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**BETWEEN LAW AND CONVENTION: MINISTERIAL ADVISERS IN
THE AUSTRALIAN SYSTEM OF RESPONSIBLE GOVERNMENT***

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Abstract

Ministerial advisers have been increasingly thrust into the limelight through scandals that appear on the front page of the newspapers. Political advisers have also come to prominence through television series such as *The Thick of It* (UK), *The West Wing* (US) and *The Hollowmen* (Australia). The rise in significance of political advisers has occurred in Westminster countries such as the United Kingdom, New Zealand and Canada. This has led to increasing scrutiny of their role and influence in traditional Westminster advisory systems.

This working paper traces the rise in the power and significance of Australian ministerial advisers. It shows the fundamental shift of the locus of power from the neutral public service to highly political and partisan ministerial advisers. The working paper addresses the issue of whether there are any constitutional conventions that regulate the appearances of ministerial advisers before parliamentary committees. This paper draws on material from interviews with prominent Australian Ministers and Members of Parliament from all political persuasions.

It is hard to feel sorry for politicians. But yet it is undeniable that a modern day Minister has many different responsibilities, including managing policy, the media, and political issues. Ministers also have to mediate with and appease various stakeholders, including constituents and interest groups. Within the political structure they have to work cooperatively with their Prime Minister, Members of Parliament and their political party. It is impossible for one person to shoulder all these tasks single-handedly.

Newly elected Ministers are faced with a vast and bewildering bureaucracy inherited from the previous government. Although the public service is meant to be impartial, Ministers may not be willing to trust the bureaucracy, which had just been serving their opponents a few moments ago. Ministers understandably have the desire to have partisan advisers whom they trust to advise them. This has led to the rise of the ministerial adviser.

Ministerial advisers are personally appointed by Ministers and work out of the Ministers' private offices. In the last 40 years, ministerial advisers have become an integral part of the political landscape. It all started from the informal 'kitchen cabinets', where a small group of the Minister's trusted friends and advisers gathered around the kitchen table to discuss political strategies. This has since become formalised and institutionalised into the role of the partisan ministerial adviser, as distinct from the impartial public service. The number of Commonwealth ministerial staff increased from 155 in 1972 to 423 in 2015; an increase of 173%.

Ministerial advisers undertake a wide range of functions. Tony Nutt, a former ministerial adviser, stated that 'a ministerial adviser deals with the press. A ministerial adviser handles the politics. A ministerial adviser talks to the union. All of that happens every day of the week, everywhere in Australia all the time. Including frankly, the odd bit of, you know, ancient Spanish practices and a bit of bastardry on the way through. That's all the nature of politics'.

In my research, I interviewed 22 current and former Ministers and Members of Parliament, including four former Premiers, two former Treasurers, five former senior Ministers, one leader of the Greens, and two former Speakers of the House.

A strong theme that comes through the interviews is that ministerial advisers are extremely influential. The interviewees stated that some ministerial advisers, such as the Chief of Staff of the Prime Minister and very senior Ministers, were more powerful than many Ministers and Members of Parliament. Former Deputy Premier John Thwaites stated that:

Often the ministerial advisers you find in the Prime Minister and Premier's office are as powerful or more powerful than some Ministers. The Head of the Media Unit, the Chief of Staff and maybe one or two advisers in the Prime Minister's and Premier's office are more powerful, have more influence on the decision-making in most cases than certainly junior Ministers and more than most Ministers.

Some ministerial advisers are also given significant discretion to speak on their Minister's behalf. Beyond this, there is an intimacy that develops between Ministers and their advisers due to the high pressure political environment and long working hours involved in a Minister's office. Former Minister Lindsay Tanner said that:

There is an intimacy in a ministerial office. People work ridiculous hours. You are living in each other's pockets. It is a relatively small area. You are under intense pressure. So the perceived power of ministerial advisers, some of it just arises from that intimacy. And by definition you have access, and you're talking about the weather or the football. So there's a trust or there's a bond. And there's a much more fertile ground for those kind of exchanges than someone who's coming to see you every two days.

