, similar to the Prime Minister's code of ministerial conduct'.¹¹

6.10 Some scepticism has been expressed about the effectiveness of a code. Mr Barratt for example, discussing the need for better record-keeping, remarks that '[n]o amount of Values and Code of Conduct will have any impact if there is no paper trail to underpin accountability'.¹² For different reasons, the former Minister Assisting the Prime Minister for the Public Service Mr Abbott has argued that any new regulations 'might turn out to be better at tripping conscientious people focused on doing their job than trapping villains who know how to cover their tracks'.¹³

6.11 The reservations expressed by the Minister have some merit. However, evidence suggests that, for the most part, codes of conduct are designed to create as

6 Submission no. 10, p. 18.

7 Submission no. 19, p. 3.

8 Submission no. 3, p. 4.

9 Submission no. 13, p. 3.

10 Paddy Gourley, 'Claims go over the top', *Public Sector Informant* [Canberra Times], August 2003.

11 *Committee Hansard*, 2 September 2003, p. 101.

12 Submission no. 7, p. 8.

13 'Abbott against rules for staffers', *Canberra Times*, 23 May 2002.

well as support a culture of good conduct, partly through an educative function. Most cases in which codes are breached are not malicious in intent. The Committee does not think that the main purpose of a code is ‘trapping villains’. Rather, it is to ensure that roles, responsibilities and expectations about behaviour are clear to everyone in the system. It will give the roles of advisers ‘a stronger professional footing’.¹⁴

6.12 The Committee believes that any difficulties that might be encountered in introducing a code for ministerial staff can and should be overcome. As Brien has pointed out in connection with the issue of a code of conduct for MPs, ‘[a]rguing that codes should be avoided because they will never be implemented or enforced is to concede the point that is at issue: that parliament is incapable of regulating itself’.¹⁵

To whom should the code apply?

6.13 One of the first questions to consider is whether there can or should be a single code for both ministerial and non-ministerial MOPS employees, or whether a code is needed that specifically applies to ministerial staff (as is the case in the jurisdictions mentioned above). The possibility of a code applying only to ministerial staff is recognised by the submission of PM&C and DoFA.¹⁶ Further, the principal concern of the public and of commentators is with the conduct of ministerial staff.

6.14 Chapter 2 outlined the distinctive roles of ministerial staff, which are clearly different to those of other MOPS staff such as electorate staff, the staff of opposition party leaders and shadow ministers. The basic distinction is that ministerial staff serve the executive, while other MOPS staff are fundamentally serving the functions of Members of Parliament. This distinction is reflected in the existing differences between the legislation, values and codes of conduct underpinning the Public Service and Parliamentary Service.

6.15 At the same time, the Committee acknowledges an issue raised by Dr Shergold. He suggested that if a code of conduct was implemented for ministerial staff, ‘it would then beg the question of whether a code should also exist for the staff of other office holders—perhaps even the electorate staff of senators and members. So the issue is, if you were to go down this track, how far would you move’.¹⁷ In addition, failure to apply a code to all MOPS staff could raise questions about the equity of the system. Ms Tongue acknowledged there may be issues with having a single code applying to all MOPS employees, but thought that:

... the kinds of things that are in a code of conduct apply in the Public Service across a range of different responsibilities, and I see no reason why

14 Mr Podger, *Committee Hansard*, 2 September 2003, p. 60.

15 Andrew Brien, ‘A Code of Conduct for Parliamentarians?’, *op. cit.*, p. 23.

16 Submission no. 11, p. 4.

17 *Committee Hansard*, 2 September 2003, p. 46.

it could not be general enough to cover all staff. If you wanted to make a separate section for electorate staff, that would be fine.¹⁸

6.16 Currently, ministerial staff lack a code of conduct. This stands them in contrast to both their ministers and the public service. This omission is one reason that the CMI Committee recommended that there be a code. It is clear from the evidence received by this Committee that a code for ministerial staff remains the most pressing and urgent issue.

Recommendation 9

6.17 The Committee recommends that a code of conduct for ministerial staff be developed and implemented.

6.18 A code for MOPS staff other than ministerial staff would also be more complex, in that it would need some different provisions to a code for ministerial staff, and could not be introduced or implemented by the Prime Minister. For these reasons, the Committee is not at this stage recommending that a code be introduced for all MOPS staff. However, it does support the inclusion in the MOPS Act of a 'Statement of Values' that would apply to all MOPS employees, in the same way that the APS Values¹⁹ are included in the Public Service Act.

6.19 The Committee believes that all MOPS staff should ultimately be guided by codes of conduct. As already indicated, the codes for ministerial and non-ministerial staff need to be different, and would have to be administered by different entities. Examination of how to develop and implement a code or codes for non-ministerial staff should proceed as soon as the government has responded to the recommendations of this inquiry and of the CMI Committee. At that point it would be appropriate for the Senate to empower the Finance and Public Administration Committee to examine the content of and procedure for implementing a code for non-ministerial MOPS staff.

Recommendation 10

6.20 The Committee recommends that ultimately a code for non-ministerial MOPS staff should be developed and implemented. The content and administration of such a code should be considered by the Senate Finance and Public Administration References Committee following response of the government to the recommendations in this report and the report of the Certain Maritime Incident Committee.

Recommendation 11

6.21 The Committee recommends that the MOPS Act be amended to include a statement of values for all MOPS staff.

18 *Committee Hansard*, 3 September 2003, p. 196.

19 *Public Service Act 1999*, section 10.

Where should the code be located?

6.22 As the APS Commissioner noted, a code could be located in legislation or in the Prime Minister's *Guide on Key Elements of Ministerial Responsibility*. A further option would be for it to be a document endorsed by resolutions of one or both houses, without being legislated.²⁰

6.23 Experience in other jurisdictions indicates that it is possible for a code to be either statutory or non-statutory. In Queensland, the principles governing codes of conduct are enshrined in legislation, as is the requirement to adhere to the code, but the codes themselves are non-statutory instruments for each public sector organisation. In the US, a range of ethics requirements are legislated. In Ireland, the Ethics in Public Office Act contains conflict-of-interest provisions specific to ministerial staff.²¹ In Canada and the UK the codes are non-statutory.

6.24 The advantages of a legislated code are that it would ensure maximum transparency, and enforcement of the code would be given the force of law. The Clerk of the Senate suggested this would be preferable because it would help ensure that ministerial staff would conduct themselves 'more like public servants and less like members of parliament'.²² The Clerk suggested:

... perhaps there ought to be some little measure of independence, if you like, on the part of those people, where they can say to an employing senator or member: 'We shouldn't really be doing that, because it is contrary to our code of conduct and I might be hauled before the tribunal if I do that. Let's look at other ways we can achieve our ends.' I think that would be valuable.²³

6.25 Dr Uhr also argued that the conduct of ministerial staff is a matter with which Parliament should be engaged:

... there is a responsibility and an opportunity for parliament to come forward and, as the elected forum for the community, to establish standards that ministers can live up to, and not just leave that to the Prime Minister of the day.²⁴

6.26 The disadvantages, however, are significant. Legislating the code endorses the idea that ministerial staff are not purely servants of their ministers. It gives them an independent existence. Several submissions—even some which endorsed a legislated

20 Dr Uhr, *Committee Hansard*, 2 September 2003, p. 102.

21 *Ethics in Public Office Act 1995* (Ireland), section 19(3).

22 *Committee Hansard*, 3 September 2003, p. 212.

23 *ibid.*

24 Dr John Uhr, Senate Finance and Public Administration Legislation Committee, *Committee Hansard*, 6 April 2001, p. 12.

code—expressed concern that ministerial staff were getting too much power and were acting independently in some situations. They argued that accountability must always come back to the minister. Ms Ivory wrote:

Ministers are accountable to the parliament and responsible for the actions of their staff. It simply needs to be enforced. This inquiry should not be looking to legislative changes as means of abdicating any member of parliament's responsibility for their actions and decisions.²⁵

6.27 The Community and Public Sector Union (CPSU) argued:

Responsibility for the actions of ministerial staff should rest with the Minister, irrespective of any qualifications in the Minister's authorisation.²⁶

6.28 Professor Lindell's concern was that:

What remains of the principle [of individual Ministerial responsibility] should not be further undermined by allowing Ministers to escape blame and avoid responsibility for the actions and misconduct of their Ministerial staff.²⁷

6.29 Dr Russell likewise stated:

If ministers can disown the behaviour of their staff then a large part of ministerial influence and behaviour potentially becomes beyond the scrutiny of the Parliament.²⁸

6.30 The central aim for a code of conduct for ministerial staff is to ensure that ministers take responsibility for the actions of their staff. Embedding the code within the MOPS Act might undermine this goal. The system should reinforce the principles that telling a staffer is the same thing as telling a minister; and being told something by a staffer is the same as being told by a minister.

6.31 The Committee would also prefer not to see a situation develop where the parliament and the Prime Minister were in conflict over the code:

If you put together legislation that imposes a code of conduct on prime ministers and sets up tribunals, the question is: what happens if the code is breached? If the Prime Minister says, 'That's all very well,' you have not really achieved anything. In our system you have to get to a point where the

25 Ms Patricia Ivory, submission no.15, p. 3.

26 CPSU, submission no. 19, p. 1.

27 Professor Lindell, submission no. 8, p. 2.

28 Dr Russell, submission no. 9, p. 3.

Prime Minister is willing to have—and wants and accepts—that discipline imposed on them and voluntarily accepts that this is a useful thing.²⁹

6.32 The Committee notes that overseas and Australian state experiences indicate that there may be situations where a legislated code is appropriate. However, it agrees with Dr Russell and others, that a code for ministerial staff should if possible be implemented under the leadership and with the imprimatur of the Prime Minister.

6.33 At the same time, the committee is mindful of Dr Uhr's concern that Parliament not be absent from this process. The Committee believes the MOPS Act should be amended to include a requirement that the Prime Minister promulgate a code of conduct for ministerial staff. By amending the MOPS Act, this approach engages Parliament in the process. At the same time, by leaving the policing of the code as a matter for the Prime Minister and the employing ministers, this approach also preserves traditions of ministerial responsibility.

6.34 If this approach fails to address the growing challenge of ensuring ministerial staff conduct themselves appropriately, then legislation, such as presently being discussed in the UK, and already in place in the USA and Ireland, should be considered.

Recommendation 12

6.35 The Committee recommends that the MOPS Act be amended to require that the Prime Minister promulgate a code of conduct for ministerial staff.

Administering a ministerial staff code

6.36 The APS values and code of conduct are embedded in the Public Service Act. Breaches of the APS code may result in disciplinary action being taken against a public servant. For this to be possible there must be a person or body with the capacity to determine whether a breach has taken place, and to recommend and enforce a penalty, if that is appropriate.

