

ERRN

Electoral Regulation
Research Network



MELBOURNE LAW SCHOOL



ELECTORAL REGULATION RESEARCH NETWORK/DEMOCRATIC AUDIT OF AUSTRALIA JOINT WORKING PAPER SERIES

MINISTERIAL ADVISERS: INFLUENCES ON THE EXECUTIVE AND ACCOUNTABILITY MECHANISMS

Yee-Fui Ng

(Sessional Lecturer and PhD Candidate, Monash University Law School)

WORKING PAPER NO. 5 (OCTOBER 2012)

In 2001, the Immigration Minister reported that passengers of an asylum seeker boat had thrown their own children overboard.¹ The Prime Minister said, “I don’t want people like that in Australia. Genuine refugees don’t do that... They hang on to their children.”²

Within a few days, several public servants found out that the children overboard story was false.³ They notified a ministerial adviser of the Defence Minister about this.⁴ 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.⁵ 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.⁶

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 and continued to assert that children had been thrown overboard.⁷

A Senate Select Committee was formed to investigate the Children Overboard incident. The Government refused to allow ministerial advisers to appear before the Senate Committee. The Senate Committee was highly critical of this, stating that ‘[s]uch bans and refusals are anathema to accountability’.⁸ Despite this, the Senate Committee did not seek to compel the attendance of ministerial advisers, stating that it would be unjust to impose a penalty on a ministerial adviser who did not appear on the direction of their Minister.⁹

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’.¹⁰

The Legislative Council Standing Committee on Finance and Public Administration 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. The

¹ David Marr and Marian Wilkinson, *Dark Victory* (Allen & Unwin, 2nd ed, 2004) 247.

² *Ibid* 251.

³ Senate Select Committee, *A Certain Maritime Incident* (2002) Commonwealth of Australia xxxvi.

⁴ Patrick Weller, *Don’t Tell the Prime Minister* (Scribe Publications, 2002) 26.

⁵ Marr and Wilkinson, above n 2, 266-7.

⁶ *Ibid* 266-7.

⁷ *Ibid* 35.

⁸ Senate Select Committee, *A Certain Maritime Incident* (2002) Commonwealth of Australia xxxiv

⁹ Senate Select Committee, *A Certain Maritime Incident* (2002) Commonwealth of Australia xxxiv-xxxv.

¹⁰ Ombudsman Victoria, ‘Ombudsman Investigation into the Probity of the Hotel Windsor Redevelopment’ (2011) <http://www.ombudsman.vic.gov.au/resources/documents/Ombudsman_investigation_into_the_probity_of_The_Hotel_Windsor_redevelopment.pdf> 7.

parliamentary committee concluded that its investigations were ‘significantly hindered as a result of the Attorney-General’s interference’.¹¹

The Victorian Ombudsman investigated this matter despite protestations from the Victorian Government that his jurisdiction did not extend to ministerial advisers.¹² The Ombudsman discovered an e-mail by Ms Duke to the Premier’s chief media adviser, saying that she had ‘taken the hit’ for what occurred with the media plan.¹³ She also referred to this being a ‘political decision’ and to ‘commitments’ made by the Head of the Premier’s Media Unit.¹⁴

Across the world in the United Kingdom, after the terrorist attacks on September 11 2001, Jo Moore, a special adviser, sent an e-mail to her Department, stating that “it’s now a very good day to get out anything we want to bury.” She then suggested, “Councillors expenses?”¹⁵

These scenarios lead to a few questions: What is the role of ministerial advisers? How are they regulated? What are the mechanisms to ensure accountability for their public actions?

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 trusted friends and advisers of the Minister 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 ministerial staff increased from 155 in April 1972 to 407 in June 2011; an increase of 163%.¹⁶ The Prime Minister employs 53 ministerial advisers.¹⁷ In contrast, the United Kingdom has 81 special advisers, with 19 staff for the Prime Minister in 2012.¹⁸

¹¹ Legislative Council Standing Committee on Finance and Public Administration, *11th Report to the Legislative Council, Inquiry into Victorian Government Decision Making, Consultation and Approval Processes*, Second Interim Report (2010) 18.