Former Premier Steve Bracks said that Ministers may see their advisers more than they see their partner. This creates a relationship forged in fire—leading to intimacy, trust and confidence between Ministers and their advisers.

Peta Credlin, Chief of Staff to former Prime Minister Tony Abbott, is a notable example of a formidable ministerial adviser who was widely regarded as one of the most powerful figures in Australian politics. She was rated as Australia's most powerful woman in the Australian Women's Weekly Power 100 List and was ranked as number one in Business Review Weekly's Spinners and Advisers Power Index. There were frequent media reports about Credlin giving directions to and berating Ministers and Members of Parliament. Credlin also sat in on Cabinet meetings and vetted Ministers' staff selection and media appearances, to their consternation. As a Liberal insider stated: 'She's tough, she's a player, she makes demands, she gives directions, she bawls people out.' Credlin undoubtedly had a lot more power and influence than most Ministers. The star of ministerial advisers has well and truly risen.

At the same time, there is a reduction in the influence of public servants relative to ministerial advisers. For instance, former Prime Minister Kevin Rudd would ignore his department for months at a time and essentially froze the Secretary of his department out. Consequently, ministerial advisers became his primary source of advice. But perhaps the reduction of public service influence is best illustrated by a story told by one of the interviewees. He was at the opening of Monash Suzhou which was attended by the Victorian Premier, the Premier's

Chief of Staff and the departmental Secretary. There was one chair in the front row for the departmental Secretary, but not the Chief of Staff. The Chief of Staff said to the departmental Secretary: move over. And the Secretary moved. The Chief of Staff sat in the front row.

So the locus of power has shifted from public servants to ministerial advisers. There has thus been a significant change in the structure of the Executive due the addition of ministerial advisers as an extra layer between Ministers and public servants. However, Ministers and public servants are subject to elaborate administrative law accountability frameworks, while ministerial advisers operate in a fluid, largely unregulated universe.

The insertion of ministerial advisers into the Executive can be seen as a 'new public management' imperative to increase the responsiveness of the public service to the elected politicians. Former Prime Minister Paul Keating noted that the public service reforms of the 1980s were intended to bolster the position of Ministers compared to public servants, as well as to increase the responsiveness of the public service. Former Minister David Kemp said that the intent of the ministerial staff system was to counter the impact of the 'imperial public service' that was not elected and had 'an excessive influence on government and was not under the control of the elected government'. This shows that the motivation for the introduction of the ministerial adviser system was to directly counteract the influence of the public service on the Minister, as well as to enhance the efficiency of the system.

However, I argue that the rise of ministerial advisers shows the triumph of efficiency over accountability. This is particularly clear in terms of the appearance of ministerial advisers before parliamentary committees.

In a couple of incidents, ministerial advisers have been banned from appearing before parliamentary committees on the basis that there is a constitutional convention that they do not appear. This happened in the 'Children Overboard' incident at the Commonwealth level and the 'Hotel Windsor' incident at the Victorian level.

In the 'Children Overboard' incident in 2001, the Prime Minister claimed that an asylum seeker boat was exceptional: the passengers had thrown their own children overboard.

Within a few days, several public servants found out that the children overboard story was false. They notified a ministerial adviser of the Defence Minister about this. Nonetheless, Ministers continued to make public statements about asylum seekers throwing children overboard as part of an election campaign. When pressed for evidence, the press secretary of the Defence Minister asked a public servant to e-mail two photographs to him. The photos were actually of two brave navy sailors who rescued terrified asylum seekers and their children in the open sea when their boat sank. The press secretary was informed soon after that the photos were not of the children overboard incident, but of the rescue operation.

The Ministers released these photographs to the media as evidence of children being thrown overboard. Even after being made aware that the photos were misleading, the Ministers did not correct the public record.

A Senate Committee was formed to investigate the Children Overboard incident. The government refused to allow ministerial advisers to appear before the Senate Committee, claiming that there was a constitutional convention that ministerial advisers do not appear

before Commonwealth parliamentary committees. The Senate Committee was highly critical of this, stating that '[s]uch bans and refusals are anathema to accountability'.