6.37 This raises the question of how a code for ministerial staff would be administered. Who would deal with breaches? As one submission argued, '[t]he special role of ministerial staff creates difficulties with investigations into breaches of the Code and the imposition of sanctions'.³⁰ It is a measure of this difficulty that the greatest controversy in Canada lies not with the content of their code – which has support – but in dissatisfaction with the enforcement mechanism.

6.38 One way to synthesise the Westminster tradition of ministerial responsibility with modern ethics institutions such as operate in Queensland and the Canadian

29 Dr Russell, *Committee Hansard*, 3 September 2003, p. 164.

30 Ms Tongue, submission no. 13, p. 3.

provinces would be to amend the MOPS Act to confer on ministers a statutory responsibility for upholding the code.

Who can allege that there has been a breach?

6.39 There is a wide variety of circumstances in which examination of possible breaches of a code might be instigated. All Canada's provinces have codes of conduct for their elected members. Most of these have an independent commissioner who investigates and reports to the parliament. However, they differ on who can initiate a complaint. In some cases, only members of the parliament, either individually or on a resolution of the house, can initiate an investigation. In others, including British Columbia and Alberta, a member of the public can cause an investigation to take place. In others, such as Saskatchewan and New Brunswick, the commissioner can undertake an investigation at their own initiative.³¹

6.40 Nova Scotia is unique. Investigations there are conducted by a judge, and may be initiated by MPs or by civil servants. The judge is empowered to investigate senior bureaucrats (unlike in other Canadian provinces) as well as ministers and MPs. Most interesting of all, the legislature cannot reject the Nova Scotian conflict-of-interest commissioner's recommendations.³²

6.41 In the UK, public servants can make complaints to the Civil Service Commissioner regarding breaches of the code for ministerial staff (though ministers are responsible for investigating them).

6.42 In New South Wales, both MPs and members of the public can trigger an investigation by the Independent Commission Against Corruption.

6.43 When reforms are proposed that open up the range of possible complainants, fears are often expressed about the level of trivial or vexatious complaints that will result. These fears usually prove to be ill-founded. The advantages of limiting the range of those who can initiate a complaint to MPs are that it:

- reduces the chance of frivolous complaints; and
- ensures all those who can initiate an investigation can also be subject to investigation themselves, ensuring all complaints are reasonably carefully considered.

6.44 The disadvantages are that it:

- may reduce the public perception of trustworthiness of the system; and

31 For details see Denis Saint-Martin, 'Should the Federal Ethics Counsellor Become an Independent Officer of Parliament?' *Canadian Public Policy*, vol. 29, no. 2, 2003, p. 203.

32 Denis Saint-Martin, op. cit., p. 203. See also Ian Greene and David Shugarman, *Honest Politics: Seeking Integrity in Canadian Public Life*, James Lorimer & Company, Toronto, 1997, pp. 154–5.

- may prevent a breach coming to the attention of a minister if it is only detected by someone not able to complain directly.

6.45 The Committee believes that mechanisms should be in place that allow anyone to indicate if they believe the code may have been violated. It may also be desirable to adopt an element of the UK model, whereby public servants can initiate a complaint related to the dealings of ministerial staff with the public service.

Who is responsible for code enforcement?

6.46 The Committee has taken the approach that ministerial staff should be subject to a code issued under the authority of the Prime Minister. It has already argued that this approach fits in well with conventions of ministerial responsibility and that those conventions should be reinforced.

6.47 It believes the logical corollary of this is that ministers are responsible for ensuring their staff comply with the code, and the Prime Minister should have overall oversight of the code. This was the approach advocated by Dr Maley, who said ‘the Prime Minister and the Prime Minister’s office should be empowered in administering the code’.³³ Dr Russell likewise advocated that the Prime Minister’s office, principally through the Chief of Staff, should play the lead role in monitoring the conduct of ministerial staff.

6.48 The Prime Minister (not just each individual minister) must have a role in overseeing the code, to deal with conflicts between the staff in ministers’ offices. From her study of ministerial staff, Dr Maley reported:

Some of the advisers I interviewed who worked for the Prime Minister were frustrated at their inability to act against advisers in other ministers’ offices whom they saw as being incompetent and dangerous.³⁴

6.49 The Committee did receive some evidence suggesting that code breaches be investigated by an independent officer or body. Ms Tongue suggested investigation by an independent party, ‘such as the Public Service Commissioner or Ombudsman’.³⁵ The Clerk of the Senate suggested an independent tribunal.³⁶ Dr Uhr suggested:

... a Ministerial Standards Commissioner, appointed by the Presiding Officers on the approval of proposed ministerial standards committees in each house. After complaint and investigation, the Commissioner would

33 *Committee Hansard*, 2 September 2003, p. 112.

34 *ibid.*

35 Submission no. 13, p. 3.

36 Submission no. 3A.

report to the appropriate committee which would then have responsibility for negotiating redress for reported misconduct.³⁷

6.50 The Committee recognises that there can be benefits from having independent investigations. It can give Parliament a greater role, and it can give the public greater confidence that a code is being complied with. However, there are at least two significant obstacles to going down this road. First, it would mean that ministerial staff are subject to greater scrutiny and discipline than their ministerial masters. Given that the ministers are supposed to be the ones ultimately responsible for staff, this could be perceived as unfair. In other jurisdictions where statutory investigators exist, such as Ireland, Canada, the UK, some Australian States, and the Canadian Provinces, they always have jurisdiction over ministers or members of parliament, not merely their employees. Second, there is a risk that the existence of an independent investigator could undermine the principles of ministerial responsibility. Instead of encouraging ministers to take responsibility for their staff's actions, a separate investigating body could encourage ministers to cut their staff loose. This outcome must be avoided.

6.51 The Committee does not rule out the possibility that it may at some future time be appropriate to have an independent investigatory commissioner or tribunal. However, the Committee considers that:

- the moderate reforms suggested in this report should be implemented, to see if they are sufficient to deal with the problems;
- implementation of any independent investigator should be preceded by a Senate Committee inquiry specifically focused on the design of such a critical institution; and
- there should not be an independent investigator of ministerial staff if there is no similar investigator of ministers.³⁸

6.52 However, while the Committee does not recommend a fully-fledged independent investigator, it does not think the work of ensuring the code is observed should simply fall to ministers alone. Resources will need to be applied to helping ensure staff make adherence to the code a priority. One suggestion was that this be dealt with through allocation of responsibility in the Prime Minister's office:

If you made the head of the Prime Minister's office responsible for how the ministerial staff operate, you would find that that person would put some effort into it, particularly if you gave that person some resources. If you said, 'You are responsible for how all the minister's offices operate and the

37 Submission no. 18, p. 3.

38 For discussion of some of the many issues in this area, see Senate Finance and Public Administration Legislation Committee, *Report on the Charter of Political Honesty Bill 2000* [and three other bills], August 2002. Dr Uhr's proposals for an investigatory body were also posed in the context of a broader scheme of parliamentary standards for ministers, not just for their staff.

structure that operates within them. If you have mavericks or cowboys doing things that you do not know about, it is your problem. Why don't you make sure that there are structures out there,' you would find that the chief of staff would probably invest some time in education.³⁹

6.53 The Committee agrees that responsibility needs to be allocated. If, however, it were to be the responsibility of the Prime Minister's chief of staff, there would have to be additional resources allocated in terms of education and advice. The Prime Minister's Chief of Staff is likely to be too busy to be responsible for day to day implementation and education regarding the code.

6.54 Although ultimate responsibility for enforcement of, and discipline under, the code must lie with the Prime Minister and his or her ministry, the system will benefit from having an independent officer to advise staff on adherence to the code. The introduction of a code of conduct requires that those covered by the code are aware of and understand it. Ministerial staff will benefit from being able to request advice to assist them in complying with the code. Prior advice is better than subsequent investigation.⁴⁰ That advice is provided by the Ethics Counsellor in Canada, by the Office of Government Ethics for staff in the USA, and by both the Parliamentary Commissioner for Standards and the Commission for Standards in Public Life in the UK. In Queensland, ministerial staff can and do receive ethics advice from the Integrity Commissioner.⁴¹ A similar advisory role is played for APS employees by the APS Commission.⁴²

6.55 It would be possible for the APS Commissioner to have a role in supporting the code of conduct for ministerial staff, just as that office is currently responsible for awareness of the APS Values and Code of Conduct across the public service.⁴³ This was recommended by Professor Glyn Davis, in his submission to this Committee's inquiry into APS Recruitment and Training:

[m]inisterial staff are an important audience for training and development initiatives. There is scope for the Public Service Commissioner to play a beneficial role in recruitment and professional development opportunities for ministerial staff under the mechanism of his responsibility as Parliamentary Services Commissioner.⁴⁴

39 Dr Russell, *Committee Hansard*, 3 September 2003, p. 165.

40 Charles Sampford, 'Prior Advice is Better than Subsequent Investigation', in Jenny Fleming and Ian Holland (eds), *Motivating Ministers to Morality*, Ashgate Press, Aldershot, 2001, pp. 173–86.

41 The Hon. Alan Demack AO, Queensland Integrity Commissioner, submission no. 12, pp. 5–6.

42 *Public Service Act 1999*, section 41.

43 *Public Service Act 1999*, sections 41(1)(a), (e)

44 Finance and Public Administration Committee, Inquiry into APS Recruitment and Training, submission no. 16, p. 3.

6.56 The Committee agrees that there may be a role for the APS Commissioner in helping to implement a code of conduct, particularly in the area of developing awareness of code provisions concerning relations between the APS and ministerial staff. However, the APS Commissioner's activities are limited to those specified in section 41 of the Public Service Act and its regulations, and section 40 of the Parliamentary Service Act. Contrary to the remarks of Professor Davis, the legislation as currently worded would not allow the Parliamentary Services Commissioner's functions to extend to advising MOPS staff. The Committee believes any more substantial role for the Commissioner would require amendment of the Public Service Act or regulations. The Committee is also not convinced that having one Commissioner providing advice to both MOPS staff and public servants is necessarily conducive to maintaining the distinctions between the services, and the preservation of that distinction has been a major theme of evidence to this inquiry.

6.57 Accordingly, the Committee recommends that a position of ethics adviser should be established. The person's responsibilities would include educating and advising ministerial staff on their responsibilities under the ministerial staff code of conduct, and working with the Public Service Commissioner to help develop mutual awareness of the public service and ministerial staff of each others' codes of conduct.

6.58 The Committee considers that there are a number of ways the position could be created. The ethics adviser could be a member of the Prime Minister's MOPS staff, or a MOPS employee supervised by one of the Presiding Officers. The role could have a statutory basis. For instance, it could be included in a provision of the MOPS Act that required the promulgation of a code of conduct for ministerial staff (see Recommendation 12). Alternatively, the adviser could be a member of the Parliamentary Service. The last option would have the advantage that the person would have continuity of appointment. This may be appropriate to the fact that the nature of their responsibilities is somewhat different to that of a typical MOPS employee.

