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SENATE

FINANCE AND PUBLIC ADMINISTRATION REFERENCES
COMMITTEE

Reference: Inquiry into members of parliament staff

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SENATE
FINANCE AND PUBLIC ADMINISTRATION REFERENCES COMMITTEE
Wednesday, 3 September 2003

Members: Senator Forshaw (*Chair*), Senator Watson (*Deputy Chair*), Senators Heffernan, Moore, Ridgeway and Wong

Substitute members: Senator Murray for Senator Ridgeway

Participating members: Senators Abetz, Brandis, Carr, Chapman, Conroy, Coonan, Crossin, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Harris, Knowles, Lees, Lundy, Mason, McGauran, Murphy, Murray, Payne, Sherry, Tchen and Tierney

Senators in attendance: Senators Brandis, Carr, Forshaw, Moore, Murray, Watson and Webber

Terms of reference for the inquiry:

To inquire into and report on:

- (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

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[9.06 a.m.]

DAN, Ms Kathryn, Assistant Director-General, Government Recordkeeping, National Archives of Australia

GIBBS, Mr Clement Ross, Director-General, National Archives of Australia

SHAPLEY, Ms Maggie, Acting Assistant Director-General, Public and Reader Services, National Archives of Australia

CHAIR—Good morning, ladies and gentlemen, and welcome to the second day of hearings of our inquiry into members of parliament staff. I welcome Mr Ross Gibbs, Ms Kathryn Dan and Ms Maggie Shapley. You have been provided with the details of parliamentary privilege and the rights and responsibilities of witnesses appearing before our committee. The committee prefers evidence to be given in public but if there is anything that arises that you would rather have dealt with in camera, you can make that request and the committee would consider it. Thank you for the written submission you have provided. If you wish, you may make some brief opening comments, and then we will proceed to questions.

Mr Gibbs—I think the statement we have provided outlines our position reasonably well. If you would prefer, I can make a statement—I have one prepared—but otherwise we could move to questions.

CHAIR—Is it a long statement?

Mr Gibbs—It just reiterates what is in our submission. It does not add anything to it.

CHAIR—I am sure all members of the committee have read the submission, so we can go straight to questions and I will lead off. You indicated in your submission that your office is involved in training and seminars for MPs and staff. A large part of our focus is on the role of ministerial advisers, and the issue of the importance of record keeping has already been raised. Indeed, Dr Shergold raised it specifically in a speech he made some time ago following the children overboard inquiry.

Senator CARR—They did not keep records.

CHAIR—Yes. Could you tell us just what relationship involvement you have with ministerial officers regarding the importance of record keeping? In your submission you go to the fact that those records would be, in the most part, regarded as Commonwealth property.

Mr Gibbs—Our advice is that those parts of the records of advisers that relate their official capacity working with a minister are Commonwealth property and, hence, are Commonwealth records. What do we do? You have outlined some things and they are in our submission. We provide training sessions for new parliamentarians and their staffs. We provide specific advice in the handbook that the Department of Finance and Administration puts out for senators and members, including the web site for them. We visit parliamentarians and their ministerial office staff and general office staff to brief them on their responsibilities.

We provide written advice, we participate in other seminars and we have a handbook called the *Personal Records Manual* which quite specifically says what is part of the archival resources of the nation and what is not, and which assists in making decisions about what they should retain. At election time, we have a staff member seconded up here full time to work with members and their staff.

CHAIR—Particularly with the ministerial offices and officers, do you find that there is a high attendance rate or a high involvement rate in your programs? I am interested in what you know about the standard of record keeping and what your experience is of them availing themselves of your services.

Mr Gibbs—We have not done a survey—and nor has anyone else—of the attendance rate or the compliance rate in the same way we have through the Public Service. In the Public Service, we have done one, the Auditor-General has done one and the Public Service Commissioner has done one. We have not done one; therefore, I cannot comment formally on the level of compliance. Hence, at election time we are very busy and we seem to have lots of people who want to listen to us. Some of our busiest transactions are with the staff of members of parliament. I will ask one of my colleagues to comment on whether we have any anecdotal evidence of that.

Ms Shapley—Yes. For instance, most ministers transferred after the last election, particularly retiring ministers. We have an office up here for the time following the election for about a month when we are busy transferring records back to the archives. There is a high level of compliance. We could provide you with a list of those ministers who transferred after the election, if that is of use.

Senator CARR—What about the ministers who didn't?

Ms Shapley—There are a number of outstanding cases of ministers who have not transferred. We followed those up—in some cases they had transferred their records back to the department or had transferred their records to the succeeding minister—but there are a couple of outstanding cases from the last election.

CHAIR—It would be useful if you could provide us with the details.

Mr Gibbs—When we talk about outstanding cases, the Public Service itself is not fully compliant either. In fact, anecdotally we would suspect that the level of compliance amongst members and their staff is equal to the level of compliance we get from the general Public Service. We would not expect 100 per cent.

Senator CARR—Why not?

Mr Gibbs—Because right throughout the world it is a grey area of what is personal, what is electorate and what is party political, and what are government records and what are Commonwealth records. Queensland has come closest in the world in trying to define that, but in Britain, Canada and the other states of Australia there is this distinction between what is personal and party political and what are Commonwealth or government records. It is not an easy area.

Therefore, it is always going to be a bit grey. People—they are busy people—are not going to fully understand and, in some cases, will not be fully compliant. It may not be intentional.

Senator WATSON—Is there any penalty if they do not comply?

Mr Gibbs—There are penalties in our legislation for destruction of or amendment to records without our approval. I think it is 20 penalty units, which is \$20,000. But our regime has always been to get compliance by education and training. We find very few people either amongst parliamentary staff or in the Public Service who do not want to comply when they know what their responsibilities are. It is almost always lack of awareness; hence our focus on training, being here and being available to advise people.

CHAIR—Has anyone ever been prosecuted, convicted or penalised?

Mr Gibbs—No, they have not, but that is not unusual either. In my previous jurisdiction in Victoria, we had much stronger legislation but we did not ever prosecute anyone for the reasons I outlined before. If you prosecute, you get in an adversarial relationship with the members. It is not going to help in the future. It is obviously better to educate and train because most people want to comply when they are aware of their responsibilities.

Senator MOORE—In terms of the process with the officers and the Public Service, is there a protocol as to a particular person that is the liaison person for the National Archives? In terms of the size of the organisation it might be a useful technique that there be at least one staff member that would have that as part of their job.

Mr Gibbs—There is one specific staff member, and she is the person who spends the month here at election time. She is the person who members would contact first. We have one person for whom that is their sole responsibility.

Senator MOORE—But I mean someone in the ministers' offices.

Mr Gibbs—No, this is in the National Archives.

Senator MOORE—Yes, it seems to be a very common technique when it comes to this expectation of liaison that, linked to someone's position, is the expectation that they will be the person who does that liaison and a list of things as part of the job. There is no expectation by the National Archives that there is a person with that responsibility in each minister's office?

Mr Gibbs—In the guidelines we have, which you are considering might form part of a code of conduct, we spell that out quite specifically. There is a list of responsibilities. It is always the same in the Public Service: there are three levels of responsibility and who they should be. It is the difficulty between getting compliance and not making it so burdensome for a busy office that they do not want to comply. So we have that sort of flexible advice. I can outline for you or provide afterwards to the committee, if you would like, the specific responsibilities and who should have them in a minister's office.

Senator MOORE—That would be very useful, thank you.

Senator MURRAY—Mr Gibbs, have you ever heard of something called the Harradine motion?

Mr Gibbs—Yes, I have heard of it but I could not say I was aware enough to comment on it directly without you telling me about it.

Senator MURRAY—The Harradine motion is a famous Senate standing order motion which dates from I think—officers could tell me the exact date—the late eighties or early nineties. It was designed to impose accountability on the entire public sector because there was not a standard filing system throughout the Commonwealth and files were not annotated or known. Now, as a result of that Senate standing order, you can get a list of indexed files for any agency or department, identify the name and the number and get access to the file. For freedom of information purposes that is very helpful. Frankly, that indicates to me how slack so much record keeping was. Are you aware that no advice whatsoever is provided to new parliamentarians on standard filing systems for their own offices, be they members of the government or not?

Mr Gibbs—No, I was not.

Senator MURRAY—And no training either. Once again, people come from different backgrounds—some would have a business or administrative background and some would not—and, as a result, can struggle to set up systems. My third question relates to the issue of Senate, parliamentary and legislative history. There is no requirement or desire, as I see it, to preserve the archival records of those who participate in negotiation and compromise which results in legislation which shapes this country. I will give you four examples from my time here: the industrial relations legislation in 1996 negotiated by the Democrats, the native title legislation negotiated with the opposition, the new tax system negotiated with the Democrats, and the recent ASIO bill negotiated with the opposition. Those are four good examples of groundbreaking law change where the records and papers of the senators and members concerned are not covered under the act—and yet I think those would be attractive items for people with your perspective. Can you tell us what efforts are made—and I understand that this is not necessarily your responsibility—to ensure that meaningful and interesting records, perhaps of those kinds, are preserved?

Mr Gibbs—I will start with your first question. We participate in induction seminars for new members and their staff and try to put forward the message about record keeping responsibilities through that. As I said, there has been no survey, but we think we are reasonably successful at that—but that is for others to judge.

Senator MURRAY—Let us stay with that for a moment. I know you do that, but my point was that there is no standard format. There is nothing provided to parliamentarians or their staff which says, ‘These are the main categories of records that you would need to keep. These are the kinds of filing systems which would make that easiest et cetera.’ So it tends to be ad hoc and laissez-faire.

Mr Gibbs—We do not provide advice on specific filing systems. As I said before, we have a personal records manual which is quite specific: it tells you what you should keep, what is personal and not archival and what we require as archival resources for the nation. It is quite specific. It is a list down to the level of different types of members and different types of records

they keep. Again, we could make that available to the committee and to you personally if you would like.

Senator MURRAY—No, for the committee would be fine, if you would.

Mr Gibbs—On your other question, the Senate and the House of Representatives both come under the archival legislation. In our view, the issues you are discussing would very much form part of the archival resources of the Commonwealth and should be preserved. In addition, we seek out the personal political papers of members of parliament and we have the papers of the leaders of the Democrats. We would imagine and hope that in those records that we have taken in from the Leader of the Democrats these issues and the Democrats' role in them would be well addressed. They will be accessible later on when they come into the open access period. Again, I can check on that for you to see whether they are there.

Senator MURRAY—But the leader does not keep the records, the portfolio holder does. When I read your submission—and I am not familiar with your act so please understand my limitations—I looked at your legal advice obtained by the National Archives which outlined those records which must be kept by law. I do not easily see that a shadow portfolio holder in the Labor Party or in the Democrats who does the negotiations, develops the amendments and clears them through their caucus or their party room would be caught by this. These things might be of interest although often they would not be because they are rather mundane and technical, but, in terms of the big issues, I do not see that they are caught by this. It would be useful for the committee to know whether that is the case because I think that would be part of the historical record of this place.

Mr Gibbs—I think you are probably right and that would be advice that we would take on board if you recommend it.

Senator MURRAY—I will ask through the chair whether you can come back to us with a comment.

Mr Gibbs—What I was suggesting is that I am almost certain that you are right: that is not retained. It might be a recommendation we could consider if it came as a recommendation.

Senator WATSON—You have another possible category called ministerial consultants who are perhaps experts in particular areas. If we are looking at codes of conduct, standards of best practice and ministerial advisers, do you think they should be set somewhat differently in terms of what is available?

Mr Gibbs—Is this a distinction between advisers and specific consultants or are you treating them as the same category?

Senator WATSON—I think they are in a slightly different category. First, do you agree with that?

Mr Gibbs—Yes, they would be.

Senator WATSON—So to what extent should codes of conduct, other standards et cetera be applicable to consultants?

Mr Gibbs—To the extent that they are involved in the official decision making of a minister or a parliamentary committee we would consider them as part of the archival resources of the nation and as such they should be part of the code of conduct.

Senator WATSON—But you can appreciate that there would be no uniform set of practices that applies to a consultant because some would be very independent and some would provide one-off advice, while others would have more of a continuing role. That is the difficulty I see with consultants. However, I could not see a consultant liaising directly with a department unless it was in a technical area such as shipbuilding or design.

Mr Gibbs—Are you suggesting the consultants engaged by the minister's office?

Senator WATSON—Pardon?

Mr Gibbs—Do you mean if the consultant was engaged by the minister's office or by the department?

Senator WATSON—By the minister's office.

CHAIR—If I may interrupt, I think the evidence from one of the submissions from one of the departments is that they now tend to be engaged only out of the Prime Minister's office or under authority whereas previously they were engaged under ministerial offices. The same point is still valid.

Senator WATSON—Just because it is not a current practice does not mean to say it will not happen in the future.

CHAIR—I am not suggesting it was. I think the witness was trying to ascertain whether they were engaged by ministers' offices. They can be, and they have been in the past. As I understand it, they are now primarily engaged from the Prime Minister's authority.

Mr Gibbs—It is a category we do not specifically refer to, but I will ask Ms Dan to comment on it.

Ms Dan—I will make a point of comparison with the advice that we provide to the Public Service, who of course outsource functions and also engage contractors to perform particular tasks for them at different times. Our general advice in that kind of situation is that, where someone is contracted or where there is a consultant who is undertaking work on behalf of that department that relates specifically to the function of the department, the department then needs to make it very clear in their contractual arrangements and so on that the records that relate to the performance of that function are Commonwealth material and stay within the purview of the government. It is a slightly different situation but, using that as a point of comparison, where a minister has engaged a consultant and it relates to part of that official duty then the information that relates to that is obviously an important part of the decision making process and so on, so we would want to see those records maintained as part of the records of the office.

CHAIR—In regard to the issue of the engagement of ministerial consultants, on pages 2 and 3 of the submission by the Department of the Prime Minister and Cabinet—and we can make this available—there is some history about what has happened and what is currently happening, and it certainly appears that they may be engaged in a number of ways, such as through a minister's office. It says:

Since 1996, only the Prime Minister has engaged consultants; under previous governments, a more extensive use of the consultants' provisions were used ...

But it also says that previously there were arrangements where they worked under the supervision of departmental secretaries, even though they were engaged by ministers. If you have a look at that, you might wish to add some further comments.

Senator MURRAY—One other thing occurred to me, Mr Gibbs. Party rooms and caucus loom very large in the business of parliament. I would assume most are like ours—there are briefing papers, minutes and documentation which attach to the considerations. Do such documents fall under the Archives Act? Are they papers that the parties are aware they must keep for you?

Mr Gibbs—No. We specifically would not bring them under our act. We would not collect them.

Senator MURRAY—Why not?

Mr Gibbs—Because as I said before, this is a very grey area. Interestingly, in Britain they have elaborate codes of conduct for ministerial advisors—or special advisors as they call them. They shy away from the record keeping area because of the reasons I described earlier. Why wouldn't we? Because it very much gets into the category of party political. We try and maintain a distinction between Commonwealth records, records of government and records of members in their capacity as members of a political party, and when it gets to a caucus or party room it would blur over into that final category very clearly. Everything you say is correct, but it is not an area we have attempted to collect in.

Senator MURRAY—But if you were offered them you would want them, wouldn't you?

Mr Gibbs—We would consider it.

Senator MURRAY—I am an historian. I am interested in this.

Mr Gibbs—Our legislation is very broad and it allows me to define the archival resources of the nation as broadly as I want, so we could do it. Again, it gets into one of those categories. Getting compliance with the rules we have already is difficult enough, though we are managing. I think people would be very suspicious about what the distinctions were if we blurred the lines that much by taking material like that. We could, and may if we are asked, but we have not been asked as far as I am aware.

Senator MURRAY—I was thinking that we could perhaps strike a public deal here.

Mr Gibbs—We do have personal papers. We have transfers from ministers. A senior minister transferred papers as recently as yesterday. Under the best regime, we would get an annual transfer. There is no question that there are personal papers in there and there may be papers relating to the party room but we do not seek them out.

CHAIR—You are not looking for a 30-year rule on the Democrats' records are you Senator Murray?

Senator MURRAY—We are getting there. My interest is this: in our party room I can see a clear distinction between what is genuinely party political and personal, and what I would regard as more parliamentary; for instance, a brief to the party room on a bill and how that bill is to be judged, what amendments are to be suggested or which amendments put up by other parties should be supported. I think that is straightforward business as opposed to party politics. It is a decision made on policy grounds. Parties make those decisions on legislation on policy grounds not on political grounds. They come to a view as to what their policy is. Within the range of documents there is a distinction to be made and I wonder whether it would be a great shame for the nation if the archival records of the major parties over the last 100 years were not accessible in some form.

Mr Gibbs—In my previous capacity under the Victorian jurisdiction—I worked for the state library there a long time ago—the records of the Liberal Party and the Labor Party in Victoria were collected by the library as private records. I cannot recall or perhaps was never aware whether that got down to the level of detail you are discussing, but that is where we would expect that sort of material to be collected. If this committee could come up with some basis for a distinction to enable the archives to do that, we would be interested in that. However, you would understand for us that it would be very difficult to determine in the party room, whichever party it was, what blurred into the category of Commonwealth records and what was in the category of party or personal records. If we got advice from the party or from this committee, we would be very interested in receiving it.

Senator MURRAY—A third of all legislation is amended. That is pretty much the process we are discussing here. I am not interested in who gets appointments to where and what; I am talking about bills and legislation. I think in some areas that would be interesting. Anyway, I will leave it there. If you have any more thoughts, let us know.

Mr Gibbs—Thank you.

Senator WEBBER—In the Labor Party Senator Faulkner takes care of all those issues for us anyway—he is our own party political archivist of sorts.

CHAIR—He even finds the ones that have been lost for many years.

Senator WEBBER—I think Senator Murray has made a very interesting point. Mr Gibbs, I want to return to what you were saying about the training that your agency provides to ministerial staff. Obviously the report of the inquiry into a certain maritime incident together with other submissions we have had from the Department of the Prime Minister and Cabinet and the Public Service Commissioner have expressed concerns about record keeping. That was

highlighted in that report. Have you reviewed the training and your relationship with ministerial officers after the tabling of that report?

Mr Gibbs—We review it on an ongoing basis. I could not comment on whether we reviewed it specifically in relation to those two events as it was before my time. Clearly that coloured what happened but I cannot imagine that it would not form part of our thinking about the training we were offering and the level at which it was being offered. Again, I can ask one of my colleagues to comment specifically.

Senator WEBBER—That would be good if they have any comments to make because it may make some of my other questions redundant.

Ms Dan—I can talk about what we have looked at in relation to those incidents in terms of our advice to the Public Service. That inquiry highlighted some difficulties throughout the whole relationship. We have not specifically had a review as a result of the children overboard inquiry but we have been aware of people for a long time not really fulfilling all of their record keeping obligations or not understanding their record keeping obligations as well as they could have. More fortuitously than as result of the inquiry we have recently issued a package of material called *Keep the knowledge—make a record!* which is aimed at the public sector. The material includes a brochure and a ready reckoner reference sheet. It also has basic training materials that can be used by any government agency in its training programs as part of induction or in specific training about record keeping. We have designed it to be fairly basic so that it can be customised because, of course, every agency of government has slightly different needs. The level of risk in record keeping in particular areas will differ and they can then tailor it to say, ‘This is very important’. I have a copy of the brochure with me and we can provide a Web reference to the material as well.

Senator WEBBER—That would be excellent.

Ms Dan—The information contained in here about why you should keep records and what sorts of records you should keep is quite generic, but we can provide information on that.

Senator WEBBER—Thank you. Yesterday Mr Podger told us that his department has done an extensive review, obviously, on the training that should take place on record keeping and what have you. Did he consult with your agency in developing that?

Ms Dan—Yes, we liaised with the Public Service Commission over the last couple of years while they prepared their *State of the service report*. We worked with them on the survey questions that they developed in relation to record keeping and they used these in the survey on which they based the *State of the service report*. We have also done our own survey work. This is of the Public Service rather than the ministerial connection. We have done general surveys of the public sector just to determine what is actually happening with record keeping at the moment. To reflect on what I said earlier, there is a willingness to do the right thing but sometimes the understanding is a bit more limited. We try to address that.

Senator WEBBER—I want to pick up on that as well as a discussion Senator Watson was having about penalties for people who do not comply. I accept what you say about not wanting to have an adversarial relationship but given the fact that it is very difficult to clarify what

category different records fall into—whether they be personal, or party political or what have you—it would be very difficult to prosecute someone for destroying records if you did not know they existed in the first place, wouldn't it?

Mr Gibbs—That is right.

Senator WEBBER—Because they have not fallen into the gamut of records that your agency would be interested in; they would perhaps have wrongly been classified as being personal or party political instead.

Mr Gibbs—It is a distinction that each jurisdiction in Australia and overseas tends to make, except in Victoria, but it is a very grey area and nowhere is it really clearly spelt out. What we do have is an evolving definition which we provide to officers in, as I said, what is called the personal records manual, which tries to be quite specific about what falls into each category to assist officers to make those decisions.

I also want to comment further on what Kathryn was saying about the relationship with the Public Service Commissioner: it is a close relationship—very close in fact. The code of conduct that the Public Service Commissioner launched last week and which he referred to yesterday has pages referring to our advice on electronic records and on email. In the same way, when we publish things we quote him. It is a very close relationship. When we launched *Keep the knowledge—make a record!* Dr Shergold wrote a very enthusiastic letter of endorsement to every agency head around the Commonwealth. We have a very close relationship with the Auditor-General, the head of the Public Service in Dr Shergold and the Public Service Commissioner. We rarely would have offered advice when we did not have support from those three lead agencies.

Senator MURRAY—It exemplifies the difficulties. In the last estimates process, because of the controversy surrounding the departure of the Governor-General, I asked the question: what papers would be retained that were Commonwealth as opposed to personal, which would be carted off? There is immense interest in the area obviously because of that controversy. The answer came back on notice that the judgment basically was for him to make. I had assumed that anything written on Governor-General letterhead was Commonwealth.

Mr Gibbs—The distinction in the Governor-General's office is quite clear: if the Official Secretary's office at Government House deals with it, it is a Commonwealth record; if only the Governor-General deals with it, it is regarded as personal and treated as such. That is not to say that we do not receive those records.

Senator MURRAY—That was not the answer I got, by the way.