At State level, Peta Duke, a media adviser to the Minister for Planning, had a bad day in 2010. She accidentally sent an e-mail to a journalist at the ABC, instead of her manager. The e-mail contained the Minister's media plan, which stated that the Minister's office intended to run a sham public consultation for the \$260 million redevelopment of the iconic Hotel Windsor. In an interview, the Minister denied any knowledge of the media plan or strategy. The Minister said that 'Ms Duke used inappropriate language and poetic licence in a speculative document'.

A Legislative Council Standing Committee created an inquiry into the Hotel Windsor redevelopment planning process. The Victorian Attorney-General refused to allow ministerial advisers to appear before the parliamentary committee, claiming that there was a constitutional convention that prevented ministerial advisers from appearing before parliamentary committees. The parliamentary committee concluded that its investigations were 'significantly hindered as a result of the Attorney-General's interference'.

The 'Children Overboard' and 'Hotel Windsor' incidents highlight a method that Ministers can use to effectively evade their responsibility to Parliament. First, they refuse to appear before Upper House committees on the basis that they have an immunity from being summoned by the other House of Parliament. They then blame ministerial advisers for certain actions or inactions and distance themselves from the actions of their advisers. Following this, they forbid their advisers from appearing before parliamentary committees and making other public appearances. In this way, both the Ministers and ministerial advisers do not appear before the Upper House committee to provide an explanation, accept a sanction, and provide rectification. Thus, all facets of accountability are undermined, from explanatory accountability, where the Minister explains their actions, to the Minister accepting any sanction for their behaviour and undertaking remedial action to rectify the issues.

If both Ministers and ministerial advisers do not appear before parliamentary committees, Ministers are able to effectively escape scrutiny for their actions and deny responsibility for controversial events or policies. This creates an accountability gap where no one takes explanatory or amendatory responsibility for public controversies and scandals. Consequently, the basic tenet of responsible government that seeks to ensure Executive accountability is undermined. This is a failure at a systemic level, where Ministers are able to utilise ministerial advisers to avoid their own responsibility to Parliament.

In terms of the law, Parliament has very strong powers to summon witnesses to appear before parliamentary committees. Section 49 of the *Constitution* imports the powers and privileges of the United Kingdom House of Commons in 1901. This includes the power to compel the attendance of witnesses, arrest those who do not comply and compel those witnesses to answer their questions. This was preserved by the Commonwealth *Parliamentary Privileges Act*, which was passed as a form of partial 'declaration' of the powers, privileges and immunities of Parliament.

Generally Commonwealth parliamentary committees are given the power to call for witnesses and documents. However, the source of their powers differs based on the committee. Standing and select committees derive their powers from Standing Orders or

Resolutions of the House, while committees established under statute have the powers to call for witnesses and documents provided by statute.

So it is clear that the Commonwealth Houses of Parliament and parliamentary committees have the power to order the appearance of persons and the production of documents. Where a person does not attend a parliamentary committee despite an order by the committee, the committee cannot punish the individual directly, but must report the matter to the House. The House can then punish for contempt those who do not comply with their orders. Section 7 of the *Parliamentary Privileges Act* provides the Commonwealth Houses of Parliament with the power to impose punishment for contempt, including imprisoning a person for six months or imposing a fine of \$5,000 on an individual or \$25,000 on a corporation.

So here we have a disjuncture between law and politics, where the legal position is clear that Parliament has the power to summon ministerial advisers to appear before parliamentary committees, while there is a political or constitutional convention claimed that ministerial advisers do not appear before parliamentary committees.

My research tells yet another story about the existence of a constitutional convention regarding ministerial advisers appearing before parliamentary committees.

Constitutional conventions are quite mysterious creatures. There is no general consensus on when a constitutional convention arises or the essential features of a convention. However, there are a few features that are said to characterise constitutional conventions. These are that conventions are not law, political participants believe that the conventional rule is binding, and arguably the conventions have a reason.

I have conducted interviews with current and former Ministers and Members of Parliament about their beliefs on whether there is a constitutional convention that ministerial advisers do not appear before parliamentary committees. The literature shows that the belief of political participants is an essential element of constitutional conventions being formed.