¹² Ombudsman Victoria, ‘Ombudsman Investigation into the Probity of the Hotel Windsor Redevelopment’ (2011) <http://www.ombudsman.vic.gov.au/resources/documents/Ombudsman_investigation_into_the_probity_of_The_Hotel_Windsor_redevelopment.pdf> 8-10.

¹³ Ombudsman Victoria, ‘Ombudsman Investigation into the Probity of the Hotel Windsor Redevelopment’ (2011) <http://www.ombudsman.vic.gov.au/resources/documents/Ombudsman_investigation_into_the_probity_of_The_Hotel_Windsor_redevelopment.pdf> 100-2.

¹⁴ Ombudsman Victoria, ‘Ombudsman Investigation into the Probity of the Hotel Windsor Redevelopment’ (2011) <http://www.ombudsman.vic.gov.au/resources/documents/Ombudsman_investigation_into_the_probity_of_The_Hotel_Windsor_redevelopment.pdf> 100-2.

¹⁵ Andrew Sparrow, ‘Sept 11: ‘A Good Day to Bury Bad News’, *The Telegraph* (London), 10 October 2001 <<http://www.telegraph.co.uk/news/uknews/1358985/Sept-11-a-good-day-to-bury-bad-news.html>>.

¹⁶ Anne Tiernan, *Power Without Responsibility: Ministerial Staffers in Australian Governments from Whitlam to Howard* (UNSW Press, 2007) 244, Australian Government Department of Finance and Deregulation, *Members of Parliament (Staff) Act 1984 Annual Report 2010–11* <http://www.finance.gov.au/publications/mops_annual_reports/2010-2011/docs/MOPS_Annual_Report.pdf>.

¹⁷ Australian Government Department of Finance and Deregulation, *Members of Parliament (Staff) Act 1984 Annual Report 2010–11* <http://www.finance.gov.au/publications/mops_annual_reports/2010-2011/content/10_personal_employee_positions.html>.

¹⁸ United Kingdom Prime Minister, Written Ministerial Statement, 17 July 2012, ‘Special Advisers’ <http://www.parliament.uk/documents/commons-vote-office/July_2012/17-07-12/23-PM-SpecialAdvisers.pdf>.

Current Regulation of Ministerial Advisers

Ministerial advisers are employed under the *Members of Parliament (Staff) Act 1984* (Cth).¹⁹ The terms of conditions of employment of ministerial advisers are subject to the determination of the employing Minister or Parliamentarian,²⁰ with the Prime Minister being able to vary the employment terms and conditions.²¹

Section 31 of the Act requires the Prime Minister to table a yearly report to Parliament setting out the name of each consultant engaged by all Ministers, the period of engagement of the consultant, and the tasks specified. Ministerial advisers are not engaged as consultants and therefore do not fall within the scope of this provision. Nevertheless, since 2007-08, the government has tabled annual reports providing information about the numbers of ministerial advisers employed, their classification levels, and their salaries and benefits.

Ministerial advisers are also subject to a Code of Conduct, which sets out the standards that they are expected to meet in performing their duties. The Code includes acknowledgement that ministerial staff do not have the power to direct public servants in their own right and that public servants are not subject to their direction.²² In addition, it recognises that executive decisions are the preserve of Ministers and public servants, and not ministerial staff acting in their own right.²³ Further, ministerial advisers have the duty to facilitate direct and effective communication between their Minister's department and their Minister.²⁴ Implementation and sanctions under the Code are handled internally by the Executive through the Prime Minister's Office.²⁵ This means that any breaches of the Code by ministerial advisers such that those in the Children Overboard incident would be handled behind closed doors, without the scrutiny of Parliament or any external bodies.

The Code of Conduct seems to suggest that ministerial advisers have a very limited role and are merely conduits between the Ministers and the public service.

However, the Senate Committee for the Children Overboard incident found that 'it can no longer be assumed that [ministerial] advisers act at the express direction of ministers and/or with their knowledge and consent. Increasingly, advisers are wielding executive power in their own right'.²⁶

¹⁹ Section 13, 20 *Members of Parliament (Staff) Act 1984* (Cth).