Senator WATSON—Aren't there incoming ministers who receive absolutely nothing from the outgoing minister while other ministers just throw open their files? How do you stand in that situation where you get nothing or the lot?

Mr Gibbs—We do not want either outcome really. We would be overwhelmed if we got the lot, and that is why we provide advice. When we get nothing we get very disappointed and make continuing representations to try to secure them. Maggie was outlining before some of the lengths we go to try to secure them in those cases. Sometimes it turns out that they have been

handed on and gone to other places. But it is very much a training and advice situation particularly if a member, as you might imagine, were to lose their seat in an election and there is obviously a great temptation just to clean the office out and leave and move on. That is why we have someone here at the house, after elections have been completed, to try to encourage and induce—but not up till now to penalise.

Senator MURRAY—So your best records are of winning governments, not losing governments?

Mr Gibbs—It depends on the level of awareness. If the member is a historian, such as yourself, clearly we get a high level of compliance. For others it is a matter of educating and inducing.

Senator WEBBER—As an aside, I want to pick up one of the comments that Senator Murray made as to whether we should explore the need for training for new senators and members. Being someone who is fairly new, it seems to me that perhaps that is an issue that is worth exploring, given the fact that new senators or members have the capacity to develop into ministers and what have you. If you get in early and train them as to your requirements, perhaps that will overcome some of the obstacles that are created a bit further down the track.

Mr Gibbs—It is not just when they become ministers; it is when they become members of parliamentary committees and things like that. That is when the papers become Commonwealth records.

Senator WEBBER—Exactly, as their involvement—and career—evolves.

Mr Gibbs—If that were recommended, obviously we would favour it very strongly.

CHAIR—Thank you, Mr Gibbs, Ms Dan and Ms Shapley, for your appearance this morning and for your submission. It would be appreciated if you could provide the further information that was raised in the questions from Senator Carr and others.

Mr Gibbs—Certainly, thank you very much.

[9.42 a.m.]

SETH-PURDIE, Dr Robyn Sheryl (Private capacity)

CHAIR—I welcome Dr Seth-Purdie to this morning's hearing. You have been provided with the details regarding the rights and responsibilities of witnesses appearing before committees and the rules regarding parliamentary privilege. I am sure you would be aware of this but I need to point out to you that we appreciate evidence being heard in public. However, if there is anything of a confidential nature that you wish to raise, you can make that request and the committee will consider it. We have received your submission, which we appreciate. I invite you to make some opening comments and then we will proceed to questions.

Dr SETH-PURDIE—The background to my submission is this: since May of last year I have been working in the National Institute for Governance at the University of Canberra; before that, I spent 20-odd years working in the Public Service where, amongst other things, I spent a period of seven-odd years as a director of investigations with the Office of the Commonwealth Ombudsman; I was secretary to the parliamentary inquiry into the ACT electoral system and I took part in policy making of all varieties—ministerial briefing reviews and so forth.

In the time that I have spent with the National Institute for Governance, we have been engaged in a number of issues related to public administration. That is the bulk of our work. The major part of that for me was involvement in the redesign and updating of the *ANAO Better Practice Guide*. We also advise Public Service agencies on governance issues.

The essence of the submission was to try to bring to bear what I see in my work on public sector governance and private sector governance as the essential features of accountability frameworks—or good governance frameworks. That will lead to good performance and give the stakeholders—those with an interest in the performance of the organisation concerned—the equipment to ascertain at any time how well that organisation is functioning. Accountability mechanisms form an important part of that diagnostic equipment. Hence, in relation to the suggestion that there be a code of conduct and that it have an enforceability mechanism associated with it, this would further the aim of providing to those with a legitimate interest in ascertaining whether the standards that the Australian public would have a right to expect occur are actually being upheld behind the scenes and would ensure that there are safeguards against what you might call governance traps—disjunctions between power and accountability and incentives to act in ways that are at variance with the interests of the public institution concerned.

Senator MURRAY—I think the concept of codes of conduct is now so well established that in your statement you put your finger on the real problem—that is, the objective assessment of breaches and the enforceability of penalties for breach. I suppose the third area which we have been exploring as a committee is that area which has so far been left out of the loop. For a long time, public servants have had codes of conduct to react to, as have ministers, but the area we are concerned with has been left in powerful limbo, as it were. Could you expand a little more on what you rather novelly—for me, anyway—described as 'governance traps' and the sorts of areas that we should pay attention to?

Dr Seth-Purdie—One such trap within the system that we are talking about—the operating environment for ministerial staff—is the opportunity to act contrary to what you might consider to be basic principles that any code of conduct would defend by offering a minister plausible deniability in relation to knowledge of particular events. Given that the action in the ministerial office is taking place behind a screen and only certain parts of that can ever emerge, it is possible for advice to be given to a minister which is never made public.

Senator MURRAY—How do you embed codes of conduct and behaviour? I do not know if it applies like this, but I assume a recruit into the Public Service goes through entrance exams or tests of some sort and training through seminars on codes of conduct and all that sort of thing. I very much doubt that anything like that would happen to a minister, for instance. They would be given this document, they would read it once—and that is it, I would expect. So somewhere in the small institutional set-up of their office, the code of conduct needs to be embedded in somebody in some system so that it is there as a failsafe device. How do you address that side of it?

Dr Seth-Purdie—You have to have common incentives working throughout the whole system. If you do not have those applying at the very top then your code of conduct is doomed. The behaviour that you want to occur will not be modelled at the top unless there are outside forces encouraging that—and if it not modelled at the top then it will not be modelled further down in an organisation. One of my favourite texts on governance is Garratt's book, *The Fish Rots from the Head*, where he points out the importance of integrity, ethical standards and sound decision making at the very top of any organisation. In the organisations we are talking about, the minister is at the top. My favourite scenario would be an enforceable code of conduct for ministers which cascaded down to ministerial staff and the Public Service so that all elements were being urged in the same direction.

Senator MURRAY—As you know, codes of conduct are by their nature not short, sweet documents like the Ten Commandments. They are lengthy, and to understand their applicability you almost need role play: 'Here is this moral scenario; how would you react to this? And here is the consequence.' In academic or business training, that sort of thing goes on all the time. I very much doubt that, when ministers are inducted as a group and go to the Governor-General to sign up, they go through any such process.

Dr Seth-Purdie—I do not think that the problem is so much one of failure to understand the intricacies of the standards required but rather a failure to understand the gap between the formal standards and the actuality—the informal rules by which the whole system is moved.

Senator MURRAY—I have deliberately used ministers as an example because we know what the problems are with that code of conduct: it has not been objectively assessed against a complaints procedure and the appropriate penalty system does not apply. It is very arbitrary, erratic and subjective, which is a good description of politics, I guess! If we go then to the staff of members of parliament, do the same problems arise? Do you think they need detailed training programs or is it easily embedded through a natural system approach?

Dr Seth-Purdie—Sorry, could I have the last part again?

Senator MURRAY—What I call a natural system approach is one where there is a behavioural norm established in writing which, it is accepted, people will understand and react to because it conforms to standard values which are embedded in the institutional history and in our own mores. I would like your input on the applicability to MOP staff, who are dispersed. If you construct a code of conduct, how do you ensure it is embedded, it operates effectively and it does not have the same weaknesses that we have seen in the ministerial code of conduct?

Dr Seth-Purdie—You would have to cut the current connection between behaviour contrary to the current standards and have rewards for performance that would carry people in a different direction. I would suggest that under the current system people are not rewarded for behaving in accordance with what most people would recognise as a strong ethical code: integrity, honesty and transparency. The incentives are in quite a different direction—and this is part of the political system; it should not surprise us.

Senator MURRAY—The political and media environment is an extremely negative one, I might say: it does not reinforce good behaviour. Good behaviour kind of passes by; bad behaviour is the focus.

Dr Seth-Purdie—When you examine the adequacy of the system—a code and an enforcement mechanism—you would have to ask yourself: is there the opportunity for people to act contrary to this code and not be detected? Or, if they are detected, will there be any sanction? Under the current system you would have to say it is exceedingly unlikely that operating contrary to an ethical code would be detected. The information would simply not get out. And when it has got out, there are plenty of instances where there has been no sanction. The end result of all of that is that there is no code. It is a question of moving with the flow of the overriding motivation of the political system.

Senator WATSON—Codes of conduct and ethics are obviously very related. It has been said that in Australia we have no such institution. We have the St James Ethics Centre in Sydney, don't we?

Dr Seth-Purdie—If I suggested that in my submission, I was clearly wrong. There are institutions that specialise—like the one you mentioned—in analysing ethical dilemmas. I understand that very organisation is frequently patronised by public servants who are faced with difficulties in telling truth to authority.

Senator WATSON—So do you think it would be useful for us to meet with them in terms of delineating what are the special responsibilities, practices, and the degree of transparency over their actions?

Dr Seth-Purdie—Yes, I think that would be very useful in assisting people to analyse ethical dilemmas. What they cannot do is fill the gaps in the current system of incentives—the influences on behaviour that are not necessarily formally set out: what is rewarded, what is punished. That is the most potent system of behavioural code that operates in any organisation.

Senator WATSON—Do you think the punishment should be via the parliament or some other independent body?

Dr Seth-Purdie—I am strongly in favour of an independent body as I think that any group of parliamentarians that you could put together would not be able to resolve the conflicts of interest they would experience in investigating the behaviour of individuals connected with their own parties.

Senator WATSON—What about an individual or a commissioner for integrity or standards?

Dr Seth-Purdie—I like that idea and I would like it to extend to ministers as well; not only to their staff. This person would need to be appointed in such a way that he or she were considered above politics, of absolute integrity, and would have royal commission capabilities to demand answers, take evidence and make determinations.

Senator WATSON—Does that mean imposing sanctions?

Dr Seth-Purdie—I believe so, and I think it would be then appropriate to align such a system with a court mechanism, so that anybody who felt aggrieved by a penalty could appeal it perhaps through the AAT and, ultimately, other court processes could follow on from that.

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.

Senator WATSON—Sometimes they might have fairly specific duties. One of the problems is that they may not necessarily know the whole picture.

Dr Seth-Purdie—I would not see that as an insuperable objection to their appearing. They certainly are able to fill in some very important gaps in providing a record of a deliberative process.

Senator WATSON—But if they did appear you would need some very strict rules about what could be divulged and what could not be divulged, in the same way as public servants have rules about not answering questions on the development of policy.

Dr Seth-Purdie—Yes.

Senator WATSON—What are the rules that you would envisage to protect them from possible parliamentary exploitation?

Dr Seth-Purdie—Your question is premised on the notion that there are some parts of the advice given to ministers by their staff that need to be subject to something like executive privilege. I do not share that view. I do not believe that any government deliberations, except for

those that are merely concerned with national security or some important financial consideration related to government organisations, should be carried out in secret. I am all for transparency at every opportunity.

Senator WATSON—So you are a bit more avant-garde than most people on that issue.

Dr Seth-Purdie—I would say so.

Senator WEBBER—So you would extend that transparency to party political advice that a ministerial adviser would give a minister.

Dr Seth-Purdie—If it is party political advice that is taking place within the minister's office involving staff on the public payroll, yes. But I think a better model would be that these staff are always considered to be public servants; they are there to assist the minister to do the job. I would like to see the party political advice relegated to the interaction between the minister and the party.

Senator WEBBER—Gee, you just did me out of one of my former jobs, but there you go!

Dr Seth-Purdie—Ministers will still require staff to advise them; it is just that the role would be nearly like a traditional public service role. I understand that in Queensland the MOPS equivalent staff are under the Public Service Act.

CHAIR—Is that all staff that would be engaged under the equivalent act? One of the issues that keep recurring in the discussions we have been having and in the submissions is that people see a pretty clear distinction between electorate staff and ministerial staff—

Dr Seth-Purdie—Yes.

CHAIR—even though electorate staff do a lot of political work, we know, but the difference is that if you are a staffer in a ministerial office you have direct and ongoing contact and interaction with the Public Service in a decision making and policy development way.

Dr Seth-Purdie—Yes.

CHAIR—which is probably unlikely to occur with electorate staff or even with shadow ministry staff. I suppose that leads to whether there should be some overhaul of the MOP(S) Act to make those distinctions clear and to identify the differences in a more legislative way.

Dr Seth-Purdie—Yes, the UK code, which was referred to earlier today, does set out some of the issues on which the special staff, the ministerial advisers, would be entitled to comment. But it does try to make a distinction between purely party political matters and other matters. I am not sure that those distinctions are adhered to in practice.

Senator WEBBER—Perhaps I should declare my hand: immediately prior to coming here I was a party official and then a ministerial adviser for the Gallop Labor government in Western Australia. It is interesting to hear your view; your view of the role of ministerial staff differs from mine.

CHAIR—You also worked in a whip's office, which is where the real power is!

Senator WEBBER—Absolutely, especially over you, Senator Forshaw. We had a discussion about the need for an enforcement mechanism—and I guess my comments on this are coloured by my political experience in the West—but surely one of the ultimate enforcement mechanisms in terms of the political context is through your political party, the political exposure of any breach of a code of conduct and the effect of that on your political career, be it as a ministerial adviser or indeed as a minister, rather than a traditional public sector sanction.

Dr Seth-Purdie—I am thinking of an analogy with trying to reduce drink driving on the roads. If the detection of drink drivers was as reliable as political exposure, I think we would not be doing nearly as well in reducing the incidence of drink driving as we have with random breath tests.

Senator WEBBER—I am in favour of having some form of code of conduct or what have you. In the West we have one for ministerial staff. I must say that it is not quite as long or as anecdotal as the Queensland one, but it is very clear. There are other guidelines as well—these are the joys that are the outcome of the Commission on Government report and a royal commission. It seems to me that it is not necessarily as cut and dried. To make sure the system robust I do not think you can simply add a public sector form of sanctions because there is a role for political advice within a minister's office and because ministers are there to make political decisions rather than, necessarily, administrative decisions. Therefore there is that impact of political exposure as well. Surely the two have to go hand in hand and the system does not exclusively need a public sector enforcement mechanism.

Dr Seth-Purdie—No, my view is that political exposure is not enough—that is a very uncertain mechanism. To draw on corporate governance trends in the private sector now, companies are now routinely introducing codes of ethical behaviour and the stakeholders, the institutional investors, are interested in how these codes are being enforced. To have a code says nothing; it is how you enforce it, and what your organisation looks like after you have enforced it in terms of the reliability of the information coming out and the transparency of the processes.

Senator WEBBER—To take that analogy further, surely having all the shareholders turn up at the meeting, carry on and demand some kind of reform is the private sector's version of political enforcement as well as internal enforcement.

Dr Seth-Purdie—Indeed, but the limits to the power of the stakeholders have been well recognised. Stakeholders suffer from a tremendous asymmetry in access to information and this is a classic governance problem. You need to have a way in to the inner workings of an organisation to be able to get that assurance that things are going as they should be.

Senator BRANDIS—Why?

Dr Seth-Purdie—To ascertain whether the principles and standards of behaviour that are appropriate to that organisation are occurring as opposed to seeming to occur in the public presentation of a public face.

CHAIR—Senator Webber had one more question. Perhaps Senator Webber can ask that and then Senator Brandis can raise his issues.

Senator WEBBER—You were having a discussion with Senator Murray earlier when he was talking about the induction process for ministers and ministerial staff. I accept some of his concerns that there may be gaps there, particularly if you are looking at more one-off appointments. Having been part of a new government that was sworn in, I think there is a very strong induction process whereby basically the entire ministry is herded together and taken through the processes and its responsibilities. In terms of a code of conduct for ministerial staff, we were exploring with National Archives whether in relation to record keeping they thought it would be suitable to have one person ultimately in each ministerial office who was the point of reference and liaison who was ultimately responsible for complying in that regard. Would having just one person in a ministerial office who was ultimately responsible for enforcing the code be the way to go or does that have to be removed away from—

Dr Seth-Purdie—Enforcing a code?

Senator WEBBER—If we were to have a code of conduct—

Dr Seth-Purdie—You are not just talking about record keeping?

Senator WEBBER—No. If we were to have a code of conduct for MOP staff.

Dr Seth-Purdie—That sounds like a good intermediate mechanism as part of an overall mechanism. Perhaps the chief of staff reporting to the minister could take responsibility for that and ensure that everybody is trained and understands the standards and what is required. In dealing with staff, both internal staff and public service staff, that person could model the principles personally and sets the example. It has to occur at the very top. The minister must also be caught by the same principles and feel exposed to a common system of scrutiny and sanction.

Senator WEBBER—At the moment in a number of jurisdictions we have ministers who have codes of conduct but no-one working for them has such codes. They could argue that they are under much greater scrutiny than those underneath and that has been highlighted at a number of inquiries.

Senator BRANDIS—I wanted to return to the issues of scrutiny and transparency. By way of preamble, I am always sceptical when people come and invoke a word like transparency which tends to generate warm feelings of approval as if that is the end of the argument implying that transparency is an absolute value rather than one of a variety of values that have to be balanced. Do you think that transparency is an intrinsically good thing for public administration or is it merely one of a number of desiderata?

Dr Seth-Purdie—I am not enamoured of the notion of balancing important principles per se.

Senator BRANDIS—You are not? But sometimes you have to.

Dr Seth-Purdie—Sometimes you have to amalgamate competing interests. My view would be that normally there is a nesting of values that would—

Senator BRANDIS—I understand your approach, but where is transparency in that hierarchy?

CHAIR—We actually have—

Senator BRANDIS—Mr Chairman, let me run my dialogue subject to you—

CHAIR—Order! Senator Brandis, you asked a question, the witness gets about two words out and you interrupt. Treat the witness with a little more respect and decorum and allow her to answer the questions and I will allow you to ask the questions.

Senator BRANDIS—Dr Seth-Purdie, where is transparency in your hierarchy? Is it at the top?

Dr Seth-Purdie—Very high, very close—without committing myself. But can I say that I agree—

Senator BRANDIS—I just want you to commit—

CHAIR—Yes, you can say, Dr Seth-Purdie.

Senator BRANDIS—I want you to commit yourself, Dr Seth-Purdie.

CHAIR—Let the witness answer the question, Senator Brandis!

Senator BRANDIS—The question has been answered, and I want to ask another question.

CHAIR—The witness had not even completed—

Senator BRANDIS—What is higher than—

CHAIR—Senator Brandis, order! This committee has been operating very well since yesterday morning. I would like it to continue in that fashion. Let the witness answer the question.

Senator BRANDIS—What is above transparency, Ms Seth-Purdie?

Dr Seth-Purdie—Before coming to that, I will respond to your comment on transparency as a warm fuzzy—that after we have said ‘transparency’ we can all be content. I do not believe that is enough. I share your concerns. You need to give it some operational meaning. Transparency has two dimensions. One is openness to outside ideas and the other is openness to outside scrutiny, and I think we have been focusing on the second sense this morning. In terms of what possible values could exceed transparency, maybe I will recant slightly and say that the major public sector values of transparency, integrity, efficiency, stewardship and accountability all cluster together. It is very hard to rate one above the other. It is like virtues that cannot exist independently.

Senator BRANDIS—I understand your point, but can I put it to you that among the values you have just suggested there is very commonly going to be seen to be an inconsistency between transparency and efficiency. Let me illustrate what I mean. Some people make the case that, if the process by which a decision or action is arrived at is subject to complete and unlimited scrutiny then those actors in that process of decision making, conscious that they might subsequently be scrutinised and, with the benefit of hindsight, have their real-time judgements in effect criticised and deconstructed, may hedge their willingness to make robust decisions or give robust advice. And if those actors are acting under that constraint the likelihood of efficient outcomes or sound and successful policy outcomes will be diminished. What do you say about that?

Dr Seth-Purdie—To the extent that that is true, it is equally true that deliberating in private with no possibility of scrutiny allows inappropriate bases for decision making to be taken into account.

Senator BRANDIS—Let me give you an example that I gave Professor Weller yesterday. There is no species of decision made by a public authority in this country which is more important in terms of its effect on the country than decisions of the High Court about the Constitution. Do you say that High Court judges, having delivered their reasons for judgement about an important constitutional decision which might affect the shape of the country forever, should be subject to interrogation about the reasons why they arrived at that conclusion or about their motives or about who they spoke to? Or do you accept, as I think most people do, that judicial decisions are a species of decision for which there should be no transparency other than the fact that the case is argued in open court and the conclusions are exposed by published reasons?

Dr Seth-Purdie—The extent of exposure in both cases is far superior to what occurs in relation to most public decision making.

Senator BRANDIS—So you are comfortable with that level of scrutiny of decisions of the High Court, for instance?

Dr Seth-Purdie—It would be hard to transport that model out of the judicial context.

Senator BRANDIS—I use that illustration to try and make the broader point that, whereas transparency is obviously appropriate and a very high value for some kinds of public conduct, in particular legislative conduct, it is a less appropriate value for other species of public conduct, including judicial conduct and, I would put it to you, some aspects of executive conduct. What do you say about that?

Dr Seth-Purdie—I am not sure that I am in agreement with you on the lack of transparency in the judicial judgment giving process.

Senator BRANDIS—The proposition I put to you and invite your comment on is that of all the values of executive decision making and conduct by ministers, it seems to me that there are two at the top of tree—not transparency at all. Firstly, they should get the decisions right and, secondly, they should be responsible for them, both in parliament and under wider public scrutiny by the media. At least in relation to the first of those two values, if ministers or

ministerial advisers have to operate constantly under the constraint that with the benefit of hindsight their decisions will be, as I said before, deconstructed before parliamentary committees, they are not going to be able to make in real time the robust calls and the fearless decisions that good public decision making sometimes requires. What do you say about that?

Dr Seth-Purdie—I do not accept that and I do not accept that making the right decisions for the wrong reasons is sustainable, but it is enough—

Senator BRANDIS—It might not be for the wrong reasons.

Dr Seth-Purdie—The essence of good governance mechanisms is to bring to bear on decision making processes and safeguards that will make it more likely over time that good decisions are made. If those processes and safeguards are not in place—even if some good decisions are made—ultimately the forces of chaos, whatever, will prevail and bad decisions will be made.

Senator BRANDIS—We have had a parliamentary system for the best part of a millennium in one form or another. It is probably more sophisticated now than it has ever been. I do not see the forces of chaos about to collapse in on it.

Dr Seth-Purdie—Are you arguing that we have achieved perfection? We have reached the end of history, so we should call it off now.

Senator BRANDIS—No.

Dr Seth-Purdie—I would not accept that.