From my interviews, all 9 Commonwealth politicians did not believe that a convention had been formed that ministerial advisers could not appear before parliamentary committees in all circumstances. Two political participants believed that there was a convention that ministerial advisers could appear voluntarily or in exceptional circumstances. Former Ministers Kim Carr and Peter Costello objected to ministerial advisers appearing before parliamentary committees on the basis that it allows Ministers to evade their own accountability to Parliament by allowing the adviser to take the blame for controversies. For example, Peter Costello was concerned that Ministers would seek to shift blame to their advisers. He said: 'To me, it would look very weak if you sent your advisers in to take the rap for you'. However, Carr and Costello agreed that advisers could appear voluntarily or under summons in exceptional circumstances.

A majority of the participants (6) believed that there was no binding constitutional convention preventing ministerial advisers from appearing before parliamentary committees. Two participants explicitly denied that there was a convention. For instance, Anna Burke, former Speaker of the House of Representatives, disagreed that there was a convention that ministerial advisers do not appear before parliamentary committees. Burke argued that ministerial advisers should appear before parliamentary committees in certain circumstances, including when they provided policy advice in the context of an issue or event, such as the

'Hotel Windsor' incident, or when there was a conflict of interest or corruption involved, as public servants appear before committees on such issues. Conversely, she thought that advice by ministerial advisers on media perceptions such as whether the Prime Minister should 'wear powder blue ties' did not need to be disclosed. Burke stated that ministerial advisers should have appeared in the 'Children Overboard' and 'Hotel Windsor' incidents as their version of events would have assisted the process and understanding of the outcome.

Most believed that the precedent of the 'Children Overboard' incident was not binding and they could change their position in the future. Two participants took a very cynical view towards conventions generally. For instance, a former senior Liberal Minister stated that 'conventions are only practised until they are broken'. Similarly, former Minister Lindsay Tanner stated that:

Conventions can be in the eye of the beholder and do not survive a brutal assault driven by political reasons ... On an issue of this kind, people will tend to do whatever suits their short-term political interest and try to dress them up as some kind of vaguely credible precedent. But in truth, and what you'll probably find, is that various parties will adopt contradictory positions, depending on whether or not they are in government or Opposition.

At the Victorian level, except for one political actor, all interviewees rejected the existence of a constitutional convention.

Former Premier John Brumby, who was Premier at the time of the 'Hotel Windsor' incident, stated that he believed that there was a 'long-standing convention' that ministerial advisers are not called and do not appear before parliamentary committees. He said:

At the end of the day you've got to have some limits on who you call. Is it your personal staff? Is it your executive assistant? Is it your partner? At the end of the day it is the Minister who is responsible.

It is clearly correct that it is necessary to draw the line about who should be called before parliamentary committees. However, the difference between ministerial advisers appearing before parliamentary committees compared to a Minister's partner is that ministerial advisers exercise significant public functions and may be able to shed light on issues discussed by parliamentary committees.

Ten other Victorian political participants did not feel bound by a constitutional convention that ministerial advisers do not appear before parliamentary committees. Rather, when they are in Opposition, they would feel free to change their position on the issue. The general consensus from the Victorian interviews is that at the very least ministerial advisers should appear where they are acting independently, but not be required to speak on policy.

For example, former Premier Steve Bracks said:

I don't think there is any such constitutional convention: number one. Number two, it's a matter of practice, and my view is that if a Minister is required to attend, you should use the same test for an adviser attending. They are one and the same.

On that basis, Bracks thought that ministerial advisers should have appeared before parliamentary committees in the ‘Children Overboard’ and ‘Hotel Windsor’ incidents.

Former Premier John Cain thought that ministerial advisers should appear before parliamentary committees where their functions intrude into government bureaucratic processes, such as when they comment upon advice to the Minister. However, where ministerial advisers are advising on political, factional or intra-party issues, then Cain thought it was not appropriate for them to appear before parliamentary committees. He stated that the refusal to allow ministerial advisers to appear before parliamentary committees where they provided public policy advice was self-serving for the Minister of the day.