Recommendation 13

6.59 The Committee recommends that the Prime Minister take a leadership role in education and training of ministerial staff in regard to the code of conduct, and that resources be publicly committed to this objective.

Recommendation 14

6.60 The Committee recommends that a position of ethics adviser be created to educate and advise ministerial staff on their responsibilities under the ministerial staff code of conduct. It recommends that the position be either a statutory position under the MOPS Act, or a position in the Parliamentary Service.

What elements should be included in the code?

6.61 Codes of conduct, as mentioned above, can be quite broad in scope, or quite narrow. The Queensland code is based on implementing broad principles such as ‘integrity’; in contrast, the Canadian code is almost entirely concerned with detailed rules relating to conflict of interest. The Committee believes the most relevant models lie between these extremes, and include the existing APS Code and the UK Code for Special Advisers.

6.62 Dr Shergold pointed out that ministerial staff already have ‘guidance on conduct. That guidance sits within the Prime Minister's guide on key elements of ministerial responsibilities’.⁴⁵ That guidance exists, but it is extremely limited and it is not located in a code directed explicitly at ministerial staff.

6.63 Professor Weller said that the code should cover two areas: the responsibilities of ministerial staff, and their relations with the public service.⁴⁶ Dr Uhr and Mr Podger both supported a code that encouraged advisers to appreciate ‘that advisers should not act in a way which might try to induce public servants to do otherwise than abide by their values and code of conduct’.⁴⁷ Dr Uhr also suggested that the code for advisers should cover all the topics canvassed by sections 5 and 6 of the Prime Minister’s Guide:

... in sections 5 and 6 of the Prime Minister’s code wherever it says ‘minister’ I would substitute ‘ministerial staffer’. Then I would add one other important rider that I think should really form the heart of a ministerial staffer code, which is that ministerial staff have to respect the code of the Australian Public Service.⁴⁸

6.64 Dr Maley similarly suggested that a code:

... be modelled on the ministers’ guide to behaviour: acting with integrity and honesty, not knowingly deceiving or misleading the parliament or the public, and respecting the nature of the Public Service and not asking them to do things that would be inappropriate. I thought an interesting thing in a code of conduct would be to state that it is assumed that advice that has been provided to an adviser has been provided to a minister. You could put statements in the code that strongly reinforce that link.⁴⁹

6.65 Mr Barratt suggested that the MOPS Act be amended to define roles of ministerial staff.⁵⁰ As noted above, the Committee at this stage favours a non-statutory

45 *Committee Hansard*, 2 September 2003, p. 46.

46 *Committee Hansard*, 2 September 2003, p. 78.

47 Mr Podger, *Committee Hansard*, 2 September 2003, p. 126.

48 *Committee Hansard*, 2 September 2003, p. 101.

49 *Committee Hansard*, 2 September 2003, p. 112.

50 Submission no. 7, p. 10.

approach to defining the roles of ministerial staff. However, it agrees with Mr Barratt that the roles of ministerial staff should be one of the topics covered by the code. It also agrees that the MOPS Act should be amended to indicate that role definitions are required for MOPS staff.

Recommendation 15

6.66 The Committee recommends that the MOPS Act be amended to indicate that ministers must write to each staff member upon appointment outlining their responsibilities, including that they must uphold the MOPS Values and the ministerial staff code of conduct.

6.67 The Committee believes the most appropriate approach is to model the code on that already in place for the Public Service, with amendments that:

- modify the text of the existing code, making it appropriate to ministerial employment; and
- inserting additional restrictions that should apply specifically to ministerial staff, particularly dealing with the roles of ministerial staff and their interactions with the public service.

6.68 The Public Service Code provisions require very little modification to be appropriate for ministerial staff. Box 6.1 highlights how they might be modified to be appropriate to ministerial staff.

Box 6.1 Adapting the APS Code of Conduct clauses for MOPS employees.

This box shows the minimum changes necessary to adapt the existing clauses of the APS Code of Conduct in a way appropriate to apply to MOPS staff.

- (1) A ministerial staffer must behave honestly and with integrity in the course of MOPS employment.
- (2) A ministerial staffer must act with care and diligence in the course of MOPS employment.
- (3) A ministerial staffer, when acting in the course of MOPS employment, must treat everyone with respect and courtesy, and without harassment.
- (4) A ministerial staffer, when acting in the course of MOPS employment, must comply with all applicable Australian laws. For this purpose, *Australian law* means:
 - (a) any Act (including this Act), or any instrument made under an Act; or
 - (b) any law of a State or Territory, including any instrument made under such a law.
- (5) A ministerial staffer must comply with any lawful and reasonable direction given by someone who has authority to give the direction.
- (6) A ministerial staffer must maintain appropriate confidentiality about

dealings that the employee has with any minister or other ministerial staffer.

(7) A ministerial staffer must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with MOPS employment.

(8) A ministerial staffer must use Commonwealth resources in a proper manner.

(9) A ministerial staffer must not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's MOPS employment.

(10) A ministerial staffer must not make improper use of:

(a) inside information; or

(b) the employee's duties, status, power or authority;

in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person.

(11) A ministerial staffer must at all times behave in a way that upholds the integrity and good reputation of ministerial staff.

(12) A ministerial staffer on duty overseas must at all times behave in a way that upholds the good reputation of Australia.

(13) A ministerial staffer must comply with any other conduct requirement that is prescribed by the regulations under the MOPS Act.

6.69 A code of conduct should contain at least two additional types of provision: one that sets out the boundary between employment responsibilities and official party work; and one which makes it clear that a staffer cannot direct a public servant. Similar clauses exist in the UK code, and as Dr Uhr pointed out, it recognises that the core issue that has been identified in Australia is ‘the degree to which [ministerial staff] overextend the office that they have by directing public servants’.⁵¹ These additional clauses would pick up on the Public Service Commissioner’s suggestion that problematic situations could be avoided:

... by clarifying that there is not executive authority; that their [ministerial advisers] authority derives from the minister and that they are exercising it on behalf of the minister.⁵²

6.70 Possible elements to address these areas could include:

- A ministerial staffer must not use official resources for Party political activity.⁵³
- A ministerial staffer must not direct a public servant.⁵⁴

51 *Committee Hansard*, 2 September 2003, p. 104.

52 *Committee Hansard*, 2 September 2003, p. 59.

53 This wording comes from the UK Code of Conduct for Special Advisers.

54 This wording is based on concepts in the UK Code of Conduct for Special Advisers.

6.71 The last point would not prevent ministerial staff transmitting a ministerial instruction. Rather, it prevents them giving directions at their own initiative. This formulation picks up on the concerns expressed by Barratt and others about official communication and record-keeping, which were touched on in Chapter 5 and are discussed in more detail in Chapter 7.⁵⁵ If this point is successfully adhered to, it should result in fewer occasions arising in which ministerial staff might be called to give evidence to a parliamentary committee under the guidelines the Committee recommended in Chapter 4.

Recommendation 16

6.72 The Committee recommends that a code of conduct for ministerial staff cover similar issues as the code governing public servants, but that it also specifically address what roles ministerial staff can and cannot perform, and how they are to relate to the public service and party organisations.

Monitoring the Code

6.73 Just as the APS Commission is using staff survey instruments to examine employee knowledge of and attitudes toward the APS Values and Code of Conduct, so should MOPS staff be surveyed at an appropriate time after the introduction of the code, to assess their awareness of it and views about it. The Committee has already suggested a survey of MOPS staff be conducted in the immediate future (see Chapter 5). A subsequent survey (perhaps some three years later) could then be adapted to examine issues related to awareness of operation of a MOPS staff code of conduct.

Recommendation 17

6.74 The Committee recommends that a survey be conducted three years after the introduction of the code of conduct, to test employee knowledge of and attitudes toward the code.

55 Mr Barratt, submission no. 7, pp. 7–8; National Archives of Australia, submission no. 2, pp. 5–7.

Chapter 7

MOPS staff and the APS

7.1 This chapter addresses the relationship between MOPS staff, particularly ministerial advisers, and the public service (APS). It focuses on three issues: politicisation of the APS, communication, and training.

Relations between ministerial staff and the APS

7.2 The balance between the authority of ministers' offices and of the public service has undergone a dramatic shift in the last thirty years. In 1974 concerns were expressed that APS officers on secondment as ministerial staff were being put under departmental pressure. This led to the Department of the Prime Minister and Cabinet (PM&C) issuing a paper on the 'Direction of and Responsibility for Members of Ministerial Staff', which said:

Ministerial staff are under the direct control of the Minister. ... The powers of direction normally exercised by the officer's Permanent Head do not apply for the duration of the secondment. Any attempt by any other Public Service officer to direct a seconded officer should be reported to the Minister.¹

7.3 In recent years, however, the concern has become quite the opposite. The problem has become one of ministerial staff putting departments under pressure rather than the other way around. Concerns about advisers' relationships with the public service were expressed during the Certain Maritime Incident (CMI) Inquiry.²

7.4 Similar problems have been recognised in other countries. The UK Code of Conduct for Special Advisers, for example, concludes by saying:

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.³

1 PM&C, 29 March 1974, cited in R.F.I. Smith, *Ministerial Advisers*, Royal Commission on Australian Government Administration, 1975, p. 11.

2 *CMI Report*, p. xxxiv.

3 Section 22 of the *Code of Conduct for Special Advisers*, UK Cabinet Office, <http://www.cabinet-office.gov.uk/central/2001/codconspads.htm>.

7.5 Effective relationships between ministers' offices and the public service require trust,⁴ professionalism and must be based on frank and fearless communication. Dr Shergold indicated a dislike of the phrase 'frank and fearless' because he believed it had become a cliché.⁵ He suggested 'frank and honest' as an alternative. However, as Mr Barratt suggested, honesty should be a given,⁶ while 'fearlessness' denotes something more: it is an endorsement of professional independence of thought, and the need for public servants to deliver impartial advice, even if it may present a problem for the government of the day. The Committee believes 'fearless' advice is important, and notes that some evidence suggests it is under threat.

7.6 The maintenance of trust, professionalism and frank and fearless advice require that the public service is not politicised, that there are clear and accurate lines of communication, and that training and professional development of both MOPS staff and public servants are adequate to ensure that everyone is clear about the roles and responsibilities of both groups of employees.