Senator BRANDIS—I understand that. There is nothing a minister does for which he cannot be called to account in parliament or by a parliamentary committee, and indeed by the media. The efficacy of the policies for which the minister is responsible will always be open to very plain and quite properly, partisanly motivated scrutiny. That is where we are now. Why do we need more?

Dr Seth-Purdie—I do not accept that that is where we are now, and it is probably not the forum in which to pursue that further. If that were the case, that would be a good situation indeed.

Senator BRANDIS—You have never been a minister, Dr Seth-Purdie I assume, but have you ever worked in a minister's office?

Dr Seth-Purdie—I have had plenty of exposure to the operations of ministerial officers from the public servant's point of view.

Senator BRANDIS—I see Dr Russell, who used to be the Australian Ambassador in Washington, sitting behind you. For example, do you think that the diplomatic relations between Australia and another nation could operate optimally or efficiently if everything the ambassador said to the foreign minister or to others were subject to immediate public scrutiny, as opposed to just public scrutiny after a delay of some decades? Do you think that?

Dr Seth-Purdie—I would like to see the alternative of operating side by side. Traditionally—

Senator BRANDIS—I do not know what you mean by that.

Dr Seth-Purdie—Diplomatic processes as traditionally conducted—not subject to open review.

Senator BRANDIS—But you cannot appeal to tradition. You have just told us, in a very kind of Whiggish view of history, that we have to look to the future; don't appeal the tradition. What is your base proposition—

Dr Seth-Purdie—I am not saying that is the way it should be; I am saying that we have no opportunity to observe the counterfactual.

Senator BRANDIS—But the question posed for us, and which your submission seems to be arguing against, is that we should have such an opportunity. The point at which I am inviting you to step back to and enter the argument is to say, rather than assuming transparency is a value so important that it is a given, one should look at the functions of government on a functional basis. For example, certain of those functions admit virtually complete transparency, like legislative functions; others only admit of a transparency in peculiar way, like judicial functions; and there are others, including functions within the executive government, including, but not exclusively, relations between Australia and other countries, issues of national security, and other areas, in which, on a case-by-case basis, you need to make a functional judgment about the importance of transparency to the process. That is my point, and I invite you to tell me why that is wrong.

Dr Seth-Purdie—I will not disagree with that. In practice there are gradations. Overall, the scrutiny mechanism needs to be such that it can cut into what might have been opaque processes on the day and bring them to light so that the assurance can be given to the stakeholders that things are being done well in their interests.

CHAIR—I have a final question. You have attached to your submission the Queensland code of conduct. As you point out, it is applicable to staff who are employed in a public service framework, and you recommend that a code of conduct be adopted, I assume using that as some sort of a basis.

Dr Seth-Purdie—That was merely illustrative in that you can have a code of conduct.

CHAIR—Do you have any propositions with regard to how a code of conduct might be drafted for ministerial staff and any other relevant MOPS employees in the federal context—whether it is a parliamentary code or prime ministerial driven? If you do, you might provide them to us.

Dr Seth-Purdie—Perhaps I could do that. There are useful elements in a number of different codes. I think the UK code has some good features in distinguishing between party political behaviours and ministerial support and policy advice behaviours. The Queensland code has some useful features, but I do not like its enforcement mechanism. It is up to the Premier to enforce the code, and I do not think that is an independent mechanism. It is not independent and it cannot be successful.

Senator BRANDIS—You are not holding up the Queensland government as a model of public integrity, are you?

Dr Seth-Purdie—No, I would not.

Senator BRANDIS—I do not think you came along to pull our legs, as it were.

Dr Seth-Purdie—No comment on that.

CHAIR—Senator Brandis, she did not say which Queensland government she was talking about, either current or former. Dr Seth-Purdie, we would be interested if you have some further thoughts on that. A lot of proposals have been put to us about having a code of conduct, the way in which that might be drafted and who might be involved in doing that, but it might be useful if you have some further comments on what aspects in the Queensland code you think would be useful and those that you think may not be so appropriate. Thank you for your attendance today.

Proceedings suspended from 10.30 a.m. to 10.40 a.m.

RUSSELL, Dr Donald Eric (Private capacity)

CHAIR—We will resume our hearing. I welcome to the inquiry this morning Dr Don Russell. I am sure, Dr Russell, you are very familiar with the rights and obligations that apply to hearings of Senate committees and also with the implications and details of parliamentary privilege. We prefer evidence to be heard in public but witnesses can if they wish request to go into camera and we will consider that at the time the request is made. Do you have any comments to make on the capacity in which you appear?

Dr Russell—I am currently working for an asset management company in Sydney. I was the chief of staff for Paul Keating when he was Treasurer and Prime Minister and I am here as a concerned citizen.

CHAIR—Thank you. I invite you to make an opening statement. Then we will go to questions. We appreciate the fact that you—a person who was involved in the capacity of chief of staff in the Prime Minister's office in the previous government—have put a submission in and agreed to appear before the inquiry.

Dr Russell—I jotted down several points on a page which I thought might be worthwhile going through very quickly as a bit of a background or as a basis for subsequent questions. I have put in a submission. I also attached a lecture that I gave to a Senate afternoon or lunch function last year.

It all boils down to a few points. There has in fact been a change in the way ministerial staff operate, certainly since the time I headed up the Treasurer's office and the Prime Minister's office. We operated—and this is throughout the Hawke-Keating years—very much on the basis that staff were an extension of the minister. This had a number of implications for the way staff operated. For a start, it meant that staff were very cautious because they knew that they had the reputation of the minister in their hands at all times. It was also very difficult for staff to do things that the minister could not do and acknowledge publicly. It was also very difficult for ministers to hide behind their staff in such an arrangement. It also had the key implication that informing anyone in the office was the same as informing the minister.

What seems to have happened is that we have entrenched a whole set of new principles in the last few years. Ministers no longer see themselves as necessarily responsible for the actions of their staff. Ministers can now hide behind their staff. The principle that informing a staff member is the same as informing the minister no longer applies. These new arrangements make it a lot easier for ministers to avoid scrutiny. In fact, what they have done is actually widen the influence that ministers can have. They can use trusted staff to do things that ministers would have trouble justifying.

This inquiry, and the issues we have before us—and there are many aspects to it—is really about this core issue of whether ministers take responsibility for their staff. It is easy to get distracted in discussions about how we manage rogue staff, and that is an important issue in itself, but unless we address the issue of making ministers responsible for their own staff we have not really addressed what is the key and core matter at discussion.

On the basis that staff were an extension of the minister, that is why or how staff were shielded from the parliament. We are now talking about a situation where ministers claim the right to use their staff or have their staff acting independently from them but still maintain the right to keep the staff shielded from the parliament. Unfortunately, it is going to be hard to make ministers responsible for their staff. The current arrangement provides a lot of flexibility for ministers and prime ministers; there are a lot of new avenues to avoid scrutiny. I think as we go through this process we need to keep very much in mind that, if ministers are to re-accept responsibility for their staff, it is going to require the Prime Minister of the day, whether the current Prime Minister or some future Prime Minister, to embrace that principle again.

As I set out in my submission, 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 have created over the last 30 years—and this is with bipartisan support—a whole new powerful institution in this country, which is the ministerial 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. Even though it is not directly connected to the actual responsibility and accountability issue, I think as part of this process we have got to put in place some structure that manages the staff themselves.

While the staff should be 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. We also need to put in place a structure where the chief-of-staff of the Prime Minister's office is responsible for the operations of the ministerial staff structure itself.

To give the whole thing some teeth and some discipline, we have also got to accept that ministerial staff are shielded from the parliament as long as they are viewed and treated as extensions of the minister. But if the minister for one reason or another walks away from that principle, disowns a staffer over a particular issue then the minister can no longer shield that staff person from scrutiny of the parliament. In other words, if ministers or the Prime Minister accepts that staff are an extension of the minister, then staff stay out of the Senate committees; but, if for one reason or another the Prime Minister or ministers want to blame their staff for a particular matter, if they want to claim that the staff were informed but they were not informed or that the operations of their office led to a set of behaviour on their part and if ministers of their own volition walk away from the principle then I think in those situations the staff should appear in front of Senate committees.

My guess is that once you put that in place it would be on very rare occasions that staff would appear in front of Senate committees. Ministers and prime ministers would in most situations prefer to front up to whatever the issue is that they were trying to shield themselves from. At that point it would be easier just to take it on the chin than to risk the prospect of having their staff put into the Senate. So it would be a self-disciplining, self-policing type structure. I will leave it at that, and I would be pleased to take questions.

Senator CARR—Dr Russell, you have had extensive experience in a prime minister's office. You have had experience of doing the things that people talk about, presumably, in regard to

directing staff and public servants and to gathering information that is important to the day-to-day management of political problems. You say now, and I take it that is all true—

Dr Russell—I did my best.

Senator CARR—You go on to say that effectively there has been a change in the way things were done in the past. You say that effectively a cultural change is occurring in the way in which ministers behave. I put it to you that another question has arisen. Whether or not those events have occurred in the way you have described in your submission, there is a further influence that needs to be borne in mind: the attitude—the culture—of the Public Service, and how the public servants respond to the ministerial officers. Do you think that is an important issue?

Dr Russell—I think it is an important issue. Part of the reason there is less scrutiny and accountability of the executive in this country is that the power and influence of the Public Service has declined over the last 30 years. As with our whole structure of government, the role that the Public Service plays comes very much from the Prime Minister of the day. It is the Prime Minister who sets the standards; it is the Prime Minister who effectively puts in place the structure in which the public servants of the day operate. Over the last 30 years we have seen a growth in the power of ministers, certainly a growth in the power of ministerial offices, and certainly a growth in the power of the Prime Minister relative to the Public Service.

CHAIR—I would like to interrupt there. Yesterday we gave permission, as is usually the case in public hearings, for photographs to be taken of the committee proceedings. I have had a request that photographers be entitled to do that today. The decision has already been made. I just want to make it clear that they should not interrupt proceedings. Photographs may be taken but that should be done as unobtrusively and quietly as possible.

Senator CARR—Your point is well made, Dr Russell, that it is up to the Prime Minister to set the tone and, in terms of the ministerial code of conduct, he is the one who sets the tone with regard to the behaviour of ministers. We have seen a deterioration in that regard throughout the life of this government. I put it to you also that it is up to the head of the Public Service to set the tone within the Public Service. Does that directly follow?

Dr Russell—It certainly is the case that the head of the Prime Minister's department has a major role to play in how the Public Service conducts itself at any point in time. But the way our system operates is that the head of the Prime Minister's department is appointed by the Prime Minister of the day; the Prime Minister will appoint somebody to head that office and perform a particular function and a particular role. It would be very unusual to have a head of the Prime Minister's department who was out of sync completely with the Prime Minister of the day. The Prime Minister selects the head of the Public Service to perform a role and, whatever that is, they do it.

Senator CARR—And they are role models, presumably, for the Public Service as a whole, if you follow that through?

Dr Russell—It may not happen overnight, but the Prime Minister will eventually get the Public Service that he or she wants.

Senator CARR—You have put the view that the question of tenure has become an important one in the process of developing an effective means of monitoring ministerial staff—that is, that if senior public servants, departmental secretaries, do not have effective tenure then they are not likely to have the courage or they may not have the incentive to make complaints about the behaviour of ministerial staff. Is that the proposition you are putting to us?

Dr Russell—I do not think public servants should be put in a position where they can dictate to ministers. I think where we were 30 years ago, where the old guard of the Public Service did think that they had an entrenched right to tell ministers what was possible and what was not possible, was not healthy. I think we need a Public Service which is responsive to ministers, but we do not want a Public Service which is acquiescent. 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 this is not necessarily about public servants speaking out publicly. It is about what public servants actually say within the debates that occur within Canberra. So 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. There are probably core people within the service that you actually want to select and say to them, 'We will give you security to your career which will enable you to follow your good judgment and not feel that, if you speak up on a particular issue which is inconvenient to the head of the Public Service, this could mean that your contract, which is up for renewal in 18-months time, will not be renewed.'

Senator CARR—It strikes me though that the question that was certainly brought to my attention through, for instance, the article that appeared in the *Griffith Review* published on Friday that talks about cultural compliance—a culture of fear that is put to me in various quarters, about senior public servants actually concerned about their prospects if they bring forth material in reports and the like that is awkward for government, embarrassing for government or does not demonstrate the arguments that government wants to see—actually undermines the values that people are claiming to be holding dear and, in effect, makes all this argument about ministerial codes quite irrelevant. If the Public Service is prepared to censor itself then you do not really need to worry about whether or not ministerial advisers are interfering in the processes.

Dr Russell—On the contrary, I think it makes it even more important that ministers be responsible for their staff, because in that sort of environment what is really happening is that departments are becoming extensions of the minister's office. If bureaucrats are acquiescent, if bureaucrats feel that they have to second-guess every piece of paper or every piece of advice that they give to ministers, if they feel that they can only tell ministers what ministers want to hear, they are in fact basically doing little more than running the spreadsheets of the minister's offices. There should be a clear division between the minister's staff, the minister and the department. Once you blur that it gets—

Senator CARR—Is it your judgment that that confusion over roles is becoming more pronounced in the Public Service?

Dr Russell—My experience is obviously of the Hawke-Keating years. During that period there was a philosophy different from the philosophy that applied in the heyday of the Public Service czars. The Public Service was expected to be responsive and to work with government, but the Public Service was given a role and a standing and a status which was separate from the minister's office. Ministers, and this is during both the Hawke period and the Keating period, accepted that they should be given advice that they did not actually want to hear. There was a conscious decision that ministers who protect themselves at all costs from advice that they do not want to hear will, in the end, do a lot of damage to themselves. I cannot speak with the same authority about the current arrangements. I have obviously followed what is in the press. Also, I talk to people who still function within Canberra, and my impression is that there is a much greater concern for careers if you do speak up.

Senator CARR—It has been put to me that in present arrangements ministerial officers will actually send back briefings to ministers if they have got critical material in them. At the education department, for instance, there have been occasions that I have been aware of when advice has been returned to the department to be resubmitted so it is compliant with the views being expressed in terms of government policy. Were you ever aware of that sort of behaviour by any of the ministers in your working period?

Dr Russell—I can only speak for the offices that I was actually involved in. A piece of paper from the department was a piece of paper from the department—

Senator CARR—That is right.

Dr Russell—You did not send it back. You did not have a shredder sitting next to your desk so that, if you got a minute that you did not want to hear about, the minute went straight into the shredder—no. All the offices I was involved with were very comfortable with the notion that departments wrote advice on pieces of paper. We were comfortable with the notion that not only did they write minutes to the minister but they would copy minutes to the minister assisting, and copy that piece of paper to not only the minister but all the division heads, the deputy secretaries and half the department as well.

So if the minister got a piece of paper saying, 'Minister, we think what you are doing is not correct,' then you would know full well that the minister assisting and his staff had a copy of the paper and that half the department had a copy of the paper. I guess you could go to a lot of trouble to say, 'In future, we want pieces of paper to only come to the minister first. We don't want any copies going to the minister assisting and we don't want any copies circulated in the department until the minister has had the opportunity to see it first.' The minister could have done that—and for all I know, ministers do that now—but ministers at that stage welcomed that quite deliberately, even if it was uncomfortable at the time. They did not want to protect themselves from advice they did not want to hear.

Senator CARR—This article actually suggests that the control over information is much tighter now on the basis of concerns that are being expressed about unauthorised disclosures.

Wasn't that model that you are familiar with open to abuse and people actually leaking information?

Dr Russell—For better or worse, our system is very much based around the Prime Minister. All our systems of accountability, certainly within the bureaucracy, and our standards very much come from the Prime Minister of the day. If the Prime Minister wants levels of scrutiny and levels of accountability set at this point then the Prime Minister, one way or another, will get that. Our system has that as a feature.

My guess is that over the last 30 years the power of the Prime Minister and the Prime Minister's office has increased quite dramatically in many cases, and we now have a system where the Prime Minister's office is very much more powerful than it used to be. The Prime Minister now has a staff of 40 or 50 people. In many cases, the brightest and the best are now in the Prime Minister's office; they are not around Canberra in the departments. You have a Prime Minister backed with 40 or 50 of the best and brightest people loyal to the Prime Minister—power has moved to the Prime Minister and his office away from the cabinet and away from the bureaucracy.

Senator CARR—Do you think that is necessarily a good thing?

Dr Russell—It has inherent flaws. We are still grappling with what is actually happening; I am not sure if it is fully recognised. I suspect that over the next 10 or 20 years we will start to think of ways in which we may want to put constraints on the power of the Prime Minister—

Senator BRANDIS—Dr Russell—

Dr Russell—I am not sure how that will manifest itself, but I think we will be grappling with these issues.

CHAIR—We will allow Senator Carr to finish his line of questioning, which he will be—

Senator Carr—You are entitled to have as long as you like, but you did this yesterday and I really would prefer it if I could actually develop a line of argument and allow the witness to address the question.

Senator BRANDIS—I was just going to ask a question arising from your line of questioning.

CHAIR—Make a note of it, Senator Brandis, and you can return to it. I do want to ensure that all senators get a reasonable opportunity, and I know Senator Carr will, after a suitable period of time, defer to other senators.

Senator CARR—Absolutely. You are dead right, Chair.

CHAIR—As always.

Senator CARR—After a suitable period of time I will do so.

CHAIR—Suitable to the chair and the committee.

Senator MURRAY—It is our version, not yours.

Senator CARR—Dr Russell, I am particularly interested in your submission in terms of the questions that this committee is now to address. A problem has arisen in response to the children overboard affair—or scandal, as I say—as to the way in which ministerial advisers have sought to intervene and exercise what I say is executive authority, to the point where they are seeking to intervene in the operational matters of naval vessels or seeking to have clearance procedures for information aborted so that they can meet press deadlines as distinct to any other operational questions that might be under consideration. Nothing has been done about it—in fact, Ross Hampton was promoted for it and ended up in education, and we see the same sorts of problems emerging in the education department.

The problem I have in terms of some of the questions that have arisen with the models that are being proposed for trying to regulate that is that there are serious implementation questions with all the models that have come forward, and the same applies to yours. Therefore, I ask whether you could address some of your suggestions. Isn't it the case that your model effectively suggests to us that we should trust the minister? Aren't you actually seeking to extend the ministerial system of trust, which has demonstrably failed under the present government?

Senator BRANDIS—Is that a question?

Senator CARR—It is a question.

CHAIR—It was a question with an observation. Dr Russell can respond to the question.

Dr Russell—The problem that we find ourselves in is that we have opened up a new level of discretion and a new power and a new role of influence for ministers. That has come about because we have broken the link between staff and ministers, and ministers and prime ministers have found that this frees them up in quite a major way. They can use their staff as a firewall. In other words, they can blame their staff if things go wrong and say: 'I wasn't at fault. It was the staff at fault.' If you have a system where the staff are an extension of the ministers, ministers cannot do that because you cannot say, 'It was the staff's fault,' if the staff, in fact, are an extension of themselves. Once you break that relationship, the minister has a whole new level of discretion.

Also, when you have trusted staff dealing with departments, the departments will assume—particularly if the person is a trusted staffer of the minister—that the staff person speaks for the minister. So while they know that the staff is not the minister, they will know that on most issues if the staff says, 'I want this. The minister wants this. I suggest you do this,' bureaucrats will, in most cases, assume that they have been told to do this by the minister. This can be pushed to the limit if the minister can disown the behaviour of the staff. If the staff start suggesting things which are clearly inappropriate, such as that pieces of paper should disappear off files, ships should be rescheduled and it would be better for the nation or for the minister if such and such a thing did not happen, and if the minister has difficulty standing up at question time and saying, 'I did ring up the head of the defence department and I did say it would be better if this ship didn't sail at 3 o'clock but sailed at whatever time', the minister would have a lot of trouble being able to say that because it would clearly look quite inappropriate. But if the staff suggest things that are inappropriate and, if it ever sees the light of day, the minister can say, 'Look, I knew nothing

about that. The staff were clearly out of line involving themselves in this. I'm really quite horrified; I don't know how that could possibly have happened,' then you have suddenly increased the power of the minister considerably. The minister can still achieve the same outcome without having his or her fingerprints all over it. That is where we have got ourselves today.

Senator CARR—Can I go to a practical example using the children overboard affair? Under your proposals, what would have happened to Miles Jordana? Would he have fronted the committee?

Dr Russell—I do not know what happened, all I know is what you know. But I do know what would have happened in the Hawke-Keating years: as soon as Miles had been informed of what was going on, Miles would have immediately come to me and said: 'Look, we've got a major problem here. What the minister or the Prime Minister is saying is actually not in keeping with what actually happened. What are we going to do about it?' Under the culture, the arrangements, the way things worked, from that moment the Prime Minister's or the minister's behaviour would have to change. Up until that point it did not matter because the Prime Minister could legitimately say he was operating in good faith. But as soon as the office was informed that something was the case, then the minister's or Prime Minister's behaviour had to change from that point in time.

In most cases—and we are not just talking about the current situation—fronting up to whatever the problem was, particularly if the minister knew nothing about it up until that point in time, sure it would cause you a problem on that day, it might cause you a problem for that week, but by and large you could deal with it. What became a problem was when that moment came and you said, 'It's going to cause us a problem today, it's going to cause us a problem this week—let's just tough it out.' What we have done is we have reduced the penalties attached to toughing it out and we have built it into the system. Toughing it out now becomes a legitimate option in every situation.

If we go back to the old arrangement, where staff are extensions of the minister, you make the senior adviser or the chief of staff responsible for the operations of the office. In other words, in that situation with Miles, the person responsible would have been the chief of staff of the Prime Minister's office. It would have been the chief of staff's call: 'Should we tell the Prime Minister that Miles knows?' And then, if the chief of staff decided, 'No, we won't tell the Prime Minister,' then you have somebody that you can go back to and say, 'Explain yourself; why did you make the decision that the Prime Minister should not be told in this particular instance?' So, if the Prime Minister then says, 'The staff never told me,' there is a process that goes on from that—that is, the Senate or a parliamentary committee would be entitled to ask the chief of staff of the Prime Minister's office: 'Why did you take a decision not to inform the Prime Minister of the day, when Miles was informed by the department of such an event?'