Greg Barber, Leader of the Victorian Greens Party, who was a member of the parliamentary committee in the ‘Hotel Windsor’ incident, stated that:

What we have here is not so much a convention, we have a straight out agreement between Labor and Liberal that neither of them wants to upset the apple cart. None of them want to bring ministerial advisers into a formal system. They like them out there in the never-never world.

Therefore, from the interviews, the conventional requirement that the rule be considered binding by political participants is not satisfied at the Commonwealth and Victorian levels. There is thus no constitutional convention that ministerial advisers are prevented from appearing before parliamentary committees.

Besides the beliefs of political participants, another element of a constitutional convention being formed is arguably that the convention has a reason. There is disagreement amongst commentators about the importance of the requirement of a reason and the type of reason that is required. The weight of the literature, however, indicates that reasons for a convention should be consistent with fundamental democratic principles.

The reason that ministerial advisers are prohibited from appearing before parliamentary committees is purportedly to fulfil the requirements of responsible government. The argument advanced is that ministerial advisers are accountable to their Minister personally, while the Ministers are accountable to Parliament. This rationale has been called the ‘McMullan principle’, after statements made by former Senator Bob McMullan to this effect.

Nevertheless, even Senator McMullan, to whom the alleged convention has been attributed, has since clarified that there should not be an accountability gap where both Ministers and advisers escape accountability. He said:

There is a longstanding principle which I have articulated – in fact, to my embarrassment, I saw it reported in one place as the ‘McMullan principle’ – which says: ‘Staff are responsible to ministers. Ministers are responsible to the parliament.’ In the normal course, that is correct, but that means you have to accept responsibility for what your staff do. You cannot say: ‘They’re responsible to me but I do not care what they do; I am not going to tell you what they do. If they make a mistake, it is nobody’s business.’ Then there is a black hole of accountability because they deal with the departments. They give instructions; they receive directions ... either ministers have to accept responsibility for what their staff do or staff have to be accountable. It cannot be that nobody is accountable.

In addition, the so-called McMullan principle is weak as public servants are similarly accountable to their Minister, who is then linked to the chain of accountability to Parliament. Unlike ministerial advisers, public servants routinely appear before parliamentary committees. Their presence is to give an *account* of their actions to Parliament, while *responsibility* for their actions fall on their Minister, who may be censured in Parliament. The appearance of ministerial advisers before parliamentary committees would be to perform a similar function.

Further, preventing ministerial advisers from appearing before parliamentary committees does not seem to closely embody the principle of responsible government. This is because there are strong incentives for actors within the Executive to shift blame where possible. Consistent with ‘public choice’ theory, politicians have the incentive to deflect all the blame that comes in their direction, while accepting the credit for anything that goes right towards achieving what Christopher Hood and Martin Lodge call ‘the political nirvana of a system of executive government in which blame flows downwards in the bureaucracy while credit flows upwards to ministers’.¹ Of course there are exceptions where Ministers have personal ethics and integrity; however by and large Ministers have the overriding incentive to shift blame to another locus.

I argue, therefore, that there is no legitimate reason to prevent ministerial advisers from appearing before parliamentary committees. Indeed, ministerial advisers have appeared before parliamentary committees in South Australia five times, both voluntarily and under summons for controversial issues. For instance, three ministerial advisers appeared under summons before a parliamentary committee about the handling of a case where a school child was sexually abused. There has also been precedent in New South Wales for ministerial advisers appearing before a parliamentary committee, both voluntarily and under summons. In Western Australia, ministerial advisers appear before parliamentary committees as an uncontested matter, both to provide details about legislative bills and in situations of controversy, including the government’s decision to close the Swan Valley aboriginal community following incidents of child abuse and family violence. Geoff Gallop, former Western Australian Premier, stated that he strongly believed that ministerial advisers should appear before committees. He said:

They have to appear before parliamentary committees. You can’t have a Minister saying ‘I’ll take responsibility’, and appear before committees and then be in a position to say, ‘oh well, I didn’t know anything about that because I wasn’t told’, without having any ministerial advisers being asked the same questions. I think it’s rather silly. I think it creates an accountability gap that has to be filled. Ministerial advisers are an important part of the system. And in that sense, I think that they are accountable the same way as Ministers are accountable: to the public interest. And the public interest is protected by the Parliament, and when Parliament inquires into something, they should get all the evidence that they need ... It’s never been an issue in Western Australia, they had to appear and they did.