7.7 The Committee is aware of evidence that suggests that there is room for improvement and reform on all three counts.

Politicisation of the APS

7.8 That the APS as a whole must not be politicised is universally accepted. However, there is debate about whether the leadership of the APS is being politicised (for example by limiting the tenure of departmental secretaries) and whether this may be undermining what should be a professional career service. Avoiding such politicisation means first of all that senior officials should be appointed on merit, and not on the basis of their political connections.⁷ It also means that public servants must be able to fulfill their duties without believing they will be rewarded or punished according to the advice they offer. They must not be doctoring their advice because of, or in anticipation of, the hostility of ministerial staff, if they believe it is the best professional advice to be given.

7.9 Concerns have recently been raised that this kind of politicisation may be subtly taking place. Commentator Graeme Dobell described foreign policy advice being offered in an environment:

4 Dr Watt and Dr Shergold, *Committee Hansard*, 2 September 2003, p. 52. See also Mr Podger, *Committee Hansard*, 2 September 2003, p. 65.

5 *Committee Hansard*, 2 September 2003, p. 41.

6 *Committee Hansard*, 3 September 2003, p. 193.

7 Scott Prasser, 'Time to Review all Senior Appointments in Government', *Canberra Bulletin of Public Administration*, vol. 108, 2003, p. 77.

[w]here self-censorship has become an ambassadorial art form; well-understood protocols ensure ministers are not told what they don't want to hear and professional discipline is reinforced by a 'culture of compliance'.⁸

7.10 John Nethercote has voiced similar concerns:

The essential problem is that the position of officials at senior levels of government is now extremely tenuous. To press unwelcome advice, even upon so straight-forward a matter as inaccurate information, may well court termination of employment. This vulnerability is particularly clear during election campaigns.⁹

7.11 Former departmental secretary, Tony Blunn identified similar issues:

... public service management was focused on an accommodation between what were perceived as the public service 'values' and pressures to adopt the ... more efficient practices of the private sector. If anything that pressure has intensified. That, together with the introduction of such things as 'performance pay' for secretaries based at least in part on an assessment of individual performance by the government of the day has, in view of some (perhaps many), resulted in the 'politicisation' of the APS. I do not believe that the service has been 'politicised', but the perception is understandable and the scene has perhaps been set where it would now be relatively easy for it to happen.¹⁰

7.12 Academic and former senior public servant, Professor Ken Baxter, expressed concern about the problem:

In many cases, advice of limited intellectual quality and rigour has diminished or in some cases replaced 'frank and fearless' advice from civil servants. With some notable exceptions, the results are showing. The real concern is that government is moving away from seeking and using 'frank and fearless' advice from professional civil servants and replacing it with advice from party appointees who stand between ministers and the civil service. It is not a case of politicising the civil service but rather diminishing its capacity to provide advice and where that advice is ranked when decisions are made.¹¹

8 Graeme Dobell, 'Diplomatic compliance', *Griffith Review*, Spring 2003, p. 67.

9 John Nethercote, 'Values in Contention: Some Key Administrative Issues in 2002', *Australian Journal of Public Administration*, vol. 62, no. 1, 2003, p. 90.

10 Tony Blunn, 'The Public Sector in the New Millennium: Public Service Values in the New Millennium', *Canberra Bulletin of Public Administration*, vol. 107, 2003, p. 30.

11 Ken Baxter, 'Accountability and the Senior Civil Servant in a Modern Political System', *Canberra Bulletin of Public Administration*, vol. 105, 2002, p. 11.

7.13 Several witnesses to this Committee's inquiry also linked the rise of ministerial advisers to the erosion of public service advice, as well as highlighting the risks of lack of tenure for senior public servants. The Clerk of the Senate remarked:

A lot of difficulties are caused by ministerial staff who believe that the Public Service particularly is there to carry out the orders of the political wing of government without question and to get on and do what the political wing of government wants done. If public servants start making cautionary noises or offering cautionary advice, they may be seen as obstructive and getting in the way of getting things done. Public servants are wary of doing that and, as a result, they do not offer the cautionary advice. That often makes things more difficult in the sorts of incidents we have seen in recent times, because there is nobody there who will say to the political wing of government, 'There are difficulties in what you're proposing; there are potential problems in what you're proposing.' They do not want to be seen as obstructionist and raising red tape and that sort of thing, so the reaction is to get on and do what they are ordered to do. That has been the source of a great many of the problems that we have seen in recent times.¹²

7.14 Dr Russell likewise argued:

Over the last 30 years we have seen a growth in the power of ministers, certainly a growth in the power of ministerial officers, and certainly a growth in the power of the Prime Minister relative to the Public Service ...

There is a very key role for the secretaries of departments, but we need to set up a structure where they can perform this role with some dignity and some security that their views will not be used to effectively destroy their careers. I think the current situation, where secretaries are on fixed term contracts and they are conducting discussions with the head of the Prime Minister's department, who is the head of the Public Service, and that person actually holds their contract in his pocket and will negotiate the terms of the renewal of that contract, is not a healthy arrangement...

I think each secretary needs to have some security in terms of their future career. Tenure is an easy way of doing it. As to whether you have a seven-year contract I do not know, and I do not think you necessarily want to provide tenure to all first division officers.¹³

7.15 Former secretary, Mr Barratt, testified that:

... efforts to strengthen the accountability regime for ministerial staff are unlikely to succeed unless the extraordinarily insecure employment situation of departmental secretaries is also addressed ...

12 Harry Evans, *Committee Hansard*, 3 October 2003, p. 201.

13 *Committee Hansard*, 3 September 2003, pp. 158–9.

As matters stand, the secretary is not in a strong position to contribute vigorously to the enforcement of appropriate standards of conduct.

We will probably never see a return to the day when department secretaries had long-term tenure, but a situation in which they are in effect tenants at will is not conducive to good public administration. An appropriate middle ground in my view would be to require that secretaries be appointed for a full five-year term and that, having been appointed, they may only be removed from office for proven misbehaviour or incapacity.¹⁴

7.16 Former senior defence officer, Maj. Gen. (ret.) Alan Stretton likewise remarked:

... a great change has taken place with heads of departments. I would like to see a bit more security of tenure there, which I think will help them if they are going to give advice to the government that is not in accordance with government policies.¹⁵

7.17 Currently, departmental secretaries are appointed on contracts for periods of up to five years, and can be dismissed at any time.¹⁶ Although they must be given reasons for their dismissal, there are no significant restrictions on what those reasons may be.¹⁷ The limited term of contracts, combined with the ease of dismissal, may seriously undermine the working conditions of, and independence of advice from, departmental secretaries and agency heads.

7.18 The Committee accepts the need for flexibility in staffing arrangements. It believes the right balance must be found between that flexibility and the need to ensure that senior public servants feel their position is secure enough to underpin the offering of robust policy advice. The Committee accepts the wide range of evidence suggesting that balance may have been lost somewhat in recent years. The Public Service Act as it currently stands limits their contracts to a maximum of five years' duration.¹⁸ Furthermore, the *Barratt v Howard* case has served to make secretaries and agency heads more aware than ever of the insecurity of their employment. This may have the undesirable side effect of removing any incentive for a minister to 'attempt to get on' with his or her departmental secretary.¹⁹ It may also mean that governments will not try and redeploy a secretary or agency head in the event of a personality clash, instead opting simply to terminate them.

14 *Committee Hansard*, 3 September 2003, pp. 179, 181.

15 Maj. Gen. (ret.) Alan Stretton, *Committee Hansard*, 2 September 2003, p. 74.

16 Public Service Act 1999, sections 58 and 59.

17 *Barratt v Howard* [1999] FCA 1132.

18 *Public Service Act 1999*, sections 58 and 67.

19 Mr Barratt, *Committee Hansard*, 3 September 2003, p. 182.

7.19 Whilst the Committee does not advocate a return to unlimited tenure for departmental secretaries and agency heads, it does believe they should have greater security than is currently allowed for in the Public Service Act. Secretaries and agency heads would also be more confident in giving advice if they knew that early termination of a contract would only result from issues related to the performance of their duties, and that conflicts between ministers and their secretaries could be addressed through redeployment, rather than through termination.

Recommendation 18

7.20 The Committee recommends that departmental secretaries and agency heads be given a greater degree of security of employment than is currently the case, through:

- **longer-term contracts of employment;**
- **abolition of the maximum length for contracts for currently contained in the Public Service Act;**
- **insertion of a minimum length for contracts in the Public Service Act; and**
- **establishment of a protocol for the management of conflict between a minister and their secretary or agency head that focuses on resolving conflict in the first instance, on finding an alternative position for the secretary or agency head if the conflict cannot be resolved, with the termination of the person's services occurring only as a last resort.**

Communication between ministers' offices and departments

7.21 The nature of communication between ministers' offices and departmental staff was a second major area where witnesses suggested improvement would be possible. The Committee is concerned that there appears to be growing ambiguity about what constitutes official communication and advice between agencies and ministers. Two important factors causing this ambiguity have been (i) the proliferation of modes of communication, and (ii) the increasing immediacy of electronic communications. Information is now passed between departments and ministers' offices by letter, fax, email, oral briefings, mobile phone calls, voice messages and text messages, phone calls and answering machines. Information is communicated in formal meetings, less formal working groups, one-to-one meetings and calls, and casual contacts.

7.22 As the 'children overboard' affair highlighted, this diversification of communication systems and organisational work practices means that it becomes unclear what weight is attached to information communicated in different settings. Professor Weller posed the question of what constituted 'formal advice' from a department, and concluded it was easier to surmise what it was *not*:

It is not a conversation between ministers ... It is not ... an oral briefing ...
It is not the use of formal channels ... It is not just a conversation ... It is not

a warning in a written brief ... It is not a warning to an adviser or a message on voicemail ...²⁰

7.23 The situation during the ‘children overboard’ incident was an extreme one: tight time frames, intense controversy, and a lot of activity. It is in these situations also that the opportunity may exist to deliberately bypass official lines of communication, and / or ignore evidence that people may not wish to hear or see. It is vital, therefore, that an effective framework exists for communication between ministers and their departments, and that it is strong enough to deal with these testing incidents.

7.24 The head of PM&C, Dr Shergold, identified the accuracy and recording of communications as a key issue. In the wake of ‘children overboard’, Dr Shergold was reported as being concerned that ‘even when timing was crucial, advice to ministers must be accurate and checked across departments and agencies and that clear records must be kept’.²¹

7.25 The APS Commissioner, Mr Podger, was reported as remarking that, in the wake of the ‘children overboard’ affair:

... some of the key players before subsequent parliamentary committees have said there are some lessons to be taken from the exercise. Jane Halton herself (the head of the task force) said one of them was about record-keeping. She accepts it was not as good as it should have been. And it is something she and her new department have been trying to address.²²

7.26 Dr Maley noted in her study that public servants always had in the back of their minds the question of whether communication from an adviser had the minister’s backing. They would seek to test the issue, if there were doubts, by asking for things in writing.²³

7.27 The Committee accepts that the time is past when all communication can be expected to be between the minister or the minister’s chief of staff and the head of an agency. Ministers’ offices need and want more open and rapid communication channels than that. As Dr Shergold pointed out, ‘[m]inisters have increasingly shown a preference for dealing directly with the name on the bottom of the written brief’.²⁴ As Professor Weller put it:

20 Patrick Weller, *Don’t Tell the Prime Minister*, Scribe Publications, Melbourne, 2002, pp. 96–7.

21 ‘War advice carefully recorded: PS chief’, *Canberra Times*, 10 April 2003. See also Senate Finance and Public Administration Legislation Committee, *Report on Budget Estimates 2003–04*, June 2003, p. 14.