My guess is that, if that was the structure that everyone was working to, when Miles was informed the chief of staff would have said, 'Look, we can tough this one out. There's an election coming; we'll deal with it after the election,' or 'I'm going to end up in front of the Senate explaining why I didn't inform the Prime Minister. On balance, it's not really going to cause us a lot of problems. We'll front up to it now.' There is usually one key meeting that takes place in all these things. My guess is that in that situation the chief of staff would have said,

‘Let’s just fess up to this one. It’s not going to make a big difference to the outcome of this election.’ All I am suggesting is that we change the balances within ministerial offices so when those situations come up—where it is a choice between fronting up to what is happening or toughing it out—you have swung the balance back to saying, ‘Let’s just own up.’

Senator CARR—The trouble in that case was that it became a critical issue for the government. The real photographs were ultimately suppressed and a doctored version of them was released. Clearly, events claimed to have occurred did not happen—and there was no correction. Under your model the opportunity would have come presumably after the election, when the parliament had resumed. Would Matt Brown, the current—

Dr Russell—No, it would have come at the time, because what you are trying to do is change behaviour. This is not about finding bad incidents and then punishing people; what you are trying to do is set up a structure where people have an incentive to behave properly. I would hope that—and it was certainly the case in the Hawke-Keating years of government—if that situation arose and the office was informed, it would not cross anyone’s mind to behave in any way other than to say, ‘That’s the new situation. We have to deal with the new situation.’ No-one would have said, ‘Let’s pretend the situation hasn’t changed. Let’s go and shred the documents.’ That is what you are looking to do: change the culture, change the behaviour and change the balances so that ministers and their staff have an incentive to front up to things and not tough things out.

Senator CARR—Why wouldn’t a legislative code encourage that change in culture?

Dr Russell—Any piece of legislation has to have the support of the Prime Minister. 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 Prime Minister is willing to have—and wants and accepts—that discipline imposed on him or her and voluntarily accepts that this is a useful thing. In many ways the current situation is very awkward for the Prime Minister because one of the major problems that any Prime Minister faces is his ministers. In our system of government, some ministers are good, some of them are mediocre and some of them are—

Senator CARR—Bloody awful!

Dr Russell—problems waiting to happen.

Senator BRANDIS—Can you tell us which ones?

Dr Russell—The wise Prime Minister—

Senator BRANDIS—Does that go for prime ministers too?

Dr Russell—By and large, prime ministers have some qualities about them. This is not always the case; we have had some prime ministers who do not accord with this. If you have been elected Prime Minister, there is usually some quality to you. If you have made your way through the—

Senator CARR—It is an apprenticeship system, isn't it?

Dr Russell—Yes, there is a weeding out of weakness. So there is a good chance that whoever makes it to the job will have some qualities, but that does not always carry over to the ministers. The Prime Minister is often hostage to the behaviour of his ministers and the Prime Minister pretty quickly realises that one of the best and quickest ways of running a well-organised and happy government is to make sure that his ministers are under control. If minister A is told something by their department, you want minister A to do the right thing. By and large, prime ministers do not really want their ministers to be playing merry hell with the advice they are getting. Prime ministers cannot be at every meeting, they cannot be at everything, but if a problem is occurring in a department and the department has told the minister that this is a major problem, the Prime Minister wants that minister to toe the line and fix it.

If the minister thinks, 'I have been told that my policies are all running amok but I am going to pretend that I wasn't told that,' that is usually a problem for the Prime Minister. So it is in the interests of the Prime Minister to put discipline and weight on their ministers. So you need to have a system in place which says, 'Minister A, if you are told by your department that something has happened and your office knows it, we want you to actually respond to that. We don't want you to respond by hiding that particular piece of paper.' The wise Prime Minister wants a structure whereby ministerial staff are an extension of the minister, because it protects the Prime Minister from dud ministers.

Senator CARR—Another problem I have with your model is the suggestion that the chief of staff play a critical role in terms of fronting the parliament should there be a problem. The question that arises in my mind is: how does the public or the parliament know that there is a problem and why do we have to assume that the Prime Minister would have to give the okay for such an appearance to ever occur?

Dr Russell—The current situation is that with the staff in question with the children overboard the Prime Minister got a cabinet decision directing all the staff not to appear. The Prime Minister will always have the power and the option to direct public servants and ministerial staff not to appear before committees of the parliament. The parliament on paper has all the powers it wants, but reality usually dampens the enthusiasm of the parliament to proceed much further than that. Somebody has to be responsible for the staff. You cannot have the bureaucrats responsible for ministerial staff. That is not going to work. Somebody has to be responsible for how the ministerial staff structure operates. Really, the only person who has the authority is the head of 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 structure that operates within them. If you have mavericks or cowboys doing things that you do not know about, it is your problem. Why didn'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.

I do not know what the current situation is, but when the majority of ministerial staff are made up of people outside the service, they are not instinctively aware of public sector processes and

ethics. There is a need to educate and train people and to tell them what is expected of them, because in many cases they do not know. If you make the chief of staff responsible for that, you will find that that person will actually have training courses. That will conceivably encapsulate guidelines, codes—call them what you like—because the chief of staff will not want mavericks and cowboys running amok in the department of whatever, because that leads to problems for the Prime Minister. You will see that once you empower the chief of staff and make them responsible, they will interest themselves in how minister A runs his or her office. That holds the prospect of changing the culture within ministerial offices.

Senator CARR—But it does not answer the question of how the public or the parliament will know when there is a problem.

Dr Russell—Under the arrangements that I suggested, as long as the minister or Prime Minister accepted responsibility for the staff, things would just go on. In other words, if there was a problem, the minister would take it on the chin. The public would know there was a problem the moment the minister stood up and said, ‘It wasn’t my fault. It was the staff over there. It was their fault.’ That would immediately change the arrangement. At that point, those staff and the chief of staff lose the cloak of protection from the Senate. In other words, the minister would signal to the public that there is a problem and that they are walking away from the principle that ministerial staff are an extension of themselves. When they do that, the Senate or the parliament has the right and, I think, the duty to ask the chief of staff, ‘Why did the system fail on this occasion? What was your role in all of that?’ And, if a particular staff person was obviously involved, they should ask, ‘Why were you doing what you were doing on this particular occasion, given your minister has now walked away from you?’

I think that would provide a big incentive for the minister not to use the staff as a defence and for the chief of staff to put in place processes and structures that would mean that the cowboys and the staff within the office would behave themselves, because I suspect in many cases nobody really knows what individual staff are doing at any point in time, and the individual staff quite like that. I think we have now built up such a large institution with the ministerial staff that we can no longer operate on that basis, where you have in each minister’s office conceivably seven or eight jockeying individuals, each with their own view about what the minister’s interests are, with no-one really that certain about what any particular staff person is doing. We can do better than that.

Senator BRANDIS—Thank you for your submission, which, if I may say so, is a very thoughtful one. I agree with much of it. Before I start, the question I wanted to intrude into Senator Carr’s examination of you was: has the process you described of a gradual enlargement of the power of the Prime Minister and the Prime Minister’s office been a lineal thing over the years? For instance, was the Prime Minister’s office less important and powerful at the beginning of the Hawke-Keating period than at the end of the Hawke-Keating period?

Dr Russell—I was there at the beginning and the end of the Keating prime ministership. It is hard for me to say what actually happened over that period. Certainly the role of the Prime Minister and the Prime Minister’s office was a very strong one. People used the office very much as a clearing house, as I am sure happens in the current situation. Disputes between ministers were resolved in the Prime Minister’s office. The agenda was set in the Prime

Minister's office. Ministers were told what they would and would not bring forward. Ministers were told, 'Forget this. Do this.' The strategy was all managed.

Senator BRANDIS—Just as a matter of impression, was the Keating office in 1996 a more powerful or central institution of governance than the Hawke office was in 1983?

Dr Russell—I think there had been a natural evolution over that period, and it occurred during the Hawke period as well. You can see it. I have attached to the submission quite a handy little chart that I lifted out of Ian Holland's research on the number of staff in ministerial office. It is quite a nice figurative representation of what has been going on.

Senator BRANDIS—But it is more than a function of staff, isn't it? I dare say it is also a function of prime ministerial style.

Dr Russell—It is a function of prime ministerial style as well as staff, but the staff are the key. It is hard for prime ministers to exert their authority unless they have staff who are familiar with a particular subject, and what have you. Keating was very collegiate. He was probably much more respectful of his cabinet colleagues and the role of the cabinet than other prime ministers were—certainly more so than Malcolm Fraser.

Senator BRANDIS—The limited suggestion you make about how the accountability to parliament of ministerial staff operates is a more conservative suggestion than that made by a number of other witnesses, as I understand it. In the event that a minister says, 'I didn't know about this,' and the issue is one that exercises the public debate, you say that the ministerial chief of staff can then, but only then, be called to account before a parliamentary committee. Is that right?

Dr Russell—Yes, when the minister himself or herself walks away from the principle that the staff are an extension, then the shield goes.

Senator BRANDIS—Do you say that the limit of the inquiry that can then be made of the chief of staff is to ask why the minister was not told or do you say that, in the event—to use your expression—'the shield goes', and it is then open slather?

Dr Russell—No, it is still very clear that what is at issue here is that, when the minister walks away from the principle, it is not then an opportunity for the Senate to inquire about every conceivable subject that the staff—

Senator BRANDIS—No, sorry, I might have put the question poorly. On that issue, do you say it is then open slather? Let us say, for argument's sake, that a minister says, 'I wasn't told about a particular fact arising from an event.' Under your proposal, the chief of staff can then be summoned before the committee. Can the chief of staff merely be asked, 'Why wasn't the minister told that fact?' or may the chief of staff then be asked any question relevant to the awareness which was concealed?

Dr Russell—As with all these things, over a period of time there would build up an accepted view between the parliament and the Prime Minister as to what was relevant to the particular subject, and we would end up with 'learning by doing'. Boundaries would be put around what is

relevant and what is not relevant. The chairman of the committees would have a view as to what was relevant and what was not relevant. You would also find that the staff themselves would decline to answer certain questions. I would imagine that the Prime Minister would want to put in place pretty clear guidelines as to what was and what was not appropriate for the staff to answer. There would be a toing-and-froing over time as to how this would work out. I am sure that the Prime Minister of the day would want to protect the executive privilege—which is exactly what it is—

Senator BRANDIS—Yes, absolutely.

Dr Russell—and that this is not an opportunity to unravel the relationship between staff and the minister.

Senator BRANDIS—I take it then that, under your proposal, the nature of the inquiry, were the occasion ever happen when such an inquiry could be embarked on, would be a very narrow inquiry?

Dr Russell—You cannot stop senators asking questions.

Senator BRANDIS—Depending on how good the chairman is, you could stop senators asking irrelevant or improper questions. Hence, I think it is a matter of what the rules are.

Dr Russell—The chairman and his or her colleagues will set the tone of the questions. What actually gets answered is very much—

Senator CARR—It is a bit like question time, isn't it?

Dr Russell—I would imagine that what is relevant to the issue would be fairly tightly defined and that would evolve over time. My real guess is that this provision would not be used very often—it would be in exceptional circumstances where a minister or a Prime Minister would use this as a defence if they knew that by doing this their staff were going to be subject to the blaze of publicity that comes from an inquiry. Normally the costs of that are far greater than the costs involved in fronting up, and all we would be doing is encouraging ministers to behave better in the first place.

Senator BRANDIS—I just wonder, though, why it is not the case that the political price that a minister would pay for saying, 'Well, I did not know about this,' in circumstances in which it could fairly be asserted that he or she should have known about it would not already a sufficient sanction.

Dr Russell—I do not think it is; otherwise, why would they do it?

CHAIR—Why would we be here?

Dr Russell—That is right: why would we be here?

Senator BRANDIS—I did not convene this inquiry.

Dr Russell—I think it does undermine good government if ministers are informed of things, one way or another, and their response is not to respond to it in their behaviour but to concoct defences which involve basically denying what has been said to them. That is unhealthy, it is not in the national interest, I do not think the Australian people would want their governments to operate in that way. It also leads to bad decisions, because when you are caught out doing something which is wrong or has not worked you want ministers to try to fix it; you do not want their immediate response to be: ‘Let’s cover it up. Let’s see if we can slide through on this one. We’ll take a bit of flack but, what the heck, we’ll still be here next week.’ That is not a healthy way to run a government, and I do not think anyone in this room really, deep down, wants governments to run in that way.

Senator BRANDIS—No. The reform you are suggesting arises from the fact that you say we have lost the notion now of deemed knowledge; in other words, what the staff knows the minister is deemed to know. Why is it not enough to supplement the notion of deemed knowledge with the proposition that if, in fact, the minister does not know in circumstances in which the information has been conveyed to his staff, and therefore he should know, he is not running his office properly and—as I said before—has to pay the political price at that level? Wouldn’t that address the problem sufficiently?

Dr Russell—It gives too much flexibility to the minister in that situation. It ends up that no-one is responsible.

Senator BRANDIS—I do not know about that. If you have a situation in which a minister’s staff have been told about a fact and that has not been brought to the attention of the minister, so the minister can then be politically chastised not for concealing a fact of which he was aware but for being unaware of a fact of which he ought to have been aware, isn’t that just as grave a political sin?

Dr Russell—Not really, because what the minister says is: ‘True, my office knew about this and, true, I should have done something about it, but in fact I wasn’t told. I didn’t know about it.’ Essentially, that is the end of the story. Parliament cannot ask the next question—‘Why wasn’t the minister told?’—because no-one is actually responsible. Once the minister says, ‘I didn’t know. I wasn’t told,’ that is it. True, it might upset the press gallery, it might upset Laurie Oakes, it might upset the 30,000 people who watch the *Sunday* program but, by and large, that is the end of it. There are no ramifications. The minister has got out of it with one bound—they have just said, ‘I wasn’t informed’—whereas if the minister is going to say that then somebody has to be responsible for why the minister was not told.

Senator BRANDIS—But that should be the minister. That is my proposition to you. Surely it is the minister who should take responsibility for the fact that his office is structured in such a manner that he has that capacity for deniability in respect of issues for which he has ministerial responsibility.

Dr Russell—It is true that if the minister every week turns up and says, ‘I did not hear about that, either. I didn’t know about that’—

Senator BRANDIS—It would start to look a bit shaky, wouldn’t it?

Dr Russell—It starts to look a bit odd. You will find then that in fact it may spill out beyond the *Sunday* program; it might turn up on some of the programs that even more people watch. You will find that the minister will start getting enemies. They will say, ‘That minister is hopeless.’ You will find that the Prime Minister will start to worry about it. It would not be a good thing. By and large, you use up capital every time you do it.

Senator BRANDIS—That is right. That is my point.

Dr Russell—That is all true. But the amount of capital you are using up is not necessarily a lot, particularly if you only do it once. If you do it every time then I suspect that you are probably in trouble, for a whole range of other reasons. What we can do as a nation is put in place structures which encourage ministers to front up to information and to deal with problems, not to instinctively sweep them under the carpet. Putting in place structures that do that would be good for the country, would be good for the way this building operates, would be good for public policy.

One thing you can do in a situation where you believe staff and the minister are ‘like that’ and when the minister stands up and says, ‘We are not “like that”,’ is make somebody explain why they were not ‘like that’. The person who is best placed to explain that is the head of the office. In other words, if it turned out this piece of information was relatively trivial—although it turned out to be important later—and it turned out that the chief of staff honestly was never informed then the chief of staff should say, ‘I didn’t know, either. I should’ve been told.’ But you should actually have that conversation.

You will find that people do not really like appearing before Senate committee inquiries. I am not sure why—you all seem such a friendly lot. But, by and large, people do not like to front up and have to explain their situation and their behaviour when they feel deep down that their behaviour was inadequate. If you put that into the equation, it would be a self-regulating discipline on ministers and their offices, which we appear to have lost.

Senator BRANDIS—That opens up another issue I wanted to explore with you. I dare say that thousands of pieces of information get conveyed to a senior minister’s office or the Prime Minister’s office practically every day. It must be a given that most of those pieces of information do not actually come to the knowledge of the minister or the Prime Minister. Therefore, the process of filtering or the exercise of discrimination and judgment about the importance of the piece of information is necessarily something done by others. Would you agree?

Dr Russell—Almost certainly. That is very much the role of staff.

Senator BRANDIS—Quite. There is a difference between—as you, better than most people, must be aware—what happens in real time in a minister’s office and what happens in Senate committees, and the children overboard committee has been referred so that is as good an example as any, looking back retrospectively over what has happened. These decisions were made—including the judgment about what to direct to the attention of the minister—in real time and often, may I suggest to you, though not invariably, the importance of a piece of information or of a fact quite properly will not be as well appreciated prospectively as it will be retrospectively. Would you agree with that?

Dr Russell—It is a hard judgment. That is what good staff provide a minister with. But what we need to have is in place in every minister's office is processes and structures which actually do that very job.

Senator BRANDIS—But it cannot be fail-safe, can it?

Dr Russell—Nothing is fail-safe in life, in anything.

Senator BRANDIS—Particularly in politics, though.

Dr Russell—It is how you deal with situations. By and large, it is about how you deal with a situation; it is not about the actual situation itself. If it turns out that a piece of information that turned out to be very important did not get to the minister—and legitimately did not get to the minister; for one reason or another, it ended up on a file somewhere and was totally ignored—but the chief of staff had arrangements in place to discuss key issues with individual staff members, had a reasonably good idea of what was pressing in each particular area within the office, talked to the various advisers, wanted to know what the advisers were doing and had his or her own contacts within the department—in other words, if they had done their job as well as they could but something did fall through—that is one thing. Bad things happen; you deal with them. But if you had no idea what the advisers were doing, could not even tell the minister what adviser A was doing on any particular day, had no idea what directions were given to the department, had no idea what was actually coming into the office at any point in time and had no systems for scrutinising what was going on yourself, then you look like a dill. If you then have to front up and say, 'Look, I had no idea—

Senator BRANDIS—Particularly retrospectively—you could be made to look like a dill even if you had not been a dill.

Dr Russell—That is the price you pay for getting it wrong. It encourages you to get it right next time.

Senator BRANDIS—Quite. But I remember reading once that James Callaghan, the former British Prime Minister, said something like this about politics and political decision making: 'In politics you always look for the little clouds on the horizon, not the big clouds above you, because most political mistakes, scandals or events that hurt a government are the unanticipated things.' You have got the big issues squarely on the radar screen—to change the metaphor—and it is the little things that escape your notice that ultimately germinate into the big causes celebres. Does that conform with your experience?

Dr Russell—It is the little things that grow into big things. It is often about how you handled things when they were little. If you handle a little thing badly, it suddenly becomes a big thing, and that is what we are trying to deal with.

Senator BRANDIS—Quite, but my point is that—if it is generally true that at least as often as not it is the little things that retrospectively look serious—they are the things that did not look serious at the time. I wonder if it is too much of a counsel of perfection to say, 'You should have prospectively appreciated that this thing, which seemed trivial and unimportant to you at the

time, could retrospectively—in the light of events which subsequently happened—bear an entirely different character.’

Dr Russell—The moment you realise that this trivial thing suddenly is real is when you have to deal with it. Sure, you take some pain because you actually did know about it six months earlier but you thought it was trivial. It is that point when you suddenly realise that this was a key thing that we are talking about. You will take some pain at that point. What we are trying to do is stop ministers and their staff saying: ‘Well, we’ve hidden it for six months. We didn’t know it was hidden, because we didn’t know about it. Now we’re going to hide it—we’re going to seriously, consciously, deliberately hide it from now on. Up to now it was incompetence, now it’s strategic.’ We are trying to change that judgment at the end.

Senator BRANDIS—I wonder if it is incompetence or simply a proper appreciation, on the basis of information then available, that something that subsequently became important was not important when it was first received. That is the point that I am putting to you, Dr Russell: there is a time line here. Sequence is always important. The point of awareness will almost by definition be after the point at which the piece of information that subsequently bears a different character was received by the minister’s office.

CHAIR—That also includes what the minister does with that piece of information when it is subsequently demonstrated to be incorrect or incomplete—which is the ‘children overboard’ affair exactly.

Senator BRANDIS—Dr Russell, could you answer my question first.

Dr Russell—That is the point. Something is overlooked, overlooked and overlooked and then, finally, it is suddenly a real problem. The minister is told at that point. It is what happens then that really matters. We have developed procedures for situations where a minister might have inadvertently misled the parliament—quite by mistake, not due to any desire to gain some advantage. If it is pointed out to the minister subsequently, the minister goes back into the house and says, ‘I’m sorry,’ et cetera, ‘I should have known but I didn’t.’

CHAIR—Without going into detail, my recollection is that that was somewhat like what happened in the case of Minister Richardson, who subsequently resigned, wasn’t it?

Dr Russell—I would have to refresh my memory; I cannot remember. There seems to be a tolerance in our system, which is quite legitimate, and it goes to the sort of issues that you are raising. You cannot get it right all the time but, if you do your best, you front up to what you do know and you do not deliberately and systematically try and hide or obfuscate things, our system accepts that.

Senator BRANDIS—But my point is a slightly different one. You have talked about something being overlooked and about incompetence at an earlier stage in the sequence, but my point is that, if fact A comes to the knowledge of the minister’s staff and at that time the staff, in the exercise of their professional judgement, say, ‘This is not an important fact,’ and subsequently—whether it be hours, days, weeks or months later—facts B, C and D come to the knowledge of the minister’s staff and put a different complexion on fact A so that there is now an issue, the initial classification of fact A as unworthy of the minister’s notice was not an error. It

was a correct judgement at the time on the basis of the information then available. But the character of that judgement needs to be revisited subsequently. Would you agree with that?

Dr Russell—The key point is when it became apparent that it was serious, and it is what happens at that point that everyone takes an interest in. That is what we are talking about here. If you owned up to the situation, even if it was six months earlier, at that point when it suddenly became apparent that this was really serious and if you do it in a frank and honest way, by and large the system will understand and you will move on. It is when you really did know and you kept—

Senator BRANDIS—Do you generally agree with the proposition I put to you that to classify a fact as unimportant, if at the time it genuinely does seem to be unimportant and the significance of it only emerges in view of subsequent events, is not an administrative error or a mistake; it is simply making your best judgement on the basis of information then available?