It is hence only the Commonwealth and Victoria who make the self-interested claim that there is a constitutional convention that ministerial advisers are prevented from appearing

¹ Christopher Hood and Martin Lodge, *The Politics of Public Service Bargains: Reward, Competency, Loyalty—and Blame* (Oxford, Oxford University Press, 2006) 59.

before parliamentary committees. This shows that there is no valid reason for the convention that is consistent with democratic principles, and thus there is no such convention.

Therefore, there is currently a stalemate between the government and Parliament about the appearance of ministerial advisers before parliamentary committees. The law is very clear that Houses of Parliament and parliamentary committees have strong powers to compel witnesses to appear and compel the production of documents. However, the politics of the situation has played out differently. In a few incidents, ministerial advisers have been banned from appearing before parliamentary committees on the basis that there is a constitutional convention that they do not appear. The empirical research I have conducted demonstrates that political participants do not regard themselves as bound by any rules about ministerial advisers appearing before parliamentary committees.

In short, ministerial advisers fall in the gap between law and convention.

This has happened because there are fractures and fissures in our conceptualisation of the Executive: legal, political and managerial.

Our legal understanding of the Executive in Australia is permeated with its historical roots from the United Kingdom. The monarch formed the original basis of executive power and there are continuing links as Australia remains a constitutional monarchy.

However, over the years, the High Court has been increasingly keen to assert a uniquely Australian version of the Executive and executive power, which is derived from section 61 of the *Constitution*, rather than the prerogative powers inherited from the United Kingdom.

The Australian *Constitution* provides a strong framework of Executive accountability through parliamentary control of Executive spending and judicial review of decisions of officers of the Commonwealth. This means that the *Constitution* sets up a scheme of watchful supervision and scrutiny of the Executive by the other branches of government. The legal controls are generally effective in constraining the decisions of ministerial advisers. However, this form of accountability is limited to a small subset of the actions of ministerial advisers that trespass into the boundaries of exercising executive power.

The political narrative shares the same backbone as the legal narrative through the principles of ministerial responsibility and responsible government. However, the political narrative emphasises the reduced role of Parliament due to the strong influence of political parties. The political narrative of the Executive is often expressed as a lament by external commentators about the Westminster system being circumvented by politicians, in conjunction with a cynical manipulation of the concepts of ministerial responsibility and responsible government by politicians towards short-term political ends. This leads to a weak form of accountability, where the government and the opposition take differing positions not based on principle, but on political expediency. At the same time, each of the major political parties has an incentive not to push too hard on the issue of ministerial advisers. This systemic flaw is shown by ministerial advisers not appearing before parliamentary committees, as Ministers seek to avoid their own responsibility to Parliament and strategically utilise ministerial advisers to evade accountability. This leads to an accountability vacuum.

The managerial account of the Executive seeks to enhance the efficiency and effectiveness of the operations of the Executive. The focus is on adopting private sector principles to improve the functioning of the Executive. Public servants are seen to be ‘can do’ managers who have to operate in a business-like way.

However, an excessive focus on efficiency can undermine accountability. This is because the Executive is not a simple private sector body whose predominant goal is profit-maximisation. Rather, the Executive has a range of additional responsibilities in addition to efficiency, such as the requirements of accountability, transparency and procedural fairness.

Therefore, there are fractures and fissures in the way that we conceptualise the Executive in Australia. The legal, political and managerial narratives have different underlying values, and there is currently no coherent way of resolving clashes between these different values. The disjuncture between the legal, political and managerial narratives leads to systemic failures of accountability.

To sum up, there are failings at an institutional level in the Australian system of public administration. This has been exacerbated by the rise of ministerial advisers in the Australian system of government, the manipulative behaviour of politicians, and the unreflective adoption of the ‘new public management’ efficiency approach.

So here we are, caught between law and convention, continuity and change.