22 Cited in Mike Secombe, ‘Silent service’, *Sydney Morning Herald*, 5 July 2003.

23 *Committee Hansard*, 2 September 2003, p. 117.

24 Dr Peter Shergold, *Two Cheers for the Bureaucracy: Public Service, Political Advice and Network Governance*, Address to APS Commission lunchtime seminar, 13 June 2003, <http://www.pmc.gov.au/docs/Shergold1306.cfm>

... it would be very nice if things went through the head of the department or the liaison officer, but—certainly from the people I talk to around the Public Service—that is no longer true. Some of the evidence we heard this morning was that people would ring around—certainly all around the senior executive service from the minister's office and increasingly down into the lower ranks—and a person would get a phone call saying that they were the relevant person and that the minister wanted to know such and such.²⁵

7.28 The Committee considers that as this proliferation of lines of communication continues, it needs to be matched by an increase in awareness of the need for those communications to be clear and properly documented. In this regard, the Committee supports the approach suggested by Mr Barratt. Mr Barratt argued:

The single most important measure to improve the accountability of Ministerial staff and of all who deal directly with the Minister's office would be to return to a system where **all** substantive communication between the Minister and the Department is in writing.

A fair rule of public administration would be that instructions that are not in writing do not exist. This is not a trivial matter. The institution of such a regime would mean that no officer or MOPS staff person could claim the protection of having acted in accordance with a lawful instruction of the Minister unless they can produce a written instruction signed by the Minister.²⁶

7.29 As Mr Barratt points out, this might be seen as a retrograde step, but he contends that '[i]t is hard to argue that the abandonment of these traditional approaches has led to an enhancement of the quality of our public administration'.²⁷

7.30 Maj. Gen. (ret.) Stretton made a related suggestion regarding the treatment of communications. He suggested that:

There should be provision in the MOPS Act to the effect that, when advice is given by an official or public servant to the Minister's personal staff, such advice will be deemed to have been received by the Minister. Also any direction or request from the Minister's Office should be deemed to have been authorised by the Minister.²⁸

7.31 The Committee agrees with the basic principles underpinning the arguments of Barratt and Stretton. In this regard, Mr Barratt emphasised that he was not suggesting that *all* communications between ministerial offices and departments should be in writing.²⁹ Rather, he was emphasising that there should be a written

25 Professor Weller, *Committee Hansard*, 2 September 2003, p. 93.

26 Mr Barratt, submission no. 7, p. 7.

27 Submission no. 7, p. 8.

28 Submission no. 14, p. 2.

29 *Committee Hansard*, 3 September 2003, p. 185.

record that ensures the authority, accuracy and accountability of ministerial decisions and directions, leaving no doubt as their status.³⁰

The role and management of Departmental Liaison Officers

7.32 Departmental Liaison Officers (DLOs) play an important role in maintaining effective communication between departments and ministers' offices. The purpose of DLOs is 'to facilitate liaison between the minister and the department or agency, in relation to administrative and policy processes'.³¹ Most DLOs are middle-ranking public servants, and their numbers have grown steadily over the last two decades. As of September 2003 there were 70 DLO positions, broken down as follows:³²

APS Classification level	Number
Executive Level (EL) 2 (and equivalents)	20
EL 1 (and equivalents)	37
Legal Officer 2 (similar seniority to EL2)	2
Australian Public Service Level 6	8
Australian Public Service Level 5	1
Australian Public Service Level 4	2
Vacancies	1
Total	70

7.33 The number of DLOs appears to have stabilised at this level, at least in the medium term. The current number is only one more than in 1998.³³ This may reflect some controversy over the growth in numbers,³⁴ and concern that their role be clearly defined and kept distinct from that of ministerial staff.

7.34 Dr Russell points out that '[i]n many ways [DLOs] are a hangover from an earlier time when the department staffed the minister's office'. He thinks that: '[i]f the department is willing to carry the cost of the DLO and if the department benefits from better communications then it does not seem unreasonable that departments behave in this way'. However, he goes on: 'DLOs should not be used as a way of circumventing

30 Submission no. 7, p. 7.

31 PM&C, submission no. 11, p. 5.

32 Adapted from Department of Prime Minister and Cabinet, additional information supplied to the Committee.

33 *Senate Hansard*, 31 March 1999, pp. 3688–9. See also Ian Holland, 'Accountability of Ministerial Staff?' *Research Paper* No. 19 2001–02, Department of the Parliamentary Library, Canberra, p. 9.

34 See, for example, Senate Finance and Public Administration Committee, *Estimates Hansard*, 8 February 2000, p. 199.

a minister's staff entitlement'.³⁵ The APS Commissioner is also supportive but cautious about the role of DLOs, suggesting that it is important that 'the number and functions of DLOs are regularly scrutinised, partly to ensure that DLOs are not doing work more appropriately performed by MOP(S) Act staff'.³⁶

7.35 The Committee agrees that the roles and operations of this group need to be regularly scrutinised. The Committee does not believe, for example, that governments should attempt to protect DLOs from appearing before parliamentary committees using arguments that a government might seek to apply to ministerial staff. As PM&C made clear, DLOs are public servants performing departmental functions, regardless of where they are located.³⁷

Recommendation 19

7.36 The Committee recommends that the numbers, locations, and seniority of Departmental Liaison Officers be published annually, preferably as an appendix to the annual report recommended by the Committee in Chapter 5.

7.37 While DLOs are public servants who work in ministers' offices, the Committee notes that the MOPS Act allows for circumstances in which MOPS staff might work in a government department. The submission from PM&C drew the Committee's attention to section 4(2) of the MOPS Act, which states that:

An agreement for the engagement by a Minister of a consultant under subsection (1) shall contain one or more of the following provisions: ...

(c) a provision to the effect that the consultant is engaged to perform, under the supervision of the relevant Secretary, such tasks as are specified in the agreement;

(d) a provision to the effect that the consultant is engaged to perform, under the supervision of the relevant Secretary, such tasks as are from time to time specified by the Secretary with the Minister's consent.

7.38 The Department noted that these particular provisions had not been used since 1993. It went on to say that:

While arrangements under those provisions could no doubt work effectively again if required, the presence of Ministerial consultants working within departments can serve to blur the relationship between MOP(S) Act staff and public servants and would require a clear definition of roles.³⁸

35 Submission no. 9, p. 7.

36 Submission no. 10, p. 19.

37 PM&C, submission no. 11, p. 5.

38 Submission no. 11, p. 4.

7.39 The Committee received no further evidence on this issue. However, it recognises that, just as DLOs must not be doing the work of MOPS staff, so MOPS staff must not be doing the work of departmental staff. As PM&C suggested, the kinds of employment relationships envisaged by these particular provisions in the MOPS Act may not be conducive to the clear definition of roles between MOPS staff and the public service. It would be appropriate that the ongoing relevance of the clause be reviewed by the government, in consultation with other parliamentary parties, to consider whether it should be repealed.

Training and development to enhance the work of MOPS staff

7.40 The Committee is concerned that, while some departmental secretaries, such as Dr Shergold and head of the Department of Finance and Administration (DoFA) Dr Watt, think that public servants and ministerial staff understand their respective roles,³⁹ their evidence also suggested little is being done to ensure that this is the case. Furthermore, officers in the two departments represented by these two secretaries are likely to have more interaction with ministers than many other public servants.⁴⁰ Any conclusion based on the experience of these two particular agencies may not be applicable to the APS as a whole. The Committee is particularly disappointed that, despite writing to all departments seeking input to this Inquiry on these issues, none other than the two agencies with MOPS-related administrative responsibilities (PM&C and DoFA) responded. The Committee is concerned that this unresponsiveness may indicate a sensitivity on the part of departments regarding the issue of interaction with ministers' offices. If this is the case, it further underscores the importance of improvements in this area.

7.41 Dr Shergold argued that greater clarity about the respective roles of MOPS and APS staff could be achieved by ensuring that the public service is 'very clear in its documentation about what the contrasting roles are'.⁴¹ He drew attention to the Public Service Commissioner's guidelines as an example of this sort of documentation. At the same time, both he and Dr Watt admitted that their departments did not have a written protocol available for staff on handling interactions with ministers' offices.⁴²

7.42 Dr Shergold was asked about training senior departmental staff to prepare them for interactions with minister's offices. Inexplicably, his response was primarily in terms of the training provided to graduates on commencement.⁴³ This response does not really address the question at issue, and graduate recruits are not the staff who are likely to be interacting with ministers' offices.

39 See, for example, Dr Watt, *Committee Hansard*, 2 September 2003, p. 52.

40 Ms Tiernan and Professor Weller, *Committee Hansard*, 2 September 2003, p. 97.

41 *Committee Hansard*, 2 September 2003, p. 44.

42 *Committee Hansard*, 2 September 2003, pp. 32–3.

43 *Committee Hansard*, 2 September 2003, pp. 38–9.

7.43 The absence of senior staff training, or communication protocols, may affect staff's confidence in dealing with ministers offices. For example, Dr Watt indicated he had never had experiences of any of his staff coming to him wanting clarification regarding any requests from the minister's office.⁴⁴ In a department that has such extensive dealings with Ministers as DoFA, the Committee would expect that such issues would arise occasionally. The fact that Dr Watt had not been presented with any incidents might suggest that these issues, when they do arise, are not being brought to the attention of the Departmental Secretary.

Recommendation 20

7.44 The Committee recommends that all departments provide written guidance to staff regarding interactions with minister's offices, and that all senior staff receive adequate training in this area.

7.45 The main area of concern with regard to training is ministerial staff. Ms Tiernan thought that training would be more important than before amongst ministerial staff:

Respondents to my study are of the opinion that a greater proportion of the current ministerial staff have no prior public service experience ... if it is true that people with limited knowledge and experience of government are filling ministerial staff positions in greater numbers, the need for context-specific professional development assumes even greater importance.⁴⁵

7.46 There appears to be no training provided specifically for ministerial advisers.⁴⁶ DoFA indicated:

MOPS staff at the level of adviser and below have a range of professional development training offered to them through the certified agreement. Specific training programs that have been sponsored by the Special Minister of State are offered. There are also ad hoc professional development programs and computer systems training. Funds are provided to political party secretariats and Independent members to conduct training for their staff as well. There is quite a range that we do offer. As I mentioned to Senator Murray earlier, there is a training needs analysis currently under way, where we are seeking to identify new aspects of training that are required. We have previously had a training needs analysis to identify the kind of training that was being sought, and that was offered. That included communication, writing and all those sorts of things.⁴⁷

44 *Committee Hansard*, 2 September 2003, p. 35.