²⁰ Section 14(1), 21(1) *Members of Parliament (Staff) Act 1984* (Cth).

²¹ Section 14(3), 21(3) *Members of Parliament (Staff) Act 1984* (Cth).

²² Code of Conduct for Ministerial Staff cl 11.

²³ Code of Conduct for Ministerial Staff cl 12.

²⁴ Code of Conduct for Ministerial Staff cl 13.

²⁵ Code of Conduct for Ministerial Staff. Implementation of the Code is the responsibility of the Prime Minister's Office and the Government Staffing Committee. Sanctions imposed under the Code are determined after consultation with the relevant Minister by the Prime Minister's Chief of Staff, acting on advice from the Government Staffing Committee.

²⁶ Senate Select Committee, *A Certain Maritime Incident* (2002) Commonwealth of Australia xxxvii.

Further, ministerial advisers have increasingly specialised and extensive roles. Anne Tiernan divides ministerial advisers into five main groups:²⁷

1. **the administrative and support staff**, who organise the appointment and diary scheduling, travel and correspondence of Ministers.
2. **the advisers to the Minister**, who assist with the Minister's portfolio policy issues. This group liaises directly and regularly with the public servants, key stakeholders and lobbyists on the substance of the policies, and provide advice to the Minister on the political perspective of how a policy could be negotiated, packaged and 'sold'.
3. **the political staff**, who manage the Minister's responsibilities as a Member of Parliament, including maintaining relations with the political party, back bench colleagues and others.
4. **the media staff**, who manage the control and dissemination of information to the mass media, including television, newspapers, radio and social media, such as Twitter and Facebook.
5. **departmental liaison officers (DLOs)**, who facilitate liaison between the Minister and department or agency on policy or administrative issues. DLOs are on placement from the public service and remain departmental officers employed under the *Public Service Act 1999* (Cth), but act under the Minister's direction for the duration of the employment.

Therefore, ministerial advisers are not a homogenous group, and each has a different role depending on their position and level of seniority.

Very little is publicly known about the roles of ministerial advisers. Harry Evans, a previous Clerk of the Senate said that the role of ministerial staff goes beyond advice and personal assistance, and they are active participants in the political process.²⁸ Evans contends that ministerial advisers control access to Ministers, filter information that reach Ministers, particularly from departments and agencies, make decisions on behalf of Ministers and give directions about government activities, including directions to departments and agencies, as well as manage media perceptions and reporting.²⁹ Professor Patrick Weller and Dr Maria Maley also discuss the gate-keeping role of ministerial advisers, who take the large amount of information from departments and decide which information is provided to the Minister.³⁰

However, the more significant issue is where ministerial advisers act on behalf of their Ministers and potentially exercise executive power. Dr Maley referred to this as advisers becoming

²⁷ Anne Tiernan, *Power Without Responsibility: Ministerial Staffers in Australian Governments from Whitlam to Howard* (UNSW Press, 2007).

²⁸ Harry Evans, Submission No 3, Finance and Public Administration References Committee, Staff Employed under the *Members of Parliament (Staff) Act 1984*, 2. Cited in Commonwealth Senate, Finance and Public Administration References Committee, Staff Employed under the *Members of Parliament (Staff) Act 1984* (2003) 15.

²⁹ Ibid.

³⁰ Maria Maley, *Partisans at the Centre of Government: The Role of Ministerial Advisers in the Keating Government 1991-96* (PhD Thesis, Australian National University, 2002) 122, Committee Hansard, 2 September 2003, 79. Cited in Commonwealth Senate, Finance and Public Administration References Committee, Staff Employed under the *Members of Parliament (Staff) Act 1984* (2003) 15-16.

‘surrogates’ and making minor decisions in the Minister’s name,³¹ while Jack Waterford noted that some ministers ‘effectively delegate parts of their work to individual staffers, expecting them to make routine decisions and to process approvals without any need for consultation’.³² Harry Evans has stated that ‘[ministerial advisers] act as de facto assistant ministers and participate in government activities as such’.³³

Therefore, broadly, ministerial advisers have the roles of providing advice (on policy and strategy), consultation (with or without the Minister and public servants),³⁴ gate-keeping, media management, and acting on behalf of Minister.