Dr Russell—You cannot generalise. All these things will be tested, and in the end it will be tested by the public. They will not take the minister's view about it if the minister says, 'This is a trivial piece of paper. It should have been there,' and the public asks, 'How can you tell us that your systems were not able to throw that up?' There is no hard and fast rule, but if in actual fact it was genuine and the public accepts that it was legitimate, then it will all go through. We have not discussed one other aspect in all this. As you say, lots of information goes to ministers' offices, and people do not see the significance of some if it until later. However, in many cases in these situations there is a responsibility and role for the Public Service. They will be following the issue, because they sent the piece of paper in the first place and they know that what has subsequently happened means that the piece of paper that went six months ago is suddenly very important. The secretary of the department has a responsibility at that stage to get on the phone and say: 'We sent you a piece of paper six months ago. It now turns out that our forecasts have changed et cetera. You should be aware that this piece of paper is now relevant.' So it is not just the staff in that situation—although it is the staff if the staff have no processes or procedures to keep that flow of information to the department or if the department is of the view that the minister and the office do not want to know.

CHAIR—Senator Brandis, could you please indicate how long you might be, because other senators do want to ask questions, and I do not want to trawl over the same ground, hypothetically, too much?

Senator BRANDIS—Another few minutes, Mr Chairman. Dr Russell, your position, plainly enough, is that a code of conduct is not the answer; you cannot legislate for ethical behaviour but you can encourage better standards by other means—is that essentially it?

Dr Russell—My position is that within our system these issues are very much determined by the Prime Minister of the day. So what we need to be working towards is acceptance by the current Prime Minister, or some future Prime Minister, that we do have a problem and that ministerial staff do have to be put back into an accountability structure where the ministers take responsibility for their staff.

Senator BRANDIS—But this is almost a yes or no question, Dr Russell. Do you think a code of conduct is the answer?

Dr Russell—When the Prime Minister accepts that, the Prime Minister of the day may find it convenient to put it into a code of conduct. But what I am trying to say is that we do not solve the problem one removed; it has got to actually be embraced by the Prime Minister of the day. So proceeding down a course which is adversarial to the Prime Minister, while possibly useful in the sense of attracting attention to the problem, is likely to be a distraction. The key thing is to get the Prime Minister to accept that ministers and he are responsible for their staff and then make him solve the problem. It is all very well to say it, but then he has to be responsible for the training of his staff, so that the staff know what is expected of them and so that he has put in place processes that actually make it work. 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. We probably need DVDs and people doing questions and answers.

I am familiar with this through financial markets, because it is the way the US regulate their financial markets. They actually have an educational process, an ethics process where every person working in the financial markets not only has to pass some examination but has to have refresher courses. They will do it all at their desk. It will be done off a CD. There is a constant attention to what is expected of people operating in the financial markets in the US. It would not be that difficult to set up in Australia a similar process where staff are constantly told what is expected of them and what is ethical behaviour—and it has power and influence, not because it is coming out of the bureaucracy or it is coming out of the parliament but because it is coming from the chief of staff of the Prime Minister. 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.

Senator BRANDIS—So it is more a matter of leadership than statutory formulae?

Dr Russell—Yes. There is a role for posturing, and I have nothing against that because I think out of posturing can come good outcomes.

CHAIR—You would agree with that, Senator Brandis?

Senator BRANDIS—I agree with most of what Dr Russell has had to say, Senator Forshaw.

Dr Russell—But I think we have to be very clear that the outcome we are looking for is the Prime Minister of the day bringing it down on his or her shoulders.

Senator BRANDIS—Dr Russell, I do not know if you follow Queensland politics but if you do you will agree with me that the fact that the Beattie government in Queensland has a detailed code of conduct would be almost irrefutable proof that codes of conduct are useless.

Dr Russell—I am not very familiar with that. I just read the submission. It did not seem that the person who was responsible for that was very busy.

Senator BRANDIS—Hearing Mr Beattie talk about ministerial standards is about as plausible as hearing Mr Bjelke-Petersen declaiming the Gettysburg Address. Dr Russell, I have one last question. In your experience, would it be right to say that most of the difficult or heated interactions between ministerial staff and departmental officials are more concerned with issues of timing or process, in particular deadlines, than with the substance of policy?

Dr Russell—I think it is probably hard to generalise.

Senator MURRAY—Dr Russell, I know, having read your material and heard some of your observations, that you have an educated understanding of the United States. The issues there, as you know, include the separation of powers and checks and balances, none of which has restrained extraordinary executive power. One of the issues I want to draw your attention to and get your reaction to is tenure and its effect on behaviour. From the early days, the Americans decided that power grows with time and that the abuse of power is more likely with time, so they restricted the tenure—

Dr Russell—Except with senators.

Senator MURRAY—So they restricted the tenure of presidents to eight years.

CHAIR—Senators can have a 60-year term.

Dr Russell—They can stay on until they are 100, too.

Senator MURRAY—In Australia, we have had 25 prime ministers. In the last 25 years, we have had three of the longest prime ministerial terms, the other one being that of Mr Menzies. Of course, in the States you have got fixed terms and you have got longer terms of parliament. I wonder if our system is inclining more perhaps towards longer tenure and whether that might be contributing to the growth in the power of the Prime Minister's office, or if this is just a kind of historical and statistical anomaly. But it does seem odd to me, when you look at Fraser, Hawke and Howard, that there seems to have been quite an increase when compared to the average over the previous 75 years.

Dr Russell—Again, it is hard to generalise. Successful prime ministers, by definition, stay around, and they certainly get better at it. You will find that many prime ministers do not really appreciate or understand the job when they get it. But they grow in the job pretty quickly, and you will find that some prime ministers grow to a great stature and become quite adept at it while other prime ministers get chewed up and spat out. Our system does not have limits, so if you are good at the job in our system you can stay a long time.

Senator MURRAY—I am going down this route because we have had evidence from witnesses, which I agree with, that the nature of modern politics and modern government is quite changed: it is far more rapid; technology imposes shorter decision-making times; the volume of information is greater; the legislative load is far greater and the ministerial responsibilities are greater—this is the substance of much of the evidence before us. All of this, of course, leads to more responsibility and more power in certain respects, and if you add tenure to the view that you and others have put about prime ministerial power you get to a situation where there is more power, more varied responsibility and perhaps more abuse of power which perhaps needs new systems, checks and balances and accountability mechanisms.

If my assumption is correct—that is, that you cannot go back and that you have to accept the reality of what is and how it operates—then the right thing is to introduce additional accountability measures and checks and balances to improve the system. In some of your

discourse, I got a hint of your belief that you could go back to the way in which it did operate, and I think you are wrong.

Dr Russell—Entrenching the principle that staff are an extension of the minister is, in a sense, going back to the arrangements under the Hawke-Keating years. It will be hard to do, because ministers and prime ministers like the new arrangements, which give them more ways of evading the system or enhancing their power. But I would not be totally despondent about it. This process here is very much part of lifting the level of awareness and the importance of the issue. Some Prime Minister will want to do the right thing because it will lead to better government. It will in fact lead to a more orderly and more efficient government and in the end would be better for the Prime Minister. Due process leads to greater predictability and a greater ability of ministers and prime ministers to deal with the problems that come along. By and large, due process is good politics.

Senator MURRAY—I agree with that.

Dr Russell—Unfortunately, because the pressures and the fierceness of the debate here are as they are, there is a temptation always, if you can get away from today's problem, to do so and worry about it tomorrow. If the window is there, more people will crawl through it. I am reasonably optimistic that some future Prime Minister will bring the discipline down on them again because it will actually set them up for a longer, more stable and better period of government. But they need to form that decision before they get into the job.

Senator MURRAY—I want to move on and distinguish between parliament and the government. The theory is that parliament determines its accountability measures and practices under the powers it gets from the Australian Constitution and under its own standing orders. In practice, the development of those things is a collaborative interchange with the government of the day. That is effectively how it gets on. But where there is a breakdown in that—and I think what we are discussing is a breakdown in many respects because there is an area of accountability which is not occurring—in my experience over the seven years I have been in the Senate, parliament will effectively impose or force through change, which is accepted in the end because it is the right thing to do.

I can give you an example. There really has been a massive improvement in the reporting, management and accountability of parliamentarians' entitlements and the way in which those operate. It was never welcomed by the government of the day; it was forced through by political and parliamentary pressure, reinforced by procedural motions and so on and so forth. What I am concerned with in your response—and it may reflect from or be a consequence of your background—is an overemphasis on the Prime Minister, not on the parliament.

What the parliament wishes to get is increased responsibility of ministers and their staff and increased accountability for things that go wrong. Your thesis seems to me to be saying that if the Prime Minister does not agree it is not going to work. My experience is that the Prime Minister of the day often has not agreed, parliament has told him how it will be and it has worked. How do you react to that?

Dr Russell—You are speaking of the parliament but in reality you are talking about the Senate.

Senator MURRAY—Absolutely.

Dr Russell—The Prime Minister does not worry that much about the House. As with all these things, the only real check and balance that we have in our system is the Senate. If the Senate disappeared tomorrow, or if we changed the powers of the Senate so it could no longer perform the role it does, and the Prime Minister of the day had 40 or 50 staff it would be all over, red rover—it would all be run out of the office.

The Senate is the only thing that really stands between the Prime Minister and total power over this country. I find it curious that the Prime Minister now wishes to diminish the power of the Senate. I suspect that would be very unfortunate for this nation. I do not want to make you all feel too good about yourselves, but the Senate basically performs the role that you are talking about where there are alternative views, where the government does not control the house and where there is an argy-bargy and people are entitled to posture. At the end of the day there is an outcome which is probably not driven exclusively by any particular view in the Senate but which the government of the day has to take account of, if that view has some credibility or credence. The Senate performs that role, and it is a useful role. If you think that the Senate can take that useful role and turn it into a process which drives the Prime Minister of the day to do things, it is not going to happen because there is a balance—and it is a useful balance—that we have built into our system. You cannot go about creating structures independently of the Prime Minister.

Senator MURRAY—That is where I want to test the proposition that in certain narrow areas you can. Let me give you an example of a narrow area. Yesterday I said that there is no constraint but convention on the powers of the Senate to call whomever they wish to answer questions relative to the expenditure of public moneys—none whatsoever—and that includes ministerial or MOP staff. The convention is that the Senate have not done that. In that narrow area, for instance, the Senate could decide to do so. Your point made earlier is that, of course, that does not oblige the witness to answer the question. The Americans and the British have recognised that and have said, ‘There is an area of executive privilege where it is right for you not to answer the questions, but you have got to front up.’

I am not exploring going a bridge too far and trying to overturn a system which works effectively and where the Prime Minister plainly has to retain a dominance and a priority in terms of his or her wishes. But in the more narrow areas of being accountable for what you do in the proper circumstances, I believe that the Senate can go down that route, without disturbing the essence of the system. What is your reaction to that?

Dr Russell—I am sure there are areas where the Prime Minister of the day will acquiesce in what the Senate wants, and it is all part of the argy-bargy of the politics that happen in this building. That is why it is a check and a balance. The Prime Minister does not have total control; he has to take account of the views of the Senate. The Prime Minister cannot behave as if the Senate does not exist, because the Senate does exist. The wise Prime Minister will work on that basis. Keating got the entire 1985 tax package through the Senate—

Senator CARR—And Mabo through the Senate.

Dr Russell—Yes. You can work with the Senate. Just because governments are thwarted by the Senate does not mean that bad things are happening. The government of the day, particularly

a government which is advised by a Public Service that no longer has the standing that it once had, does not necessarily have all the answers. The fact that the Senate is capable of changing a government's agenda and its legislation is not necessarily a bad thing. The government of the day does not have all the wisdom.

Senator WATSON—One of the difficulties, though, is that it is a lot easier for socialist governments to get important matters through the Senate than it is for conservative governments given the composition of the Senate.

Senator CARR—When was the last time we had a socialist government?

Dr Russell—The composition of the Senate changes. The composition of the Senate is determined by the Australian people, and there have been periods when the third party has actually been very much a right-wing party. The Australian people seem to quite like the idea that the Senate reflects an array of views. What those views are is very much determined by the people. It is not true that the Senate necessarily favours one party or the other.

CHAIR—Are there any further questions? I am aware that we are well over time.

Senator WEBBER—Bearing in mind that we are well over time, I think we have detained Dr Russell long enough.

CHAIR—I have one last question to finish. We had discussions this morning about the role of the Prime Minister's office under Paul Keating. Don Watson wrote in his book:

... Paul Keating defined how the government travelled. From where I sat he *was* the government—or sometimes *we* were. It was not that anyone thought the PMO had an absolute monopoly on wisdom. In fact much that was attempted or done was driven by or drawn down from the perceptions and advice of people outside ... those who complained most loudly that Keating and his office did not listen to outsiders were least often seen and never heard and their complaints came second-hand.

Do you agree with that statement?

Dr Russell—Don could not quite understand why more people did not come to talk to him.

CHAIR—On that note, thank you for your appearance this morning. As I said, it was very useful for the committee to hear your evidence as a former chief of staff. Thank you very much.

[12.12 p.m.]

BARRATT, Mr Paul Hunter, Principal/Director, CEO Collegiate Propriety Limited

CHAIR—Mr Barratt, I welcome you here today and thank you for your attendance and your written submission. You have been made aware of your rights and obligations in regard to appearing before our committee and parliamentary privilege.

Mr Barratt—Yes, I have.

CHAIR—As I think you are aware, we like to hear evidence in public, but if there is anything that you believe needs to be raised in confidence then you can ask to do so and we will consider that request at the time. We have received your written submission and are aware that you have had extensive experience in the public service going back many years and dealing with various governments. I invite you to make an opening statement and then we will go to questions from members of the committee.

Mr Barratt—I am appearing here as a witness based on my previous experience. I think it would be helpful for the committee if I give you the five-minute version of my submission. My submission solely addresses issues relating to staff who work in ministers' offices. I draw on experience gained over a period of more than 30 years, 14 of them at deputy secretary level and four as a departmental secretary. Over the course of this time I had significant interactions with the offices of 17 ministers and three prime ministers. The essence of my submission could be encapsulated in seven points. The 1984 amendments to the Public Service Act and the parallel introduction of the Members of Parliament (Staff) Act introduced major role confusion into the respective roles of minister and secretary. From 1984 onwards, ministers were to be involved in the management of the department as well as its strategic direction. This amendment to the Public Service Act, by definition, introduced into Commonwealth public administration a diffusion of responsibility, a reduction in the accountability of both minister and secretary, and, as a necessary consequence of these outcomes, 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.

In addressing any issues relating to the accountability of staff working in ministers' offices and the accountability of a government for them can be enhanced, it is of fundamental importance that their roles be clarified. This will only be achieved in a robust and sustainable way if the respective roles of minister and department secretary are themselves clarified. Subject to this clarification, there is a need for tighter definition of the roles of ministerial staff. 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. This is the way it used to be and, in my view, it has much to commend it.

Finally, 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. I will elaborate on some of these core points briefly. Reliance upon oral

communication exposes the nation to three principal areas of risk in relation to the highest level affairs of state. First, on authority: who is actually issuing this instruction? Is it in fact the minister or is it someone purporting to act for the minister? Second, on accuracy: who is being asked to do what and for what purpose, with what resources and by when? What precisely is the response of the minister or the department to the communication that initiated an exchange or sequence of exchanges? Third, on accountability: who did what and when, for what purpose and on what authority? Where there is no auditable paper trail accountability becomes far more problematical.

It might be argued that this would be a cumbersome and old-fashioned approach, but when a choice has to be made effectiveness is more important than the efficiency in managing the affairs of a nation. Getting it right first time and knowing who is accountable for what transpires has a lot to commend it. I would suggest that a regime along the following lines is practicable and strikes a fair balance between the confidentiality of transactions within the minister's office and the accountability of ministers and public servants to the parliament. First, 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. Any action taken pursuant to this advice would be taken by the minister or on the minister's instructions. The minister can be held fully accountable for this. Under these circumstances there would be no requirement for the accountability processes to penetrate the internal workings of the minister's office and nor would this be desirable. Second, communications between ministers' staff and ministers' offices should enjoy similar levels of confidentiality under the same conditions. Third, 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. 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.

In respect of the latter point, it seems to me an intolerable situation that, as seems to be the case at the present time, members of ministerial staff can give oral instructions to departmental officials that purport to be instructions from the minister but, being oral, are susceptible to claims that the minister was not aware of them and yet the staff member concerned cannot be reached by due public service or parliamentary processes. Similar concerns apply to the receipt of information or advice by ministerial staff. If information or advice is provided to ministers' offices by departmental staff, in my view only one of the following two approaches is tenable: either the information or advice, having been received by the minister's office, it is deemed to have been received by the minister, there being no conceptual distinction to be drawn for this purpose between the minister and the minister's staff, or, alternatively, there being a conceptual difference between the minister and the minister's staff, members of the minister's staff are liable to be tested as to what they did with the information or advice and when.

Addressing these issues is a matter of high importance as the first line of defence for the parliament and public in safeguarding our political system against the establishment of a political culture in which ministers can operate in an environment of plausible deniability. In order for any regime governing the actions and accountability of MOP staff to be robust and sustainable it is essential that department secretaries be in a sustainable position to exercise their prerogatives as embedded in such a regime—ensuring, for example, that departmental staff cannot be coerced or intimidated into behaviours that are not consistent with it. This means that

in order to achieve appropriate levels of accountability to the parliament and the public it will be necessary to address the extraordinary lack of security in office of departmental secretaries under the Public Service Act 1999. 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. Upon expiry of their terms, secretaries could be reappointed to their existing office or some other office, but there would be no presumption of reappointment beyond their current term.

So what should we do about this? I have put five recommendations in my submission for senators to consider. Firstly, in respect of the responsibilities of department secretaries, the Public Service Act 1999 should be amended to restore in effect the status quo ante prior to the 1984 amendments—that is, to establish that it is the secretary who is responsible for the general working of the department and the business thereof, and of course the secretary is accountable to the minister for that, as has always been the case. Secondly, whether or not that is done, the Members of Parliament (Staff) Act 1984 should be amended to define the roles of ministerial staff and that definition should be consistent with the respective roles of the minister and secretary. Thirdly, it should be made clear that instructions from a minister only have force and effect when they are conveyed in writing and that officers can rely upon having been instructed by the minister only when they have instructions signed by the minister or the minister assisting. Fourthly, the advice given to ministers by MOP staff should continue to be confidential but MOP staff should be held accountable and subject to scrutiny by parliament for all actions that go beyond that purely advice-giving function, including the obtaining of information and/or advice from departments. Finally, the Public Service Act 1999 should be amended to provide that secretaries must be appointed for a five-year term and that, having been appointed, they may be removed from office only for demonstrated incapacity or proven misbehaviour.

Senator CARR—Dr Shergold informed this committee that the current arrangements were working well in regard to the relationship between ministers' offices and the Public Service. He told us that he thought it was very important that there be different but complementary roles for the ministerial adviser staff and the senior management of the departments and there be an atmosphere of trust between them. In essence he was saying that it was working well. This committee has had other evidence to say, in support of your view, that there is considerable confusion in the roles and definitions and there is a pervasive atmosphere of uncertainty and mistrust. Do you agree with that? In your judgment are the present arrangements working well? Are you aware of any confusion, and in your judgment is there an atmosphere of uncertainty and mistrust in those relationships?

Mr Barratt—Of course, it varies from department to department, but I have certainly experienced at first hand circumstances where there was a pervasive atmosphere of mistrust and confusion. I think I have experienced the full spectrum of ministerial staff who well understood their duties and accountability to their minister and whose minister would be horrified to discover that any member of their staff had exceeded the bounds of proper behaviour. I have seen the other end of the spectrum where people seem neither aware of their duties nor

particularly concerned and have caused confusion, suspicion and mistrust between the minister and the department.

Senator CARR—Mr Barratt, the question you have raised about the role confusion of ministerial advisers is one that there is substantive support for, from the evidence presented to the committee. But I put it to you that another element of that is the role confusion concerning public servants. The role of the public servant is just as important as the role of the MOP staff—and understanding what that is. If public servants accept a culture of compliance or self-censorship in their dealings with ministerial offices then equally there is a serious problem for governance in this country. How do you respond to such a proposition?

Mr Barratt—I agree, and that is why one of the central propositions of my submission is that, to restore an appropriate system of checks and balances in which ministers, ministerial staff and public servants can play their proper role, it is necessary to address the issue of the tenure of secretaries, because a secretary can be out of office within 48 hours. As I said in my introductory statement, that means a secretary is not in a position to take a robust stance when ministerial staff intimidate their officers.

Senator CARR—Your experience is a case in point. I appreciate that. However, my role here—in terms of the work I do in this parliament—is not just as a member of parliament holding the government accountable but also to propose suggestions for how an alternative government might respond. I am sure many of my colleagues would say to me that in government they would have a reasonable expectation that they should get on with the head of a department and that there should be a close working relationship. It does not mean it has to be a compliant relationship. Under your model, what happens when a minister and a head of department just do not get on?

Mr Barratt—Part of my thesis would be that the ease with which a minister can dispose of a secretary means that there is not even the necessity to make the attempt. There needs to be some robustness to the position of secretary, as the chief executive officer of the minister's department. It is necessary to test and, if you like, be in a position to put to the Prime Minister the fact that this person is either unwilling or unable to do the government's bidding—that they are either incapable or misbehaving. I think it is necessary to create some robustness in the system so that ministers and secretaries need to at least attempt to get on.

Senator CARR—It has been put to this committee that the notion we have at the moment of a bias to action as part of a redefinition of the frankness and fearlessness of traditional advice has meant that it encourages secretaries to be less than forthright in their advice to ministers. Can you comment on that?

Mr Barratt—Could you elaborate on the 'bias to action' phrase?

Senator CARR—It is a term that the current head of the Public Service uses. We do not have 'frank and fearless' anymore; we have 'frank and honest advice with a bias to action'. Others have put to us that this term arose in Thatcher's Britain. Public servants had to demonstrate that they were can-do people, that they were not necessarily Tories but they were the sorts of people that a government could rely upon and that they were sound people who could get the job done.

It redefines the concept of responsiveness to ministers. I am asking you: could you comment on that proposition? In your experience, has there been a cultural change within government?

Mr Barratt—I must say that in my 30 years of experience in the Public Service I have never worked in a department that I would have thought was not responsive in an active way to the wishes of the minister of the day. It was a novel concept to me in 1984 that somehow departments were not responsive to ministers and we needed to change legislation to make clear that the minister was boss. That was a startling proposition to me—and remains so.