45 Ms Anne Tiernan, supplementary submission 4A, p. 2.

46 See discussion in *Committee Hansard*, 2 September 2003, pp. 45–6.

47 *Committee Hansard*, 2 September 2003, pp. 45–6.

7.47 The Committee is concerned about both the level and adequacy of the training, though it does not question DoFA's diligence in offering these activities. Ms Tiernan pointed out that:

The DoFA evidence about training and development programs was concerned with staff at the Adviser level and below. Of greater importance, however, must be the training offered to the approximately 27% of current ministerial staff who have higher classifications than these – they are Principal Advisers, Senior Advisers and Media Advisers.⁴⁸

7.48 This issue is implicit also in Professor Weller's concern about whether 'the Department of Finance training is as high-powered as it might be for understanding some of the sensitivities'.⁴⁹ The Committee was also not convinced that training opportunities were being effectively maintained. It received no evidence from DoFA about the rate of uptake of training. In September 2003, the DoFA-maintained internal website for MOPS staff contained a statement that the professional development program 'has resumed for 2002',⁵⁰ raising the issue of whether training infrastructure and opportunities are being kept up-to-date.

7.49 The Committee received other evidence to suggest a possible gap between the offering of training and the take-up of those offers. Ms Tiernan's commented on her research, indicating that the MOPS staff she interviewed:

... have identified a serious lack of training and other professional development opportunities as an important weakness of the current system. A consistent theme in the interview data is the lack of career development available to ministerial staff ...

a number of respondents have indicated that making time to attend conferences, seminars or courses can be problematic because of the workload pressures and irregular hours associated with working in a ministerial office. I understand that their employers are sometimes reticent to agree to absences from the office, because they are concerned that work might accumulate, or are not persuaded that the training would be beneficial ...

A number of submissions and witnesses to the MOPS Inquiry mentioned the need for formal induction programs for ministerial staff. My interview data and other research indicate these are rudimentary or absent in most ministerial offices. Staff may have no handover with the person they are replacing; there is simply no time for induction and perhaps no recognition of its importance.⁵¹

48 Supplementary submission no. 4A, p. 2.

49 Professor Weller, *Committee Hansard*, 2 September 2003, p. 94

50 On the intranet at http://mops/S_M_Menu/professional_development.html

51 Ms Tiernan, supplementary submission 4A, pp. 3, 1, 2.

7.50 The Committee believes that the training of MOPS staff is vital. It seems clear that this training needs to be radically boosted at the ‘top end’. Training should be increased for senior staff, and there should be an increased emphasis on high-level skills and professional development. The Committee believes these training needs will be further increased by the need to ensure that a deep, enduring understanding of a code of conduct and what it means must be bedded down in the staffing structure.

7.51 This requires intensive and regular training that is not merely accessed when some staff in some offices find a quiet moment to go off-site for a few hours. As Dr Russell observed:

My guess is that we do need education sessions with every staff person that comes on board. We probably need processes where the staff are actually re-educated every year. I am familiar with this through financial markets ... an ethics process where every person working in the financial markets not only has to pass some examination but has to have refresher courses.⁵²

7.52 The second thing that is required is leadership. If training comes with the endorsement of the Prime Minister, this can have an important impact:

In other words, every day the Prime Minister, in some form or other through his chief of staff, is signalling to all the staff: this is what we expect of you; it is coming from me and you had better believe it.⁵³

7.53 This leadership extends not merely to the staff, but to ministers, making it clear to them that the training of their staff is a priority in ensuring the ‘efficient, effective and ethical’ operation of the government.⁵⁴ Ministers must have staff who know how to interact with the public service, understand their Commonwealth record keeping responsibilities, and are clear about what is expected of them under a code of conduct.

Recommendation 21

7.54 The Committee recommends that the level and intensity of training for ministerial staff be increased, and be given a significantly higher priority by ministers. It recommends a mandatory induction training process for staff commencing in ministers’ offices, which focuses on political ethics, relationships with the APS, and record keeping responsibilities.

**Senator Michael Forshaw
Chair**

52 Dr Russell, *Committee Hansard*, 3 September 2003, p. 174.

53 *ibid.*

54 The principles of ‘efficient, effective and ethical’ use are the basis of the instructions to Chief Executive Officers in the *Financial Management and Accountability Act 1997*, section 44.

Government Senators' Dissenting Report

The Government Senators dissent from the conclusions and recommendations in the majority Report ("the Report"). We will confine our discussion to what we regard as the key recommendations in the Report, namely, those concerned with oversight of Ministerial staff and the tenure of Departmental Secretaries.

1. Oversight of Ministerial Staff

1.1 The key recommendations in the Report would expose Ministerial advisers to a regulatory regime, and to a form of parliamentary scrutiny, which has not hitherto been known in Australia.

1.2 Government Senators are concerned that, were these recommendations to be accepted, the traditional role of the Minister, as the officer of the Executive Government directly accountable to the Parliament, would be prejudiced.

1.3 Under the current system, Ministers may be held responsible for the conduct of their Ministerial staff. The Minister is answerable in the sense that he must take political responsibility for that which is done in his name. As the evidence of public service witnesses before the Committee suggested, it is a fiction to imagine that every piece of information communicated to Ministerial staff, or every decision made by staff, is conveyed to the Minister. Nevertheless, the Minister has political responsibility at least in the sense that, if a matter is known to his staff but unknown to him, he must explain that lack of knowledge and face whatever criticism might arise from his unawareness of it.

1.4 In short, making Ministerial staff answerable would tend to undermine the principle of Ministerial responsibility, making Ministers less rather than more accountable.

1.5 In addition to the prejudicial effect which the Report's proposals would have on Ministerial responsibility, there are serious practical objections to exposing to scrutiny the workings of Ministers' offices. It is in the nature of decision-making within the Executive Government that many decisions are necessarily made in confidential circumstances. Ordinarily, it is the decision which is the public act, for which the Minister may be held to account; not the process by which it is arrived at.

1.6 To expose the process of decision-making to the kind of public oversight recommended in the Report is likely to have at least two damaging effects. First, it will prejudice the efficiency of that decision-making. Secondly, it will place pressure upon those participating in the decision to hedge, lest their conduct be subsequently the subject of minute examination. The very notion of advice to Ministers being

fearless – a value no less important in regard to the role of Ministerial staff as it is to the public service – would be lost.

1.7 As well, it is to be remembered that Ministerial staff have a legitimately political role. They are expected to be, and are quite properly involved in the development of political tactics and strategies. That role is intrinsically confidential.

1.8 Some witnesses showed enthusiasm for new oversight arrangements. However, Government Senators note that witnesses with considerable experience in the operation of Ministerial offices were sceptical of the value or utility of an invasive regime. This may be seen, for example, in the evidence of Dr Russell, a former Chief of Staff to Prime Minister Keating and Ambassador to the United States, whose approach was the most conservative of the witnesses.

1.9 It may be that the difference in witnesses' views reflected their professional dispositions and interests. Academic witnesses such as political scientists, whose profession it is to study the workings of government, will naturally be eager for as much information as possible to be available. On the other hand, those with experience of actually making government work may be expected to be focussed on outcomes. This contrast is evident in the enthusiasm for transparency amongst academics such as Dr Seth-Purdie and Dr Uhr, in contrast to the approach taken by Dr Russell.

1.10 In the view of Government Senators, transparency is not an absolute value in the operation of the Executive Government. Indeed, in many cases it is not even an appropriate value. Many decisions made within the Executive Government – both in the deliberations between Ministers (of which the most obvious example are Cabinet discussions) and in the deliberations by individual Ministers in the course of arriving at decisions – cannot be the subject of oversight or scrutiny, without destroying the capacity for the free exchange of views and consideration of various options. As we said earlier, it is the decision itself which is the public act, for which there is accountability; that is a matter for the Minister to answer for, not his staff.

1.11 It follows from what we have said that, in the view of Government Senators, a Code of Conduct is unnecessary.

2. Ministerial Staff and the Australian Public Service

2.1 Government Senators note the evidence of certain – mainly academic – witnesses suggesting “politicisation” of the Australian Public Service over recent decades. They were more impressed, however, by the evidence of the Head of the Department of the Prime Minister and Cabinet, Dr Peter Shergold, who was confident that the capacity and willingness of public servants to provide frank and robust advice was as strong as it has ever been. Importantly, Dr Shergold was emphatic that the rise in the importance of Ministerial staff was *not*, in his experience, prejudicial to or inconsistent with the provision of frank and robust advice:

Dr Shergold—In terms of the values that are set out for the professionalism of the Public Service under the Public Service Act, it is important to provide that frank, honest, robust policy advice which is, at the same time, responsive to the directions that are set by the elected government of the day.

Senator CARR—Yes, and you do not see that there is any conflict between those two principles?

Dr Shergold—No. I believe that it is important to understand what ‘responsiveness to government’ means, and it is in that way that I think the directions that I suppose were set by Prime Minister Whitlam and Prime Minister Hawke seem to me probably correct. My view from my experience in the Public Service is that the role of ministerial advisers is actually a very helpful one to the professionalism of the Public Service—in that the advice that I provide certainly needs to be responsive to the broad directions set by government but it does not need to concern itself with party political considerations, because within the minister’s office there are advisers who will have those concerns.

2.2 Government Senators strongly disagree with the recommendation that Departmental Secretaries should be given greater security of tenure through longer term contracts. We believe that a relationship of the utmost trust and confidence between a Minister and the Secretary of his Department is vital to good public administration, and the failure of that relationship inimical to it. For that reason, we consider that it would be bad public policy to limit the capacity of a Minister to terminate that relationship.

3. Other Matters

3.1 The Government Senators regard the two topics discussed above as the key recommendations in the Report. The other recommendations are essentially secondary and, in the view of Government Senators, unnecessary.

Senator Brandis

Senator Heffernan

Senator Watson

Senator Andrew Murray: Australian Democrats: Supplementary Remarks

These ‘Supplementary Remarks’ of mine are so titled because this is not a dissenting report. There is little the Democrats would disagree with in the Main Report. The Australian Democrats are strong supporters of reforms that enhance the accountability of government to the Parliament, and thus to the Australian people.

In this context we consider this an important Report, whose recommendations, if accepted, would advance the functioning of our Federal democracy, and help keep the Executive in check.

Nevertheless, without diminishing its importance, nor derogating from our support for the Report and its recommendations, the Main Report does not go far enough. It is work-in-progress.

The weaknesses which appear to me are:

- leaving it to the Prime Minister to promulgate the code of conduct, instead of having a statutory code;
- having no enforcement mechanism, just an ethics adviser;
- not insisting that Ministers from each House be accountable to the other House; and
- unduly limiting the circumstances in which ministerial staff should give evidence before Parliamentary committees (although the committee says its listed circumstances are not to be limiting, they may come to be regarded as the only circumstances).

There are at least two further steps that must be taken if the accountability of government is to be preserved, and the role of the Senate as a watchdog is to be secured.

Reforming the convention on parliamentary scrutiny of ministers

First, there must be a proper implementation of the doctrine of the separation of powers. That doctrine requires a clear divide between the legislature and the executive, together with absolute accountability of the latter to the former.

Currently, ministers are not fully accountable to the parliament, as they should be.

This defies the logic and law of their circumstance. The legal persona of a Minister is separate from the legal persona of a Member or Senator.

The Democrats have no difficulty with the long-established view that members of one house should not be held accountable in another house, as *members*. But as members of the executive, ministers in the Senate should be accountable to the House committees in their executive capacity, and ministers in the House should similarly be accountable to the Senate committees.

Australia must reform the outdated practice, inherited from nineteenth century Britain, whereby ministers from one House of the Parliament cannot be compelled to appear and answer the questions of the other House. The British convention has its origins in the need to protect members of the House of Commons from the once powerful, unelected Lords. It was never meant to have anything to do with the ministry, and it is not appropriate in a country with a democratically elected upper house.

This convention is being used in Australia to protect House of Representatives ministers from the scrutiny of the Senate, and vice versa. It is an avoidance of full accountability, and this must change.

Ministers have two clearly separate roles. They are an elected representative, and they are an instrument of executive government with portfolio responsibilities. The fact that the former should be disciplined only by the chamber to which they are elected must in no way compromise the fact that they must be answerable, as a minister, to both chambers of the Parliament.

An office of an Ethics Commissioner

The Australian Democrats believe Parliament should adopt a code of conduct for all ministers and Members of Parliament. There are five fundamental requirements for any code of conduct for parliamentarians and ministers:

- It should be one they approve, and one they assist in designing;
- A complaints system is essential;
- An investigative process by an independent body is essential;
- That body should be able to make recommendations and findings; and
- The code must be enforceable and penalties must apply.

The Democrats' proposals in this area have been outlined in our Charter of Political Honesty Bill 2000,¹ which was reported on by the Senate Finance and Public Administration Legislation Committee.²

The Report of this References Committee rightly notes that there are issues with having an independent investigator policing breaches of a code of conduct that applies only to ministerial staff. It argues that this:

¹ See Senator Murray, *Senate Hansard*, 10 October 2000, p. 18198.

² Senate Finance and Public Administration Legislation Committee, *Report on the Charter of Political Honesty Bill 2000* [and three related bills], August 2002.

... would mean that ministerial staff are subject to greater scrutiny and discipline than their ministerial masters. Given that the ministers are supposed to be the ones ultimately responsible for staff, this could be perceived as unfair. In other jurisdictions where statutory investigators exist, such as Ireland, Canada, the UK, some Australian States, and the Canadian Provinces, they always have jurisdiction over ministers or members of parliament, not merely their employees.³

For some time now, the Democrats have argued that the solution lies not in protecting ministerial staff from scrutiny, but in ensuring that their ministers are also subject to scrutiny.

Once a code of conduct is in place that every minister and parliamentarian can abide by, there should be no problem in having an independent investigator who will examine alleged breaches of that code.

While the recommendations in this Report are a valuable step forward, the Democrats believe that Parliament must act to set ethical standards for all of its members, including its ministers. Only then, with a transparent code of conduct and an impartial investigator of breaches, can the public have confidence that its elected representatives are maintaining the high ethical standards that are expected of them.

Senator Andrew Murray

3 This report, paragraph 6.50.

Appendix 1

List of Submissions and Additional Information

Submissions

1. Australian National Audit Office
2. National Archives of Australia
3. Mr Harry Evans, Clerk of the Senate
- 3a. Mr Harry Evans, Clerk of the Senate (Supplementary Submission)
- 3b. Mr Harry Evans, Clerk of the Senate (Supplementary Submission)
4. Ms Anne Tiernan, Griffith University and Professor Patrick Weller, Professor of Politics, Griffith University
- 4a. Ms Anne Tiernan, Griffith University (Supplementary Submission)
5. Dr Maria Maley, School of Social Sciences, Australian National University
- 5a. Dr Maria Maley, School of Social Sciences, Australian National University (Supplementary Submission)
6. Dr Robyn Seth-Purdie, National Institute for Governance, University of Canberra
7. Mr Paul Barratt, Principal, CEO Collegiate Pty Ltd
8. Professor Geoffrey Lindell, Adjunct Professor of Law, University of Adelaide and the Australian National University
- 8a. Professor Geoffrey Lindell, Adjunct Professor of Law, University of Adelaide and the Australian National University (Supplementary Submission)
9. Mr Don Russell, Head of Global Operations, WestAm
10. Australian Public Service Commission
11. Department of the Prime Minister and Cabinet
- 11a. Department of the Prime Minister and Cabinet (Supplementary Submission)

12. The Honourable Alan Demack AO, Queensland Integrity Commissioner
13. Ms Susanne Tongue
14. Major-General Alan Stretton AO CBE (ret)
15. Ms Patricia Ivory
16. Confidential
17. Confidential
18. Dr John Uhr
19. Community and Public Sector Union

Additional Information

National Archives of Australia

A list of Ministers who transferred their records after the last election and a list of opposition members who transferred their records after the last election.

The web address for the Archives new recordkeeping publication *Keep the Knowledge – Make a Record*.

A paper version of *Keep the Knowledge – Make a Record*.

A copy of a paper on recordkeeping responsibilities.

A copy of the Archives' *Personal Records Manual* and its companion publication *Your records in the National Archives*.

Public Service Commission

2002-03 State of the Service employee survey questions (SES and non-SES).

2002-03 State of the Service agency survey questions.

Prime Minister's Public Service Directions 1999.

Department of Finance and Administration

Members of Parliament Staff (MOP(S)) Inquiry – response to questions asked of the Department of Finance and Administration dated 1 October 2003.

Appendix 2

Public Hearings

CANBERRA, Tuesday 2 September 2003, Parliament House

Department of Prime Minister and Cabinet

Dr Peter Shergold, Secretary

Ms Barbara Belcher, First Assistant Secretary, Government Division

Department of Finance and Administration

Dr Ian Watt, Secretary

Mr Lembit Suur, General Manager, Corporate Group

Ms Jan Mason, General Manager, Ministerial and Parliamentary Services

Ms Kim Clarke, Branch Manager, Entitlements Policy, Ministerial and Parliamentary Services

Australian Public Service Commission

Mr Andrew Podger, Public Service Commissioner

Major General Alan Stretton, AO, CBE (ret)

Ms Anne-Maree Tiernan, Doctoral Candidate, School of Politics and Public Policy, Griffith University

Professor Patrick Weller, School of Politics and Public Policy, Griffith University

Dr John Uhr

Dr Maria Maley

CANBERRA, Wednesday 3 September 2003, Parliament House

National Archives of Australia

Mr Clement Gibbs, Director-General

Ms Kathryn Dan, Assistant Director-General, Government Recordkeeping

Ms Maggie Shapley, Acting Assistant Director-General, Public and Reader Services

Dr Robyn Seth-Purdie

Dr Donald Russell

CEO Collegiate Propriety Limited
Mr Paul Barratt

Ms Susanne Tongue

The Senate
Mr Harry Evans, Clerk of the Senate

Appendix 3

Tabled Documents and Exhibits

Tuesday 2 September 2003

APS Values and Code of Conduct in Practice – a Guide to Official Conduct for APS Employees and Agency Heads tabled by Mr Andrew Podger

APS Values – Extract from Public Service Commissioner’s Directions 1999 tabled by Mr Andrew Podger

Embedding the APS Values – Framework and Checklist tabled by Mr Andrew Podger

Embedding the APS Values – Case Studies and other supporting material tabled by Mr Andrew Podger

Embedding the APS Values- Executive Summary tabled by Mr Andrew Podger

Embedding the APS Values tabled by Mr Andrew Podger

Griffith Review – Insecurity in the New World Order tabled by Senator Carr

Email dated 15 August 2003 from Tom Karmel tabled by Dr Peter Shergold

Copy of letter to Dr Peter Shergold from Mr Andrew Podger dated 23 July 2002
tabled by Dr Peter Shergold

Copy of letter to Mr Andrew Podger from Dr Peter Shergold dated 20 July 2002
tabled by Dr Peter Shergold

Appendix 4

MOPS employment, 1983–2003

Year	Personal Staff Govt	Personal Staff Non Govt	Electorate Staff
May-03	372	116	686
Apr-02	364	111	686
Apr-01	356	107	680
Apr-00	346	104	680
Apr-99	340	99	680
Apr-98	326	101	680
Apr-97	294	91	680
May-96	294	93	680
Apr-95	356	99	680
Apr-94	341	100	680
Apr-93	349	100	680
Apr-92	354	93	680
May-91	325	86	680
May-90	311	78	680
Apr-89	304	74	678
Apr-88	302	68	678
Apr-87	269	70	678
Apr-86	272	68	678
Apr-85	245	65	678
Apr-84	223	65	414
Apr-83	207	63	414

Source: PM&C, submission 11, Staff numbers table (prepared by Department of Finance and Administration)

Appendix 5

Extract from the *Requirements For Annual Reports For Departments, Executive Agencies And FMA Act Bodies*

Approved by the Joint Committee of Public Accounts and Audit under subsections 63(2) and 70(2) of the *Public Service Act 1999*

12 Management and Accountability

(3) *Management of Human Resources*

- (a) The annual report must include an assessment of the department's effectiveness in managing and developing its staff to achieve its objectives. The focus is on the human resource capability at year end. It is suggested that this may include:
- workforce planning and staff retention and turnover;
 - the main features of certified agreements and Australian Workplace Agreements (AWAs) and developments regarding agreement making and the impact of making agreements;
 - the department's key training and development strategies, the outcomes of training and development, and evaluation of effectiveness;
 - the department's occupational health and safety performance¹; and
 - productivity gains.
- (b) The discussion must be supported by broad categories of statistics, for example, on the number of **APS employees**² (including **ongoing** and **non-ongoing**) as at 30 June for the current and preceding year, by:
- broadbanded classification;
 - full-time/ part-time status;

¹ Specific information is also required pursuant to the *Occupational Health and Safety (Commonwealth Employment) Act 1991*.