I think the problem that has arisen over the last 20 years is the discovery that secretaries are on—people use the term ‘contract’ loosely: there is no contract; there is an appointment—an appointment which can be terminated at any time. To the extent that there is a culture of compliance, rather than of action to give proper support to the government of the day, in my view it is traceable back to this issue that the minister can break the secretary’s rice bowl anytime he sees fit and the minister’s reasons for that cannot be tested.

Senator CARR—I am interested in this concept. My personal view is that the question of tenure has to be revisited. However the question still in my mind is: how do you get a relationship to actually work with any particular minister? I accept your argument that people are more likely to be forthright, particularly in their complaint about inappropriate behaviour from cowboys in ministerial offices, and that any government really needs to be protected from that behaviour. But I would be concerned to establish how it would work in a practical sense if a minister and a head of department did not get on. Under your model would you see it being possible to actually transfer people to other roles?

Mr Barratt—That could happen at the end of the day. I really do expect that that would be a rare situation. It has been my experience that it is a rare situation. Ministers are inheriting all the time secretaries that they have not chosen, and secretaries inherit deputies and first assistant secretaries and what have you. I was reappointed from one department to another as secretary and inherited 100,000 people that I had not chosen. The first thing you do is seek to make the best of the hand you have been dealt.

Senator CARR—I can see that point. Our formal position is that people should be given the opportunity to actually perform—after the next election, when there will be a change of government. We actually take the view that there ought not be a general clean-out.

Mr Barratt—There have been quite a few examples of people making a successful transition from one administration to another, sometimes to the surprise of all concerned in the sense that they have identified their efforts.

Senator CARR—Yes, I accept that.

Mr Barratt—There have been quite a lot of examples of governments leaving people in very senior diplomatic posts in office to do the work of the new government until the expiry of their term.

Senator CARR—I accept all of that. I come back to this problem though that the real issue here is the culture that is actually operating within the senior elements of the Public Service. The

previous witness, Dr Russell, said that that can be traced right back to the core of government, which is the Prime Minister and the Prime Minister's office and—as I say—the head of the Department of the Prime Minister and Cabinet. What do you say to that?

Mr Barratt—I am in very substantial agreement with Dr Russell's comments on those issues. The culture and tone of the way the bureaucracy works and the way the ministerial staff system works is going to revolve very much around what the Prime Minister regards as appropriate standards of behaviour.

Senator CARR—So in that sense the code of conduct really boils down to whether or not the Prime Minister and the head of the Public Service and the chief of staff in the Prime Minister's office want to actually make it work?

Mr Barratt—Indeed. I do not place a great deal of weight on a code of conduct, but I do not dismiss it entirely. I think the value of a code of conduct would be, in part, the process of settling its content, because at least in the process of debating, drafting and redrafting you would come to some settled view as to what are appropriate expectations about ministerial staff behaviour. It would be helpful to both ministers and their staff, who want to behave in an appropriate way, to know what is the sort of benchmark template of reasonable and appropriate behaviour. It would be helpful to public servants to know this is the settled view of the parliament and of the government about the behaviour of ministerial staff. I do not think it would be much help in relation to the people that are described in another submission as 'junkyard attack dogs'. The people for whom you most need the code of conduct are the people who will be least likely to have any regard for it.

Senator CARR—I think that view has some force to it. I come back to the issue that you are proposing, which is central to your submission, and that is the written instructions to departments from ministerial offices. You address the issue of practicality by saying that it is more important to get it right than it is to be efficient. I am a bit worried about that insofar as the volume of correspondence that may be involved could well make effective governance impossible. How do you respond to that?

Mr Barratt—I think you have raised an important point, but it raises a rather deeper issue. We have heard a lot about the rapid movement of events and how rapidly everything happens in government these days. In my experience, it has always been pretty rapid. I was deputy secretary of Doug Anthony's department for most of the Fraser years. I can remember occasions—this is in the days before emails and all the rest of it—where I got a phone call from the minister's office saying, 'So and so is coming in to see the minister at midday. The minister wants a brief because he has now found the person wants to talk to him about X,' and there was just time to call in my secretary, dictate a minute that, just in terms of time, could not run to much more than a page, rip it off the typewriter, run over with this piece of paper in my hot little hand, hope I would get a parking space outside Parliament House and burst into the minister's office about five minutes before the person and sit there while he read it, and then I would sit there through the meeting.

CHAIR—Is that familiar to you?

Senator CARR—It is extremely familiar.

Mr Barratt—The minister did not get from me: ‘Jeez, there isn’t time. I suggest you say “X” to him.’

Senator CARR—But you did not get a written instruction to prepare a brief, did you? You got a phone call.

Mr Barratt—Yes, I got a phone call, but we were operating in an atmosphere of trust and all of the substantive content was in writing. All I was told was that the minister was seeing somebody.

Senator CARR—I can accept that, but my concern is that your model, if I understand it correctly, would lead to an extraordinary administrative burden and require ministerial staffs of real size just to deal with communications between the departments. However, if you are suggesting that the big questions may well be the subject of written advice but the incidental details be on the basis of verbal communication, then I do not see what is really different from what is happening at the moment.

Mr Barratt—I would have to refresh my memory on the details, but on my reading of the accounts of the children overboard affair there are some pretty important things happening by telephone.

Senator CARR—I agree.

Mr Barratt—And irreversible steps are taken on the basis of phone calls. I recently had a conversation with a former colleague who said that he used to get lots of instructions, purportedly from the minister, from a particular senior advisor to the minister. As soon as he started sending emails back to the office saying, ‘This is what I understand you to have asked me to do. This is what I am going to do,’ both the frequency and range of the instructions narrowed very considerably, because there was a paper trail about what was being asserted the minister had asked for and about what the minister was purportedly requiring of the department.

Senator CARR—I do not have great difficulty with that, but it was a question of every communication being in writing.

Mr Barratt—Did I say every communication? I said every instruction, didn’t I?

Senator CARR—So you distinguish between instructions—

Mr Barratt—If there is a substantive instruction to do something, there ought to be a paper trail, and there ought to be a paper trail about what was done. That is my point.

CHAIR—I assume that, in the instance you gave us, a paper trail would be commenced at your end—in other words, a note would be made that a telephone call was received and there would be a description of what was required, if action were required.

Mr Barratt—One does one’s best. But, again, if there is no discipline at the other end, you can be bombarded by telephone calls. You can spend your life making file notes.

CHAIR—Yes, it is something that all members of parliament experience, too. People ring you up and ring you again. It is not unusual.

Mr Barratt—I have had the experience of being asked to send advice in draft so that the staff can look at it before it is signed off.

Senator CARR—Have you had that experience?

Mr Barratt—I have.

Senator CARR—Has material been sent back to you?

Mr Barratt—I have had requests to send it in draft so that it would not need to be sent back. I have had requests not to send it through the rounds, so that it is not formally registered that the minister has it. I declined to play that game and handed it personally to the minister in the presence of the chief of staff. I read in the newspapers for the next six weeks that the minister was waiting on advice to the department, because, in the view of all concerned at the other end of the process, the fact that it had not been logged through the paper tracking system meant that the minister had not received advice.

Senator CARR—The other example that has been put to me is that there is a difference between official and unofficial advice. Have you come across this concept?

Mr Barratt—Yes, but I think this is the game we are playing. I just do not accept that, when a minister receives a piece of paper from a secretary, that it could in any way be unofficial advice. Advice is advice.

Senator CARR—Except when you are doctoring reports, which is an experience I am referring to. Has this been a change in pattern that you have observed across the years? You have observed 17 ministers. Has this been a practice that you have observed?

Mr Barratt—I think there has been an evolution over that time. The most difficult experiences I had have been quite similar in a way, but they were at 20-year intervals and involved both political parties. So it is in the nature of the minister and the chief of staff the minister chooses, and it is in the culture of the minister's office. On the sides of both political parties, I have had ministers who I thought were almost too concerned about the department not straying into the political area. There was quite an excessive preoccupation with propriety.

There are always grey areas, so it is encouraging to have a minister who feels that strongly. I do not think it is a party style thing, but it is a system that has been growing over 20 years. I think the best performance and the best relationship between a minister and a minister's office comes when the culture of the minister's office is set by a group of people who have long experience in public administration and who understand the environment: how the parliament works, how the Public Service works, and what the respective roles are.

Senator CARR—The demographic of the Australian Public Service is such that we are likely to see one-third or so of the entire service move out within the next few years. I know that in some departments there has been an extraordinary departure of senior executive officers. Will

this problem become worse when you are getting a rapid promotion of junior officers into the SES ranks or is it something that can be managed by an education program?

Mr Barratt—It is something we will have to manage by an education program. I fear that the culture has changed so much over the last 20 years that there is no corporate memory of what it used to be like. Some people say that is a good thing.

Senator CARR—There is no corporate memory of what happened five years ago, let alone 20.

Mr Barratt—Yes, that is right. We just have to make the best fist we can with the people we have and attempt to train them. I certainly agree with Dr Russell's view that the in-service training of people who are playing a vital and very influential role in the processes of government, parliament and the interactions between the government and the bureaucracy is very important. That is a very important investment to make. At least then no-one can say that they did not know what was expected of them.

Senator MURRAY—On the code of conduct issue, I agree that in many respects codes of conduct can have limited value. The one in my mind, though, if it were to be introduced, would need additional components to it—namely, complaints should be able to be made for breaches to it. Those complaints should be capable of being objectively evaluated, and penalties should then be capable of being applied and enforced. To my mind, once you have got that mechanism, a code of conduct becomes very much a tool to be used and with real effect. You said that you did not go as far as Dr Russell's kind of antipathy—I thought it was—to a code of conduct. How do you react to the kind of model I am talking about?

Mr Barratt—I think it is worth considering. One of my problems with a code of conduct is the question of how you enforce it. What you are proposing is a way of bringing both an inquiry process and sanctions to bear when people violate the code. Almost by definition, a code of conduct becomes more important when there are sanctions for breaching it. I think there is some reason to believe at the present time that people would be rewarded for behaving inappropriately, because it would be regarded as clever politics: this person is showing that they are politically astute.

Senator MURRAY—Yes.

Mr Barratt—Somehow the cultural environment has to be that if you behave in inappropriate ways you are a liability to everybody.

Senator MURRAY—Does the Public Service code of conduct have those elements that complaints can be made and objectively evaluated and that penalties can be applied and enforced?

Mr Barratt—I am not aware of examples of that happening.

Senator MURRAY—That is right. It is mostly a value statement, isn't it?

Mr Barratt—It is said to be a statutory obligation. It is a statutory obligation. As a person outside government now who is simply an informed newspaper reader, I see examples of things that suggest to me that people are not living up to the APS values and codes of conduct, but I do not see examples of where people are brought to account for this.

Senator MURRAY—We have had evidence to us about a code of conduct which has utilised mechanisms used in other countries—the commission of public standards sort of approach and others. Is there any particular process mechanism that you have an interest or belief in as a way of doing things? For example, would you use an existing accountability office, if you like, such as Mr Podger's office, or would you see a new institution being created to manage these areas?

Mr Barratt—My personal view is that accountability has to come back to the minister and that it ought to be set up in a parliamentary framework. I see value in making the chief of staff responsible for the smooth and proper operation of the minister's office, but I think the chief of staff is accountable to the minister and the Prime Minister for that. My preference when things go wrong would be to see the minister being cross-examined in parliament about why this went wrong and why either the wrong chief of staff was in place or why the chief of staff did not perform their duties. It seems to me that calling the chief of staff to account directly by the parliament is again allowing the minister to slip out of it and say, 'Geez, I didn't know.'

Senator MURRAY—One argument we have heard about the ministerial code is that, regardless of its non-application or its limited and selective application over the last few years, nevertheless ministers who do wrong are subject to the full force of parliamentary questioning and debate, and of course media examination.

Mr Barratt—The one thing that they are liable to in particular is that the media can always compare the observed behaviour with the written word in the code of the conduct—and they do.

Senator MURRAY—But such a mechanism—such a political and public mechanism—does not exist for MOP staff—

Mr Barratt—No.

Senator MURRAY—and that really is a key difference.

Mr Barratt—But I would be reluctant to let ministers too much off the hook in terms of accountability for the behaviour of MOP staff. I prefer the model where the MOP staff are extensions of the minister and the minister is accountable for everything they do. I accept as a qualification to that Don Russell's suggestion that if a minister seeks to walk away from that we go directly to the MOP staff. But it is a big statement for the minister to say, 'I'm walking away from my office.' There would be consequences to that as well.

CHAIR—Can I just follow that up. I am trying to remember the precise details of the most recent example of a situation like that, which was when the chief of staff of the Prime Minister's office, Mr Morrison, and other staff effectively—

Mr Barratt—Fell on their swords.

CHAIR—fell on their swords over the travel issue. That was a case where they failed to advise the Prime Minister—or the claim was that they failed to advise him. I suppose it could be argued in one sense that the system worked, but it was the staff who paid the ultimate penalty, if you like.

Mr Barratt—Yes, but there was a logic—

CHAIR—But, if that was a conscious decision by them not to advise their minister, then—

Mr Barratt—Yes, but there was also an internal logic to that, where the person to whom they were accountable said, ‘These people have failed me and I am terminating their roles.’ We have seen some examples more recently where it was said, ‘These people have failed me. They didn’t tell me,’ and you wait for the heads to roll but—

CHAIR—They get moved up the ladder.

Mr Barratt—you do not see any sign at all that any sanction has been brought to bear for this failure.

CHAIR—I was just thinking also that in some ways the irony of it is that in the former situation, where the staff member has resigned or is terminated, a Senate committee investigating that issue would have certain powers to call those people which would not be available—at least by convention, as Senator Murray said earlier—if they were still staff. Whether they do it again is another issue, of course. Thank you.

Senator MOORE—Mr Barratt, when you were head of the department, did you have any doubt about the role that the minister’s staff had when they contacted your office or any of your staff members? Were they contacting your office on behalf of the minister or on their own behalf?

Mr Barratt—I do not wish to particularise it—to talk about particular departments—because I do not want to speak—

Senator MOORE—As a department head, then—

Mr Barratt—implicitly. Can we just make it ‘as a department head and as a deputy secretary’?

Senator MOORE—Sure, as a department head, yes.

Mr Barratt—As someone occupying that space for a period of 20-odd years, I have had the very strong impression on a number of occasions that I was dealing with someone who had their own agenda and was doing things of which the minister was not aware.

Senator MOORE—When we heard from Dr Shergold and Dr Watt yesterday, I asked a similar question, and their responses were very similar. They said that, as department heads, in any communication with ministers’ offices, they were under the impression that the staff were

speaking on behalf of ministers. If there was any doubt about that from any member of their department, it was their job to clarify that with the minister.

Mr Barratt—Yes, indeed.

Senator MOORE—That is how you would see the role of a senior person in the department?

Mr Barratt—Yes, certainly.

Senator CARR—How often would that have happened to you in your 17 years of experience?

Mr Barratt—Quite frequently in particular ministerial environments, and not at all in others. So I come back to the point that it depends on the minister and the culture of the office.

Senator CARR—I agree with that. We have got to find a dope test in any system we propose, because there are dopes that manage to bugger it up for everyone.

Senator WEBBER—I think we are meant to be in charge of that.

Senator CARR—We were told yesterday that in the experience of the head of the Public Service she has only observed it twice. You have seen it more than twice?

Mr Barratt—Sure. I want to go back to a point that Senator Carr raised earlier about the volume of correspondence. That volume of communication is a very important issue here. The growth in the size of ministers' offices has contributed to the volume of and lack of discipline in the advice that goes to a minister's office. These days, what the hapless secretary can find is that in putting a considered piece of senior level advice to the minister you are competing with a process where half-a-dozen different members of the ministerial staff are talking to all sorts of people in the department, some of whom are not in a position to know. I have had thrown in my face advice from an extraordinarily junior level person that someone bumped into, and he was simply not in a position to know. People can be flattered by having their opinions sought by very powerful people. So you have got a parallel process going on: half-a-dozen staffers talking to this person and that person without doing a proper filtering process of asking, 'Does this person know?'; and a considered piece of advice going to the minister, to which it is said, 'But we have been told so-and-so.'

Ministers have got a self-imposed burden, which I trace back to the 1984 changes which had the minister and secretary as co-responsible for managing the department. Often, the minister is actually acting on information they have received that has never been through the secretary's hands and may well be wrong, but the secretary is accountable for advice given by the department. One of the issues in all this is: what constitutes advice given by the department? If it is a telephone backgrounding from someone who is not in the loop it is a pretty dangerous process.

Senator MOORE—One of the issues we talked about yesterday was that in the modern environment the Public Service no longer has the monopoly on giving advice; we work in an environment where there is contestability of advice. So people are getting a whole range of

views—which is disturbing if one department is providing a range of views without a point within the department where it comes under formal advice—coming through. That was actually raised as a positive—that having this wide range was improving ministerial advice. But what we did not hear yesterday was the point you have made about the range of advice sources within one department; that was not explored.

Mr Barratt—I have no problem at all with the contestability of advice. My proposition is that there needs to be a capacity for the department to bring forward disciplined, considered advice that the secretary will stand by. That is why I would like to see a restoration of some degree of an arms-length process whereby the secretary is uniquely accountable for everything the department does and the minister is entitled to say to the secretary or one of the deputies, ‘Advise me on this subject,’ and get something that is the departmental view that is in writing and that the department will stand by, no doubt about it.

Senator MOORE—Then it is able to be questioned.

Mr Barratt—It does not matter to me who else they speak to. The minister is the minister; the minister is responsible for the decisions that are made. My view about ministerial prerogative goes to the point that—unusually, amongst public servants—I am troubled by the process whereby in cabinet submissions there is a requirement to put in coordination comments from departments. In my view, all that ought to be on the cabinet table is what the minister thinks. The fact that the Department of Finance and Administration thinks that, the Department of the Treasury thinks something else and the Department of the Environment and Heritage thinks something else again is something for those ministers to bring up in the cabinet discussion if they are persuaded by that. I do not mind where ministers get their information from as long as there is a clear, traceable process of advice from the department.

Senator CARR—Your approach to cabinet submissions is probably a bit unusual—

Mr Barratt—Very unusual.

Senator CARR—in the sense that people have come to take the view that they actually like to see things in writing. You were suggesting before that things be in writing as to what people actually think about proposals. I thought you were saying before that the secretary currently, under the present agreements, is not responsible for what happens in the department. The advice I have from some evidence put before this committee by the head of the Department of the Prime Minister and Cabinet is that his officers were responsible to him as secretary and he was, in fact, responsible to the minister. Are you saying that is not right?

Mr Barratt—There is no doubt that the secretary is responsible for the advice that goes forward, but—

Senator CARR—No, for the actions of departmental officers. Yesterday Dr Shergold said to us that, just as he can assume that ministerial officers were speaking on behalf of the minister, others were entitled to assume that officers in the department in which he was the secretary were working to him. Are you saying that that is not how it works?

Mr Barratt—It is not always how it works, and when you have a member of ministerial staff saying, ‘Yes, but I’ve talked to someone, unnamed, in the department who told me thus and so,’ you are starting to lose control of the process.

Senator MOORE—You have actually lost control of the department.

Mr Barratt—And you may not even be told that this conversation has taken place.

Senator CARR—That is a different proposition from saying that you are not responsible for what goes on in the department. People may act in an unauthorised way, but you are still responsible—

Mr Barratt—Yes, that is right.

Senator CARR—unless you do something about it, like saying that it was wrong. That is a process similar to what others have said to us should be applied in ministerial offices. So do you agree that that is what should happen, or is that what does happen?

Mr Barratt—I agree that the secretary should be responsible for everything that happens in the department. That is my thesis, and that ought to be reclarified.

Senator CARR—My point is: is that how it works at the moment?

Mr Barratt—I am saying that the current arrangements make it very difficult for the secretary to enforce, particularly in a large department, because it is difficult for the secretary to be aware of everything that is going on.

Senator MOORE—And it everts the proposition we have heard on a number of occasions that the integral relationship in the mechanisms of how these things operate is the relationship between the minister and the secretary. So, given the same legislation, given the same interpretations, some arrangements are working quite effectively.

Mr Barratt—Yes, sure.

Senator MOORE—It is when they fall off, when they disintegrate, that you have the issues which you describe.

Mr Barratt—Yes.

Senator MOORE—I have one point on Senator Murray’s comments about codes of conduct. Certainly my understanding of the code of conduct in the Public Service is that it has now become embedded and that people are working with it. It is my understanding that public servants can be personally assessed in their performance assessments on how they are performing on the code of conduct issue. So it is not just an issue that people can be disciplined by; it is an issue about how their performance can be assessed for effectiveness in their jobs. I asked some of the departmental people yesterday: ‘As people representing people in the public sector whose staff members do have a code of conduct in interaction with people who are working in ministers’ offices and do not have one as such—even if it is not as effectively

implemented as we would like, there is some guidance there against which you can be assessed—does that create any tension at all for public sector workers in their understanding of their accountabilities as opposed to people who do not have the same restraint?’

Mr Barratt—It does to a degree. But I would also question whether the code of conduct stands up in intimidating situations where people are being told that their careers are on the line if they do not do what is being asked of them.

Senator MOORE—But it is like lots of situations—to implement something means a degree of martyrdom, that you put yourself forward.

Mr Barratt—Tell me about it!

Senator MOORE—Exactly.

Senator WEBBER—In some of the discussions we were having yesterday with Dr Shergold, he outlined the fact that he no longer liked to use the term ‘frank and fearless’ advice. He thought that it had become a little bit of a cliché and devalued and, therefore, he preferred the term ‘frank and honest’ advice. I thought we should be able to automatically presume that the advice we got from a department was honest—

Mr Barratt—I would have thought that was a threshold issue.

Senator WEBBER—and, therefore, there was more value to something being fearless. I was wondering if you would care to comment on that.

Mr Barratt—I think genuine honesty takes you in the direction of ‘fearless’. The oath that you take when you give evidence before a court is that not only will you tell the truth but you will tell the whole truth.

Senator CARR—That is not entirely a concept—the whole truth.

Mr Barratt—I would have thought that advice that was genuinely honest would be given without fear—or one would hope it would be given without fear.

Senator WEBBER—Is it your perception that the concept of being fearless is a bit clichéd and devalued within the public sector?

Mr Barratt—The fact that there have been several years of belittling the concept does not alter its substantive content. The words ‘frank’ and ‘fearless’ separately have a very clear meaning in the English language. They are pretty good labels to attach to what ministers are entitled to expect from departments.