² This terminology applies to departments and executive agencies, and to prescribed agencies staffed under the *Public Service Act 1999*.

- gender; and
 - location.
- (a) The annual report must include information on any certified agreement(s) and AWAs including:
- the number of APS employees covered by a certified agreement and AWAs by SES and non-SES;
 - the salary ranges available for APS employees by classification structure (note: the range should reflect the full span of salaries available under a certified agreement and/or AWAs); and
 - a description of the range of non-salary benefits provided by the agency to employees.
- (b) The annual report must include information on **performance pay**³ including:
- the number of APS employees at each classification level who received performance pay;
 - the aggregated amount of such performance payments at each classification level;
 - the average bonus payment and the range of such payments at each classification level; and
 - the aggregate bonus payment for the agency as a whole. (note: in the case of a small agency, or a small number of officers at each classification level, say 5 or less, a lesser disaggregation would be necessary to ensure that payments to individuals cannot be identified.)

³ Performance pay is defined in section 6 of Attachment A [Production and Distribution Guidelines and Requirements]

Appendix 6

Letter from the Prime Minister to the Special Minister of State, regarding the Members of Parliament (Staff) Act, 26 November 2001; and

Letter from the Prime Minister to the Special Minister of State, regarding the Members of Parliament (Staff) Act, 6 December 2001



PRIME MINISTER
CANBERRA

26 NOV 2001

Senator the Hon Eric Abetz
Special Minister of State
Parliament House
CANBERRA ACT 2600

My dear Minister

The *Members of Parliament (Staff) Act 1984* (the MOPS Act) creates a legislative scheme for the employment of staff by office-holders and senators and members and gives the Prime Minister certain powers.

In the past, I have authorised the Special Minister of State to exercise certain of my powers under the Act for and on my behalf. I have also determined that certain senators and members can employ staff under section 12 of the Act.

I hereby revoke, with effect from 28 November 2001, all authorisations and determinations previously issued by me or the Acting Prime Minister under the MOPS Act. However, for the avoidance of doubt, this does not affect any decision or determination previously made by the Special Minister of State acting under those authorisations or determinations.

I have made certain determinations under the MOPS Act as set out in this letter and now, under section 19 of the *Acts Interpretation Act 1901*, I authorise you, the Special Minister of State, and any minister acting as Special Minister of State from time to time, on and from 28 November 2001, to exercise certain of my powers under Parts II, III, IV and VI of the MOPS Act for and on my behalf.

PART II – MINISTERIAL CONSULTANTS
Section 5 – Terms and conditions of engagement

I authorise you to exercise my powers under subsections 5(1) and 5(2) to make determinations relating to the terms and conditions for the engagement of ministerial consultants. In making your determinations, you could seek advice of the Government Staff Committee as you consider appropriate.

My approval will continue to be required under section 4 for any decision to engage a ministerial consultant.

PART III – STAFF OF OFFICE-HOLDERS

Section 12 – Determinations by the Prime Minister

Under section 12 of the MOPS Act, the Prime Minister may determine that a senator or member ought to be empowered to employ members of staff under Part III.

I authorise you to exercise the powers conferred on me under section 12 of the Act in relation to the following senators and members:

- Government Whips;
- the convenor of the Government Members' Secretariat;
- the Presiding Officers in the Senate and House;
- the Deputy President and the Deputy Speaker;
- the Whips of recognised non-government parties in the Senate and House;
- shadow ministers;
- Australian Democrats; and
- independent senators and members not affiliated with a major party.

You will need to consult me before making a determination that any senator or member not included in one of the above classes ought to be empowered to employ staff under the Act.

Section 13 – Office-holders may employ staff

Under subsection 13(2) of the MOPS Act, I determine that the power of officeholders to employ persons as their member of staff shall be subject to the following conditions:

- people shall be employed only in positions allocated by me; and
- salaries and conditions for positions at the level of Special Adviser and above shall be determined by you in accordance with the arrangements and parameters set out in Attachment A.

I authorise you to exercise my powers under subsection 13(2) of the MOPS Act to approve arrangements for the employment of persons by officeholders as members of staff, and to determine any further conditions subject to which office-holders and other members and senators may employ staff.

Section 14 – Terms and conditions of employment

I authorise you to exercise my power under subsection 14(3) of the MOPS Act to determine that the terms and conditions of employment of persons employed under Part III are varied as set out in the determination, including issuing determinations on my behalf to give effect to Australian Workplace Agreements (AWAs) and a certified agreement for staff employed under the Act.

Section 16 – Termination of employment

I hereby direct, under subsection 16(5) of the MOPS Act, that, where a person's employment has been terminated under subsection 16(1) or (2), it shall be deemed not to have been terminated and to continue, or to have continued, for a period of two weeks from the date of termination.

PART IV – STAFF OF SENATORS AND MEMBERS

Section 20 – Senators and members may employ staff

I authorise you to exercise all of my powers under subsection 20(2) of the MOPS Act.

Section 21 – Terms and conditions

I authorise you to exercise my power under subsection 21(3) of the MOPS Act, to determine that the terms and conditions of employment of persons employed under Part IV are varied as set out in the determination, including issuing determinations on my behalf to give effect to AWAs and a certified agreement for staff employed under the Act.

Section 23 – Termination of employment

I hereby direct, under subsection 23(4) of the MOPS Act that, where a person's employment has been terminated under subsection 16(1) or (2), it shall be deemed not to have been terminated and to continue, or to have continued, for a period of two weeks from the date of termination.

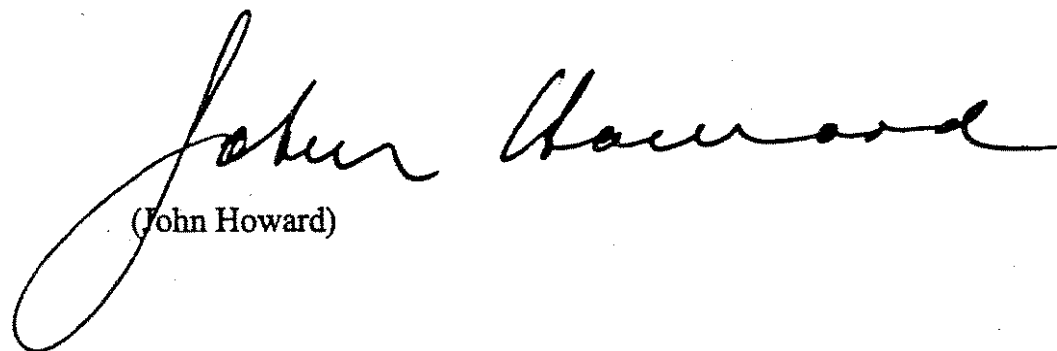
PART VI – MISCELLANEOUS

Section 31 – Annual report

I authorise and request you, acting for and on my behalf under section 31 of the Act, to cause annual reports on the engagement of consultants under section 4 to be prepared and tabled.

In exercising my powers under the above authorisations, you may draw matters to my attention as you consider necessary. I would expect you to consult me on decisions which may represent a significant departure from established policy or practice.

Yours sincerely

A handwritten signature in cursive script that reads "John Howard". The signature is written in black ink and is positioned above the printed name.

(John Howard)



PRIME MINISTER
CANBERRA

- 6 DEC 2001

Senator the Hon Eric Abetz
Special Minister of State
Parliament House
CANBERRA ACT 2600

My dear Minister

I am writing further to my letter to you of 26 November 2001 about the *Members of Parliament (Staff) Act 1984* (the MOPS Act). In that letter, I advised you of directions and determinations I had made and also authorised you to exercise certain of my powers under Parts II, III, IV and VI of the MOPS Act for and on my behalf.

I now advise you of a direction I have made in relation to consultants, and that I have revoked two authorisations and issued two replacement authorisations.

PART II – MINISTERIAL CONSULTANTS
Section 5 – Terms and conditions of engagement

Under section 9(5) of the MOPS Act I direct that the engagements of both Mr Graeme Starr and Mr Geoffrey Cousins are deemed not to have terminated under section 9(1) of the MOPS Act and that both are deemed to continue until 31 December 2001.

PART III – STAFF OF OFFICE-HOLDERS
Section 16 – Termination of employment

With effect from the date of this letter, I revoke the authorisation in relation to subsection 16(5) that I gave you in my letter of 26 November 2001. However, for the avoidance of doubt, this does not affect any decision or determination made by you under that authorisation.

I authorise you to exercise my power under subsection 16(5) of the MOPS Act. This authorisation will enable you to direct that where the employment of a person is terminated under subsection 16(1) or 16(2) of the MOPS Act, the person's employment is deemed not to have been so terminated, and to have continued, or to continue, until a specified date.

When exercising my power under that authorisation, I would expect that in most cases you will deem the employment to continue for a period of two weeks from the date of termination. I ask you to advise me in writing of cases in which you have deemed a period of time greater than two weeks.

PART IV – STAFF OF OFFICE-HOLDERS

Section 23 – Termination of employment

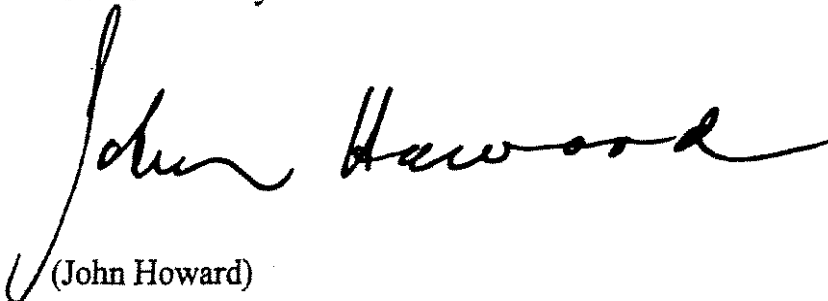
With effect from the date of this letter, I revoke the authorisation in relation to subsection 23(4) that I gave you in my letter of 26 November 2001. However, for the avoidance of doubt, this does not affect any decision or determination made by you under that authorisation.

I authorise you to exercise my power under subsection 23(4) of the MOPS Act. This authorisation will enable you to direct that where the employment of a person is terminated under subsection 23(1) of the MOPS Act, the person's employment is deemed not to have been so terminated, and to have continued, or to continue, until a specified date.

When exercising my power under that authorisation, I would expect that in most cases you will deem the employment to continue for a period of two weeks from the date of termination. I ask you to advise me in writing of cases in which you have deemed a period of time greater than two weeks.

In exercising my powers under the above authorisations, you may draw matters to my attention as you consider necessary. I would expect you to consult me on decisions which may represent a significant departure from established policy or practice.

Yours sincerely



(John Howard)