Senator WEBBER—Thank you.

CHAIR—Thank you, Mr Barratt, for your attendance today and also for your patience with the fact that we are running over time. Your evidence has been very useful. We appreciate it.

Mr Barratt—Thank you.

[1.06 p.m.]

TONGUE, Ms Susanne Patricia (Private capacity)

CHAIR—Welcome, Ms Tongue. You have been provided with details regarding your rights and obligations in appearing before a committee and also details regarding the operation of parliamentary privilege. If you wish to present any of your evidence in camera, you may make that request at such time and the committee will consider it. Do you have any comments to make about the capacity in which you are appearing today?

Ms Tongue—I am a director of Sherton Consulting and I am appearing as a private individual.

CHAIR—Thank you. We have received your submission, and we appreciate that. Would you like to make some opening comments, then we will proceed to questions?

Ms Tongue—I will be very brief. I am a former senior public servant and ministerial staffer. Now I consult in the area of the code of conduct in the Public Service. I conduct investigations into breaches of the code of conduct and I train in political management with People and Task. I am very conscious, in the discussion that I have listened to, of the perception that a code of conduct may not be worth having. My submission basically makes two key points: there needs to be training of ministerial staff and a code of conduct for ministerial staff.

CHAIR—Thank you. In respect of the code of conduct, you state in your submission:

A code for MOP staff is desirable, even if it is only a declaratory document.

Firstly, do you favour a legislative based code of conduct? If there were to be only a declaratory document, could you comment on the limitations of that? Secondly, should it cover all MOP staff, or do you draw a distinction—as a lot of the evidence that we have received does—between ministerial advisers in ministerial offices and other staff covered by the MOP(S) Act, such as electorate staff?

Ms Tongue—Ideally, it would be legislative, just as the code of conduct is for the Public Service. A declaratory document is definitely a fall-back position. It should cover all staff. In discussions that I have listened to, one of the difficulties we have had is that a lot of the talk has been at the high-end level—the minister to the departmental secretary kind of thing. Mr Barratt was talking about the range of people who talk to the department. Often the more junior level people in the minister's office work in that complex environment without a clue as to how the system works, what the budgetary requirements are and, importantly, what the law says. The other thing that has been lost a bit in the discussion is the fact that with the separation of powers there are three arms—not just the executive and the parliament but the judiciary too. We must not forget that administrative law plays an important role in this area.

CHAIR—When you say 'all staff', the MOP(S) Act of course covers the staff of both government and opposition backbenchers, who I would suggest as a general proposition do not have the same relationship with the Public Service that ministerial officers do. They still have a

lot of contact. I know my office staff do when they are following up issues on behalf of constituents who bring problems to them, but it is a different relationship from staff in a ministerial office. What about those staff? Am I correct in assuming that it should primarily be directed at ministerial staff? Or, if you were to have a code of conduct that applied to all MOP staff, how would we ensure that electorate staff, for instance, do not get caught up in issues regarding accountability and responsibility that may not really have ever been intended to apply to them?

Ms Tongue—I see the point that you are making. I can see the difficulty, but 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 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. Whenever I have talked to electorate staff in different capacities over the years they have been extremely grateful for training on anything that helps them to understand Canberra.

CHAIR—I am not going to the issue of training; it is more about issues which relate to the ability to, say, call staff before committees as a result of the operation of a code of conduct. To be frank, the pay scales for electorate staff are not very good in my view, despite whatever increases they may have got. I think that point has been made by other senators. It might be a further difficulty. Anyway, I hear what you say.

Senator MURRAY—You were going somewhat along lines I am interested in, Chair. Let me put this to you, Ms Tongue. The attention in this inquiry so far has been mostly on ministerial staff—probably for good reason—but, from a parliamentary and public point of view, non-ministerial staff who are allocated to the opposition parties and electorate staff have major needs and, in some respects, strong accountability requirements. For instance, take the shadow responsibilities. They are very significant indeed. Opposition staff have to help develop policy for the alternative government, and in the case of both the opposition and the crossbench parties, such as the Democrats, the staff concerned are actively involved in determining the outcome of major legislation which can affect billions and billions of dollars. Then you get the electorate staff. House of Representatives duties and constituency calls are entirely different to those of senators, and the staff have a very different set of needs. My understanding of that whole mix is that training, systems and accountability mechanisms are all poorly developed. Your submission focuses on just one part of the problem. How would you seek to improve training and accountability for varied needs in the non-ministerial area?

Ms Tongue—It would be in the same way that it is done in the Public Service. In the Public Service I train people from the level of an ASO3—a very junior level—through to SES. There is a range of different experience of things like the privacy legislation, what discrimination means or freedom of information requirements. Really, it is quite possible to adjust training packages to suit different needs. Most people are surprised, when they receive training, how much they did not know—they had been operating in a vacuum, not understanding the context in which they had been working. I think you would approach it in that way. In my submission, I was talking particularly about ministerial staff, because when I was a ministerial staffer I saw the need for training. That is my experience. But certainly electorate staff have needs too.

Senator MURRAY—Bear in mind that the public sector has an ethos of recruitment, induction, training and development which you go through. People obviously come in at

different levels as required, but generally speaking that is so. Parliamentarians, by and large—unless they have been through the system of being parliamentary officers—come in without real understanding and real training and so on. They learn by osmosis and through their own skills and abilities. My impression both of the parliament for parliamentarians and of the parliament for staffers is that it is very poor in real training and development terms. There is no development system. Have you had an opportunity to appraise the evidence and the systems which Finance claim to be quite well developed along these lines?

Ms Tongue—The best practice guides developed by ANAO and Finance?

Senator MURRAY—No, the training programs that the finance department say they have for MOP staff. Have you had a chance to appraise them?

Ms Tongue—I have never participated in them. I have heard about them.

Senator MURRAY—But you have no professional knowledge or understanding of them.

Ms Tongue—I have no professional knowledge. Certainly ministerial staff whom I have talked to have had no training, but that is anecdotal.

Senator MOORE—I know your reputation in the public sector, so, in terms of the statements you made in your introduction that you have actually been involved in investigating some issues around the code of conduct, I think it would be interesting for us as a committee to hear generally about how seriously those issues are taken in the public sector and the kinds of things that come to an independent investigator. We have all read the code of conduct. It would be nice to see exactly where that goes if someone is in the situation of being investigated.

Ms Tongue—It is basically approached like any administrative investigation. I am appointed as an independent investigator by the department. I am provided with papers on the record and then I conduct investigations by asking witnesses what occurred. For example, if it was an allegation that someone was not treating clients courteously and with respect then you take evidence from the witnesses to the incident and weigh it up just like any administrative investigation. It is taken very seriously in the Public Service. I agree that the code of conduct is now embedded, and the latest release from the APSC—which was just last week—on further guidance is very valuable. It is embedded but still in its early days; but it has great potential to improve the culture in the Public Service.

Senator MOORE—And, in your own experience, the department is actually implementing it; so it is not just a document.

Ms Tongue—Yes, definitely—across a range of departments.

Senator MOORE—And that is over a period since 1999?

Ms Tongue—Yes.

Senator MOORE—So it is not that old?

Ms Tongue—No.

Senator MOORE—I have asked some people at senior levels in the public sector about their perceptions of them being senior in an area where their members are covered by a code of conduct dealing with people in quite senior areas who are not covered by such a document. I am trying to find out whether people have views about that: whether that actually does create tension in itself and whether people understand that they are governed—I think that is the appropriate word—by such regulation whereas the people with whom they are dealing are not.

Ms Tongue—I think there are definitely tensions. The basis of my submission is my view that you have to have mutual respect. I consider that I worked in a very successful ministerial office. It helped that we were lawyers in the Attorney-General's office and we were working with lawyers in the Attorney-General's Department, so we had a base of mutual understanding about behaviour and so on. It was less successful in offices where that did not exist. It would be much better if every participant in the process—and they are all trying to achieve good government—had a shared value system to work with together.

Senator MOORE—You heard Dr Russell's evidence earlier. Do you see any conflict between a code of conduct on performance and the concept of full ministerial responsibility for the people who work in ministerial offices?

Ms Tongue—No, I would have thought that ministers who believe in good government would expect their staff to comply with the code of conduct.

Senator MOORE—So it would not erode the concept of ministerial responsibility to have a code of conduct for employees?

Ms Tongue—The only way it could erode it is when you get to the sanctions area, and that is the tricky area that has been identified. What do you do if someone complains about someone in a minister's office? Inevitably, that will happen. I used to take calls in the minister's office—I was in charge of the difficult calls—from vexed constituents who spoke for hours. I have no doubt that they would have complained about me being discourteous at the end of the conversation. What do you do when you get a complaint like that about a breach of the code? Ultimately the minister is responsible—it is the minister who I was responsible to—and they have to investigate.

Senator MOORE—Do you have any comment on the concept of having the chief of staff in the Prime Minister's office and the opposition leader's office being administratively responsible for ministerial offices across the wider range of ministerial processes?

Ms Tongue—That would be a big management job and it would certainly distract them from their main work, I would have thought. I see no problem with the concept. When I worked in a minister's office—it was a long time ago—the chief of the office was the one who was responsible.

Senator MOORE—For each individual minister's office?

Ms Tongue—Yes, for each individual minister's office. We would have had virtually no contact with the Prime Minister's office and no sense of them being in any way responsible for us.

Senator MOORE—My understanding of what Dr Russell put forward was that that would be the line responsibility within each minister's office but the overall responsibility to entrench the infrastructure and also to entrench the responsibility of the Prime Minister for the operations would be back with the chief of staff in the Prime Minister's office. So the process described by Dr Russell was a tiered one.

Ms Tongue—That has theoretical appeal. The system lends itself to that structure.

CHAIR—When did you work in a minister's office?

Ms Tongue—It was a long time ago, in the Old Parliament House.

CHAIR—Just out of interest, are you able to say in which year and for which government?

Ms Tongue—It was from 1983 to 1985.

CHAIR—Of course we can obtain the details of this case, the Ozmanian case—and I know some senators and the committee secretary are already aware of this case. Would you just like to quickly make a further comment about that because you do specifically refer to that case in your submission?

Ms Tongue—Yes. I refer to that case because it exemplifies what can happen in a minister's office. When a minister has a responsibility to take a decision and the decision is actually taken by a staff member, it can be a question of whether they had the delegation to make that decision. In administrative law a lot of the leading cases have come up through the immigration area, because that is one of the most litigated areas. This case exemplifies that. It was a case of the minister's discretion being exercised under the Migration Act and the department making a decision—or was it a recommendation made by the department?—about whether that discretion should be exercised and then it coming to the minister's office and a letter being sent from the minister's office back to the person.

CHAIR—As there are no further questions, thank you, Ms Tongue, for your appearance and also your patience, given the fact that we called you later than previously arranged.

Proceedings suspended from 1.26 p.m. to 2.04 p.m.

EVANS, Mr Harry, Clerk of the Senate, The Senate

CHAIR—This hearing of the Senate Finance and Public Administration References Committee is resumed. I welcome to the inquiry the Clerk of the Senate, Mr Harry Evans. I was going to read you out this long statement, Mr Evans, but I think you know what I am about to say.

Mr Evans—I am passably familiar with it, Mr Chairman.

CHAIR—Yes. I do not think I need to go through the usual formalities about rights and obligations when appearing before committees. I appreciate the fact that you have agreed at somewhat short notice to appear today. It was prompted particularly by your correspondence to the committee where you gave an indication of a potential format of a code of conduct for staff under the MOP(S) Act, which of course has been the subject of much discussion and submissions to our inquiry. I invite you to make some opening comments and then we will proceed to questions.

Mr Evans—I am happy to proceed just on the basis of the written submission.

CHAIR—Without further ado, I will ask Senator Carr to commence the questions.

Senator CARR—Can you enlarge upon your reference on page 1 of your submission to the roles of personal staff? We are talking about essentially, I suppose, ministerial advisers, although you speak of personal staff more generally. You say that some ministerial advisers meet the description of ‘junk-yard attack dogs’. I wonder if you could explain to us what you meant by that.

Mr Evans—First of all, that is not my expression. I believe it is an American expression which was reported—

Senator CARR—You do identify it as an American expression. But it is in your submission.

CHAIR—There is a footnote.

Mr Evans—I also identify it as coming from Professor Patrick Weller’s book.

Senator CARR—Yes, you do.

Mr Evans—You heard about Professor Patrick Weller earlier in your hearings. But I think it is one of those apt phrases, as so many of those American phrases are. It indicates that some ministerial staff see their role, and some of their employers see their role, as a matter of going out and frightening and savaging people who they think ought to be frightened and savaged for the good of the cause. Some staff perform that sort of role. As I stressed in the submission, certainly not all do. There is an enormous disparity in roles and the way people see their roles amongst those staff.

Senator CARR—So the question then goes to one of culture, in essence, as I read that particular paragraph. It reads:

They are problems arising from the culture of those personal staff.

It is an issue that concerns me greatly in terms of this inquiry. How do we effect cultural change in any system of government, the assumption being that there has been a cultural shift in recent times?

Mr Evans—Effecting cultural change is very difficult, as the committee would know, in any organisation or in any context. As I go on to say in the submission, I think you can effect cultural change by prescription—in other words by prescribing codes of conduct and giving a legislative expression to what sort of conduct is expected of people in these sorts of roles—and by having some policing mechanism of the sort that I have suggested. That is not going to effect change overnight but that sort of legislative prescription can eventually effect the sort of change you want to bring about.

Senator CARR—You say on page 3 that:

This culture of politically active ministerial staff, able and willing to do anything to assist the political cause of their minister and government, in the long run causes more harm to governments than good, as it leads to, or exacerbates, difficulties such as those exposed by the Select Committee on a Certain Maritime Incident.

Can you enlarge on the sort of behaviour that you see is covered by that expression?

Mr Evans—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.

Senator CARR—Is that with regard to the children overboard affair? Is that what you are referring to?

Mr Evans—As I said, that was one of a number of incidents.

Senator CARR—A question has come before the committee about the culture of not only ministerial offices but also the Public Service. Would you agree it is an important component of a discussion of this nature?

Mr Evans—Yes, indeed. And, as I said, a large part of the problem is public servants being very wary of being seen to be obstructionist or raising difficulties or putting obstacles in the way

of what governments want to do. They want to be responsive, to use the jargon term, and not to be labelled as obstructive and difficult and so on. Their natural reaction now is to jump to, to salute and to get on and do what they are being told to do and not to think about difficulties and potential problems. That is not healthy for the system of government.

Senator CARR—In your submission you say:

Some public servants seek to enhance their careers by following the pattern set by ministerial staff.

I take it that by that you mean they imitate?

Mr Evans—Yes, I think so. A lot of public servants are getting the message that the way to get on in the Public Service is to be a can-do operator—to get on and do what needs to be done and to not worry about process or legal problems or difficulties of that sort; to be a smart operator and to get things done without too many scruples about the way you get them done. That message has been given to public servants in recent times.

Senator CARR—Does that not lead us back to the question of who is actually setting the tone of the Public Service and who is setting the tone of the ministerial offices?

Mr Evans—Yes, indeed, and I have said in the submission that the cultural problem arises from the employing members and senators in the first instance. I have said that some personal staff and ministerial staff are indistinguishable from the traditional model of the public servant. That is because the message they get from their employing member or senator is that that is the role that is expected of them. If they get a different message, they perform a different role.

Senator CARR—This is why I come to the point about the leadership role of the Prime Minister in determining codes of conduct within ministerial offices. Don't you think that that is ultimately where these issues come back to?

Mr Evans—I think too much of this has been left to the executive government—that people tend to say it is up to the government to do something. My reaction is that it is up to the parliament to do something.

Senator CARR—I understand that is your way to fix the problem. I am asking the question: what is the responsibility of prime ministers, as heads of government, for the actions and behaviour of their governments?

Mr Evans—Of course, they are ultimately responsible.

Senator CARR—Equally, isn't the head of the Public Service responsible for the responses of public servants?

Mr Evans—Yes, indeed—and I think there is a problem with the sorts of messages public servants are being given.

Senator CARR—That leads me to the next question, and that is about the way in which public servants respond to the parliament. I have seen your views on the question of commercial-

in-confidence, for instance; I think you argue that there is an increasing use of the concept of commercial-in-confidence, of executive privilege or advice to ministers as a means by which basic evidence and information is excluded from public scrutiny. Have I understood your view correctly on that?

Mr Evans—Yes, basically. As I have said in the submission, one of the things we have been doing at the direction of the Senate—by resolution of the Senate—is talking to public servants and telling them how they should interact with parliamentary committees. One of the things I say to them is, ‘Before you make a decision to withhold information, make sure that you’ve got some sound, defensible and persuasive basis for withholding the information’—in other words, if it could interfere with the conduct of legal proceedings and so on; those well-known legitimate grounds—‘but do not put yourself in the position of withholding information because it might be politically embarrassing. What you have to do is say to the political wing of government, “If you want to withhold information on purely political grounds, you have to make that decision and you have to defend it.” It’s not up to us as public servants to make such a decision and defend it.’ The reaction I get from public servants is, ‘Well, it’s easier said than done. It’s not that easy.’ And I say, ‘Yes, I know it’s not that easy, but I think that’s what has to be done in order to preserve a professional Public Service.’

Senator CARR—When you look at the questions that have been raised in this committee about the sort of material in the *Griffith Review*, about self-censorship, about a culture of compliance emerging within the Public Service and about public servants actually taking on the behaviour of ministers—for instance, reclassifying research reports as ministerial advice or rewriting advice to make it palatable for government—it does not seem to me as though your entreaties are having much success.

Mr Evans—I was afraid somebody would say that! Senators have remarked to me before that our efforts in speaking to these groups do not seem to be changing things. My response to that is that the problem is much more deep-seated than we can overcome by talking at seminars. That is my story, anyway, and I am sticking to it.

Senator CARR—I appreciate that. That is my point as well.

Mr Evans—I think it is a big problem. I say to these groups of public servants, ‘It is not your job to withhold information or manipulate information for political reasons. If that’s going to be done, let it be done by the political wing of government.’ And, as I said, their answer is: ‘Well, it’s not that simple.’

Senator CARR—And therefore we come back to the question: what is the enforcement mechanism? Unless there is a cultural change within government, I am wondering what other mechanisms are realistically available that could effect a cultural change.

Mr Evans—Here we are dealing with only one small part of a big problem. Senator Carr is pointing out that there is a big problem there. Here we are only dealing with one small part of that big problem—namely, the way in which some personal staff and ministerial staff conduct themselves. I think you have to tackle that small part of the problem first and see how far that leads you towards solving the bigger problem. How you solve the bigger problem I really do not know. I think the fundamental problem is that government has come to be seen as determining

what the facts are. In other words, there is no such thing as an objective fact anymore; the facts are what the government says they are.

Senator CARR—What the truth is.

Mr Evans—Yes. The art of government is the art of making the facts conform to your view of the world, making the facts appear as you would like them to appear, manipulating information and manipulating the public's perception of the real world rather than dealing with the real world itself. That is a huge problem, and how you get over it I do not know. As you say, there has to be an enormous change in political culture—but how do you achieve it? I suppose the answer is that you achieve it by piecemeal changes like the ones we are talking about here.

Senator CARR—Alternatively, you achieve it by changing the attitude of the government, which often begins by changing the attitude of the Prime Minister.

Mr Evans—That might be more difficult and more complex than—

Senator CARR—A good election could intervene on that, couldn't it?

Mr Evans—As I have said, a big problem is the way in which government has come to be perceived nowadays. It is significant that the same problem has occurred in the other jurisdictions that we like to compare ourselves with. It has occurred in a big way in the UK, as summed up in the expressions 'spin doctoring', 'the government is all spin and no substance'. You see the same problems in the United States and in other countries similar to ours. Somewhere along the line, government has come to be seen as the art of manipulating the facts and making the facts appear to be what you would like them to be. How you change that, I do not know. I suppose you change that by constant exposure of the problem and by educating people to go beneath it.

Senator CARR—Your proposition is basically saying that you do not really need to attract the support of the Prime Minister to get those changes; you can just impose it by resolution of the Senate, presumably.

Mr Evans—What I am suggesting in the enforcement model—if you would like to call it that—which the committee asked me to enlarge on, is a statutory scheme. It would need parliamentary enactment and a statutory structure of policing—to use that term. So it would not just be a resolution of the Senate. I do not know that a resolution of the Senate alone would solve the problem.

Senator CARR—This is the notion of a one-person tribunal, appointed on the nomination of the government with the approval of both houses of parliament.

Mr Evans—Under the statute. What I envisaged was that these provisions would be put into the MOP(S) Act or put into the statutory law somewhere and that the tribunal would operate on that statutory basis.

Senator CARR—This tribunal would determine the fates of ministerial officers?

Mr Evans—No. Again, what I have recommended is that the tribunal investigate complaints and then make reports and recommendations to the employing member or senator and receive reports back from the employing member or senator on the action that they have taken in relation to the recommendations, and then have an option of making reports to the two houses or the relevant house on particular cases where that is thought to be justified. It is not an enforcement mechanism as such; it is a mechanism which would depend on seeking the cooperation of the employing members and Senators, with the mechanism of public exposure as a last resort, as it were.

Senator CARR—Do you see this applying to the personal staff of senators and members as well?

Mr Evans—Yes, all the people employed under the MOP(S) Act.

Senator CARR—Would you see that extending to the work they do for political parties, for instance, as part of their normal duties?

Mr Evans—I think part of your code of conduct would have to be delineating what they are supposed to do and what they are not supposed to do.

Senator CARR—For instance, if they were involved in a political party on a policy committee, would you see that as a legitimate function for personal staff?

Mr Evans—I suppose that depends on whether they are acting for their employing senator or member.

Senator CARR—It is pretty unusual when they do not.

Mr Evans—Whatever they do, they should be acting for their employing senator or member.

Senator CARR—Occasionally they do not. Abbott found out, for instance, that—

CHAIR—Minister Abbott.

Senator CARR—Yes, sorry, Minister Abbott.

CHAIR—I was not sure which one you were talking about.

Senator CARR—I want to get an understanding of the extent of what you are proposing. Is it all staff employed under the MOP(S) Act?

Mr Evans—Yes.

Senator CARR—And all behaviour?

Mr Evans—This tribunal would be able to receive complaints and investigate those that it considered worthy of investigation relating to alleged breaches of the code.

Senator CARR—Right. Thank you very much.

Senator MURRAY—Mr Evans, I was appalled by something Dr Shergold said yesterday, when, to use my encapsulation, he accepted the doctrine that it was at the generous whim of ministers that public sector bureaucrats turned up here to answer for the programs that they administered. It occurred to me that I might make a request of you, if the chair was happy for that to happen. We need a short paper from you which indicates the gap between the powers of the Senate and the conventions we have accepted.

Let me explain what I mean by that: my view is that the Australian Constitution, supplemented by statute in some circumstances and the standing orders of the Senate, pretty well gives untrammelled powers to the Senate to summon who it wishes to appear before it on matters of the collection, expenditure and administration of public moneys. It is the Senate which has decided that to some extent it will let there be ministerial discretion about who attends, and it is the Senate which has decided that personal staff shall not attend. There is no power or legitimacy in the claim that they should not attend. Furthermore, I think it is the Senate which has decided that members of the other house should not attend as ministers. Perhaps you could spell that all out so that, once and for all—although perhaps once, if not for all—it can be clear in this report as to what the gap is between the conventions the Senate has allowed the adoption of and the real powers that it has.

Mr Evans—I can certainly do that, Chair; I can set it out in a paper for the committee. But Senator Murray's summary is basically accurate. The power to summon any person in the jurisdiction as a witness is there. It is basically a convention that ministers are asked to send the appropriate officers and that officers are not normally directly summoned. It is also a sort of understanding that personal staff are not summoned or do not appear. I would not give that the status of a convention; I think it is just a sort of general understanding. Basically, Senator Murray, your summary is correct.

Senator MURRAY—Except that I have not added in all the constitutional references and the sort of stuff you would wrap your paper in.

Mr Evans—I can certainly set it out.

Senator MURRAY—If the chair is happy for that to happen.

CHAIR—Yes.

Senator MURRAY—Thank you. The issue that I follow on with is this: I have long gone past any debate in my own mind as to whether some ministerial personal staff should appear here or not. My question is: who and in what circumstances and how would executive privilege apply? It is my understanding of your submissions—because I think we have your submission and the letter—that you hold the same view. Would you restrict the basis on which personal staff should appear in any major way or would you rather give them leeway as to what they may say, which is the executive privilege concept?

Mr Evans—As I think I have said in the paper, I have no difficulty with a convention, if you like, that personal staff do not appear, on the basis that they are no more than the faithful agents

of their employing senator or member—in other words, they have no decision-making capacity of their own; they do not make decisions on their own. They are simply the agents of the senator or the member, and the senator or the member takes absolute and total responsibility for all their actions and does not seek to put up the excuse: ‘This wasn’t done by me; it was done by my staff.’ If that were the situation and everyone accepted and applied that, I would have no difficulty with a convention that personal staff do not appear, simply on the basis that they are nothing more than the agents of their employing senator.

Senator MURRAY—The difficulty I have with that is that I do not think you can change reality. Both your remarks in your submission and in evidence today and the remarks of others indicate the reality is that some—I do not even get the impression that it is the majority—ministerial staff do act with executive authority and will continue to do so. It is a kind of consequence of the nature of the minister, the character of the minister, their own character and the nature of modern government. I will go further and suggest to you that it might be desirable in some circumstances. I see no reason whatsoever why personal staff responsible to the Prime Minister should not have the de facto executive authority. I would think it desirable that you know that their judgment and their considerations are of that kind. If the reality is that they are going to continue to be individuals within that staff structure who act and exercise de facto executive authority, isn’t it far better to accept that they will be accountable to the Senate but to determine the limitations on who will be accountable to the Senate and what they will be required to be accountable for, which essentially was Professor Weller’s approach?

Mr Evans—If that is going to continue to be the reality then I think there is every justification for those people to appear in parliamentary inquiries, tell parliamentary inquiries what they know and give an account of themselves. As to any limitations, if that is the situation, I cannot readily see what limitations there ought to be.

Senator MURRAY—That is where you get into the discussion of executive privilege—matters which are to do with direct policy advice, personal and political communication, and that sort of thing.

Mr Evans—In the paper that you have requested, Senator Murray, I will probably point out that there is no such thing as executive privilege. It is a term covering a claim made by executive governments which has never been accepted by any legislature worthy of the name.

Senator MURRAY—So it is another convention?

Mr Evans—It is not even a convention; it is a claim which is raised from time to time that legislatures do not accept and have not accepted. You can think of circumstances where the proper pursuit of an inquiry into a matter of public interest could require that a member of personal staff be asked about what advice they gave. It depends entirely on the circumstances of what the matter under inquiry is and what needs to be known. I do not think you can say, ‘These people are exercising executive authority. Therefore they should be required to give evidence,’ and then say, ‘But there are some areas which are off-limits.’ Once you get to that stage, I do not think you can reasonably say that there should be any areas that are off-limits.

Senator MURRAY—Another area I have identified as making the situation a little worse is a further degree of separation. As you know, more often than not ministers appearing at estimates

who are asked about activities in ministers' offices are often ministers representing the minister and they have absolutely no idea of what goes on in that minister's office: they do not manage it, they do not manage the staff, they do not have any knowledge of the day-to-day processes. It is a worthless form of inquiry. Being able to call the actual chief of staff, as has been suggested to us, would short-circuit that problem, wouldn't it?

Mr Evans—Yes, certainly—and I was tempted to add that some Senate ministers do not want to know what goes on in the offices of the people they represent. That system of Senate ministers representing other ministers creates all sorts of problems, and that is one of the problems it creates. Yes, certainly, if you can talk directly to the staff you short-circuit that problem, as you say.

Senator MURRAY—Just remind me about something. I agree with the view that members and senators should not be required to appear before committees of each house but I do not hold the same view of ministers. I think ministers, as members of the executive, should be required to appear. There is no real impediment, other than precedent or practice, to prevent the Senate requiring the Prime Minister or any other minister to appear before a Senate committee, is there?

Mr Evans—No. That is correct, and you draw a distinction which is a perfectly valid one. It is quite appropriate that there be a convention that Senate committees do not question members of the House of Representatives about their activities as members. There is no convention, and there should not be a convention, that they do not question ministers about their activities as ministers, regardless of which house they come from. After all, the system of Senate ministers representing their colleagues and being responsible to the Senate acknowledges the fact that the Senate and its committees can ask questions about the activities of House of Representatives ministers as ministers. So you are quite correct: there is no basis for one house not being able to question ministers from the other house about their ministerial activities, their executive activities.

Senator WATSON—Other witnesses have suggested that, while the Senate can pass what motions they like, certainly if they go too far or do not get the agreement of the Prime Minister that is where they will stay and it will be just another exercise in futility. It may be a study of ethics, but that is where it will stay.

Mr Evans—That is why, in dealing with the particular problem that we are looking at—the accountability of personal staff—I have not suggested a resolution of the Senate; I have suggested a statutory scheme which would require legislation by both houses.

Senator WATSON—Would that stand on its own or would it be an amendment to the MOP(S) Act?

Mr Evans—I envisage it would be by provisions inserted into the MOP(S) Act.

Senator MOORE—Your paper actually reflects on information that you have received and on what you have observed, and you reflect on the discussions that public servants have engaged in during the whole series of training courses that you run. The problem that I have arises from listening to evidence over two days. There are some perceptions that everything is working splendidly and that there is a perfectly based complementary relationship based on trust. Then

there are perceptions, which have been brought out in a number of submissions that cannot be evidenced because they are based on hearsay, that there are concerns—there is an environment of fear. How to balance those levels of evidence is difficult in terms of the process.

Mr Evans—That is a very great difficulty; you are looking at something that basically goes on in secret and getting evidence of it is difficult. But you do get glimpses of it. As you say, my submission is basically based on personal observations—talking to public servants and talking to other people involved in the system of government. It is very difficult to obtain hard evidence, but there are bits of hard evidence out there and the bits of hard evidence are very suggestive that there is a big problem. One of the bits of hard evidence I would refer you to arose in the Select Committee on a Certain Maritime Incident when letters were written from a minister's office to that committee and those letters became public. You only have to read those letters to say to yourself: 'Something is greatly amiss here. If a member of a minister's staff can write that sort of letter to a committee, there is a problem.' Where did the idea come from that that sort of letter could be written by a member of a minister's staff to a parliamentary committee?

There is a problem and there is a symptom of the problem. When I talk to public servants I say to them: 'This is what you should be doing; this is how you should be reacting to a parliamentary committee. You should be telling members of the political wing of government that, if they want to mislead a parliamentary committee, they have to take political responsibility for it.' The answer I get is: 'It's not that easy; the problem is not that simple.' I get that answer from every group I talk to. They smile and they say, 'You're pretty naive; you don't know how the real world works.' Based on that sort of observation, I think there is a problem.

Senator WATSON—How widespread is this problem?

Mr Evans—I believe it is a general problem. As I have said in the submission, it varies greatly from office to office and minister to minister. Public servants will say to me: 'We're lucky. The way our minister's office operates, we don't have that problem. We know that, if the private secretary says that the minister wants something, we know that the minister wants it. And if they say the minister has made a decision about something, we know that it really is the minister's decision. We are very lucky.' And others say, 'We're not so lucky.' It is a widespread problem, but how widespread? I cannot give you hard evidence of that either.

Senator WEBBER—Some of the evidence we heard yesterday, particularly from Dr Watt and his colleagues from the Department of Finance and Administration, described the wonderful training that is provided for staff under the MOP(S) Act and how that has been reviewed, particularly in light of the report from the inquiry into a certain maritime incident, and how everything is fine now and everyone understands their responsibilities. I am not entirely convinced of that. A long time ago I was actually employed under the MOP(S) Act and I do not recall any wonderful training, but there you go. Have you seen any evidence of that training regime being changed by DOFA or PM&C, or anywhere else, after that report?

Mr Evans—No, and I would not necessarily get the evidence of that. In some of the seminars that I attend for public servants there are senior officers of the Public Service there who give messages which are entirely consistent with the messages I give. They say, for instance, that you must never mislead a parliamentary committee; you must always give a truthful answer regardless of the political implications of it. But I think there is a disparity between the rules that

are laid down and people's perception of how the real world works. They say, 'Yes, that's the rule but we all know that the world doesn't work that way.' That is the problem.

Senator MOORE—A point we have been hearing from a number of people is that the whole process operates on the effective relationship between the minister and the departmental secretary. If that relationship is strong and effective, the other things fall into place. Is that an argument with which you agree or concur?

Mr Evans—That is certainly a necessary condition for the whole relationship to work, but I do not think it is sufficient. You can have a very happy relationship between the minister and the secretary and still have problems at other levels, so I do not think that is the entire solution. But, again, it depends on what role the secretary of the department sees themselves performing. A minister and a secretary can get on very happily because the secretary sees their role as making sure that what the minister wants the minister gets, regardless.

Senator CARR—And that precludes the need for a ministerial adviser's intervention, if there is someone in that job who is prepared to do the dirty work for a government.

Mr Evans—Those are not my terms. As I say, the relationship can be a very happy one but not conducive to good government.

Senator MOORE—The point that was made was that, if there were any problems in the relationship between ministerial advisers and the way they were interacting with the Public Service, and public servants and the way they were interacting with the ministerial advisers, it would work up through the hierarchy very effectively and then the two heads would be able to communicate and fix it. That is not too simplistic, is it?

Senator WEBBER—No; we have been told that repeatedly.

Mr Evans—I do not think that is necessarily so.

Senator MOORE—I thought it was a bit straightforward.

Mr Evans—The public servant would think, 'This person from the minister's office is asking me to do something, and I have doubts about the propriety or the legality of it. The solution to that problem is for me to raise it with senior officers and, if necessary, up to the secretary, but what reception is it going to get from those senior officers and the secretary? Is it safe for me to raise it?' and that depends on the message that they have got from further up the hierarchy.

Senator MOORE—And we have found out that the message coming from the hierarchy is often unwritten.

Mr Evans—Certainly, yes.

Senator MOORE—It is a cultural, environmental thing that people suddenly feel. We have had a number of submissions from people talking about the relative strength of having codes of conduct in place and how they would work. Do you have any particular view on how a code of conduct would be developed and implemented with this group of workers?

Mr Evans—I was hoping the committee would not ask me for my idea of what should go into a code of conduct!

Senator MOORE—What about the process for developing one?

Mr Evans—I think developing it would be a complex task, and determining what goes in it would be a complex task, with great room for disagreement. But I think it is something that this committee, for example, could undertake, using the people that you have been taking evidence from. You could get those people to give you their ideas, put them together and synthesise a reasonable draft code of conduct. That, obviously, would not meet with agreement everywhere, but that would be a start.

CHAIR—I would like to draw attention to the fact that two of the recommendations of the ‘children overboard’ report—the inquiry into a certain maritime incident—went to that sort of proposition about developing a code of values or a code of conduct using the committee system of the parliament, the Public Service Commission and the Department of the Prime Minister and Cabinet, but we have not yet received a response from the government to those recommendations. Mr Evans, can I ask a couple of questions. Firstly, you state in your supplementary submission regarding how a code of conduct might be administered:

The function of the tribunal would be to receive and investigate complaints of breaches of the code ... Complaints could be received from any source.

How do you envisage that such a tribunal might ensure that the myriad complaints that might come in from the public about staff of members, senators and ministers do not clog up the system? I can envisage that, for unsatisfied constituents who get to the end of the road—they have contacted the government, they have contacted the department and they have contacted the opposition and they still do not get their problem solved to their satisfaction—the next thing is, ‘Let’s go to the tribunal and complain that this person did not do their job.’

Mr Evans—It would be up to the tribunal to give a fairly clear indication of the sort of complaint it will consider. In other words, they do not really want to know that the private secretary to the minister refused the request for an additional pension or something, because it is obviously nothing to do with the private secretary; it is up to the minister as to whether the person gets a pension or not. I think there would have to be a fairly clear set of guidelines set out as to what sort of complaint the tribunal—

CHAIR—Oftentimes, I know the complaint—and I know that committees get this sort of complaint—is that, because the person does not get the outcome they desired, they then look to blame a staff member or a member of parliament. Under this parliament, the member or senator would not be subject of the investigation; the complainant would say, ‘The staff member did not take my complaint seriously and did not follow it through,’ when all of that could be totally untrue. It is just that then you end up with a long investigation into something that, at the end of the day, is quite wrong or fruitless.

Mr Evans—I think the person constituting the tribunal would have to make some quick decisions about whether things are worth investigating or not and be able to judge whether there really is something to a complaint or not. That may mean that justified complaints are not

investigated, but I think it would still be an advance on the current situation, where there is no mechanism. The member of the tribunal would have to be non-legalistic and would have to exercise a fairly quick judgment about whether a complaint is worthy of investigation or not and whether there is something there worthy of investigation or not.

CHAIR—Can I also go to your proposition that the person who would constitute the tribunal would have had no current or previous involvement in the political system. One point here could be: why exclude people that have had a previous involvement in the political system, given that, I would assume, they should have an understanding of way in which the very issues they could be looking at operate and they should understand the system?

Mr Evans—There are two reasons for that. One is the matter of public confidence. I think people would have more confidence in the system if it were someone outside the political system. But also, I think there is value in someone from outside the system performing this role, because their assessments and their views are not coloured by their knowledge of how the system really works. They are not going to say to themselves, ‘Yes, we all know that that is how the system really works and therefore this is not worth looking at.’ It is good in this sort of area to have someone completely outside the system who can say, ‘If that is the way the system works, I am not sure there isn’t something wrong with the system.’ That is why I put in the paragraph saying that if the tribunal thought there were some systemic problems arising in this area then they could make a report on those systemic problems and what they thought ought to be done about them.

CHAIR—I have two other things. Firstly, does your proposal—and it is an issue that arises with other proposals about having a legislative framework for accountability for ministerial advisers and other MOP staff and, say, a legislated code of conduct—effectively legitimise a greater independent status for ministerial advisers and relevant MOP staff? If it is seen that they can be made personally accountable or brought before a tribunal or whatever then might that not entrench the separation? The argument that we heard from Dr Russell is that the focus should be on the ministerial adviser being an extension of the minister.

Mr Evans—Yes, that is certainly a consideration. The reason I have suggested this model is that I think the sort of people we are talking about should be more like public servants and less like members of parliament. These people would still be hireable and fireable at the discretion of the employing senator or member—there would be no doubt about that. They would be personal staff in that sense. But there is value in them being able to perform something like a Public Service role in being able to say to their employing senator or member, ‘What you’re proposing may have these and these and these problems.’ In other words, they should be a real adviser who sounds cautionary notes and draws attention to possible difficulties in proposed courses of action and so on. It would be valuable to the whole system of government if they were more like that. In other words, 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.

Senator WEBBER—My question slightly departs from that issue. This is about your personal interaction. When you personally deal with a ministerial staff member, is it your view that he or she speaks with the authority of the minister?

Mr Evans—We assume that, unless we have some indication of the contrary. I always assume that, unless there is something that indicates there is something wrong somewhere.

Senator WEBBER—Does it happen often that there is an indication that there is something wrong somewhere?

Mr Evans—Not often, but it does happen. This is one of the things I say to public servants: you have to be in the position of being able to say: ‘I think I’d better have a further talk to the minister himself, or herself, about that. I can see what you’re proposing, but I really think I ought to talk to the minister personally about that, because there are some problems with it that they ought to be aware of.’ If the member of personal staff says, ‘Okay, I’ll arrange a time,’ you know you probably do not have a problem. If they say, ‘The minister’s very busy; he won’t be able to talk to you about that,’ you know there may be a problem.

Senator WEBBER—Indeed. Thank you.

Senator WATSON—Mr Barratt suggested earlier today that all communications between a ministerial office and the department should be in writing. Do you agree?

Mr Evans—I do not think that is realistic. I do not think you can say that all communication should be, but all significant communication—

Senator WATSON—Certainly communications of an instructive nature.

Mr Evans—Significant communications of an instructive nature, yes. One of the things that led to impatience with the old-model Public Service was that they were always writing memos. People said to me, in fact: ‘Why do public servants insist on writing memos about everything? I don’t want any more memos—just tell me.’ But an essential safeguard of the proper functioning of the professional Public Service was putting things in writing where appropriate.

Senator WATSON—It is an indication whereby you can demonstrate that there has certainly been a measure of due process, which seems to be lacking with some of these problems.

Mr Evans—Yes. Quite a number of the problems that have arisen have been problems of record keeping—

Senator WATSON—A lack of records.

Mr Evans—If you like.

Senator WATSON—A lack of record keeping.

Mr Evans—Yes, a lack of record keeping.

Senator WATSON—What are your views on the current level of training for ministerial advisers?

Mr Evans—I am not sure that there is any level of training. As I said in response to the question earlier on, I do not have any direct knowledge of that but I certainly have not come across training as such of those sorts of staff. There may well be something, but I do not really have any knowledge of it.

Senator WATSON—Where advisers deal with intermediate officers within a department directly, is this not a reflection on a weak departmental head in allowing such things to take place?

Mr Evans—No, not necessarily. I think with somebody in a minister's office there is no problem with them knowing who in the department is dealing with a particular matter, as they can talk to that person in the department and they can get information directly from that person in the department. I do not think there is any problem with that as such. I think the problem arises if the ministerial staff member is making some request with which there may be difficulties of propriety or legality and the departmental person does not feel comfortable in raising those questions. That is where the problem arises.

Senator WATSON—Shouldn't all such approaches be accompanied by a memo to the departmental secretary to ensure that he is in the loop?

Mr Evans—I think that degree of written record keeping is probably unrealistic. I do not see any problem with a person in a minister's office ringing up the person in the department that they know is responsible for a particular matter and saying, 'The minister urgently needs some advice on that matter. Can you fax me over some material on that as soon as you possibly can?'—with no time to put it into a memo and no time to be sending copies of memos everywhere. There is no problem with that sort of interaction as such. The problem arises if the departmental officer thinks there is a problem with the request, such as there are personal privacy issues involved, and does not feel that they can raise that problem except at risk to themselves. Ideally, the departmental person should be able to say: 'There's a difficulty with that. We can't give you that document because it has got private information in it and we would have privacy problems.' And the ministerial person is thoroughly understanding of that and says: 'Of course, yes. How can we get around that difficulty? How can we give the minister what the minister needs in this case without causing that problem?' If the ministerial adviser is impatient with that sort of response and unaccepting of that sort of response, that is where the difficulty arises.

Senator WATSON—In terms of your tribunal approach, the problem appears to us to be essentially at the ministerial adviser level. What is the point of extending it to electorate staff? Essentially they are dealing with day-to-day issues with people in the electorate; they are not dealing with consequences of government and making policy decisions.

Mr Evans—I think the case for having this sort of arrangement is far stronger for ministerial staff than it is for members' and senators' private staff. The only reason for covering everybody is to ensure that you are treating everybody alike. These people are alike in the sense that they

are personal staff employed under the MOP(S) Act and employed at the personal discretion of their employing member or senator, and therefore there is a case for treating them all alike.

Senator WATSON—But you are probably creating a bureaucracy that is bigger than it needs to be. If the problem is in a particular area or relates to a particular group of people essentially, that has implications for government rather than for an individual senator or member in the discharge of their electorate duties.

Mr Evans—If you were to say to me, ‘Let’s confine this purely to the ministerial staff and not extend it to personal staff,’ I would see no difficulty in principle with that, because that is where the problem lies and where you want to solve the problem.

CHAIR—A similar distinction has arisen in industrial law. There was the case of Loty and Holloway, where a distinction was made between clerical staff who were working for a trade union and were supposed to be doing the usual clerical type duties and those who were more involved with the politics. There have been decisions that have distinguished between the respective rights of these employees in terms of the management of their organisation. Whether it is still current, I do not know, but it is a similar sort of example.

Mr Evans—In other words, you are confining it to a level of staff as well as to ministerial staff.

CHAIR—What happened in that case was that both employees were dismissed and one was reinstated and one was not. One was deemed to have not been involved in the management politics. Whether or not that was the case is another question entirely!

Mr Evans—I do not see any difficulty in principle in confining this system in that way—in other words, confining it to the place where you think the problem lies.

CHAIR—Thank you very much, Mr Evans, for your attendance this afternoon and also for being understanding about the delay to your scheduled appearance. We had a very full today and yesterday and we certainly appreciated your attendance and your submission. We will await your paper. Thank you.

Mr Evans—Thank you, Chair.

Committee adjourned at 3.07 p.m.