In this paper, I will focus on senior ministerial advisers with the role of acting on behalf of the Minister, as this is their most controversial role. I will consider whether in some situations senior ministerial advisers exercise executive power.

Do Ministerial Advisers Exercise Executive Power?

The constitutional framework for the Executive is characterised by large gaps and eloquent silences. The content of Commonwealth executive power was deliberately not expressly defined by the drafters of the *Constitution*. Sir Alfred Deakin stated in relation to section 61:

No exhaustive definition is attempted in the Constitution — obviously because any such attempt would have involved a risk of undue, and perhaps unintentional, limitation of the executive power. Had it been intended to limit the scope of the executive power to matters on which the Commonwealth Parliament had legislated, nothing would have been easier than to say so.³⁵

Therefore, executive power is an elusive and slippery concept which defies the strictures of precise definition.³⁶ Even the scope of executive power is uncertain, with only incremental clarification through case law over the years.

Technically, according to section 61 of the *Constitution*, the Commonwealth’s executive power is vested in the Queen and is exercisable by the Governor-General. In practice, executive power is exercised by Ministers. However, it is recognised that efficient government administration

³¹ Maley, above n 31, 123. Cited in Commonwealth Senate, Finance and Public Administration References Committee, Staff Employed under the *Members of Parliament (Staff) Act 1984* (2003) 16.

³² Jack Waterford, ‘Reining in Political Staff and Outsiders’, *Public Sector Informer* (Canberra Times) December 2001, 6. Cited in Commonwealth Senate, Finance and Public Administration References Committee, Staff Employed under the *Members of Parliament (Staff) Act 1984* (2003) 16.

³³ Clerk of the Senate, Correspondence to Senator Cook, 22 March 2002, 4.

³⁴ *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 [22].

³⁵ Alfred Deakin, ‘Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth’, in Brazil and Mitchell (eds), (1981) 129, 130.

³⁶ In *Davis v Commonwealth* (1988) 166 CLR 79,92, Mason CJ, Deane and Gaudron JJ acknowledged that the scope of the executive power of the Commonwealth had “often been discussed but never defined”. In *Pape v Commissioner of Taxation* (2009) 238 CLR 1, the judges do not attempt a full discussion on the scope of executive power.

may require in many circumstances that a Minister act through another person:³⁷ As stated by Staughton LJ in *R v Secretary of State for the Home Department; Ex parte Doody*:

Parliament frequently confers powers on a minister who is the political head of a department. Much less frequently, it confers powers on an official of a particular description or grade... But it is absurd to suppose that every power which is conferred on the political head of a department must be exercised by him and him alone. It is in general sufficient that the power is exercised by a junior minister or an official on his behalf.³⁸

Thus, Ministers do not have to personally make all decisions themselves. Legislation may confer the ability for Ministers to delegate their powers.³⁹ Alternatively, legislation may specify that a public servant is to exercise powers under the statute.⁴⁰ Therefore public servants may exercise executive power by virtue of authority granted by statute or power delegated by the Minister.

The Code of Conduct for ministerial advisers seems to envisage that executive power is solely the province of Ministers and public servants; not ministerial advisers. However, I argue that, in certain circumstances, ministerial advisers can and do exercise executive power. In particular, according to the *Carltona* or ‘alter ego’ principle,⁴¹ Ministers may have agents who are authorised to carry out certain tasks without having a formal delegation to do so. According to this principle, constitutionally the agent’s decision is deemed to be the Minister’s decision. The Minister remains responsible and answerable to Parliament for anything his/her officials have done under the Minister’s authority:

It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials.⁴²

³⁷ *R v Secretary of State for the Home Department; Ex parte Doody* [1993] QB 157, 194, *R v Secretary of State for the Home Department; Ex parte Doody* [1994] 1 AC 531, 566. Applied in Australia by *Attorney General v Foster* (1999) 84 FCR 582.

³⁸ [1993] QB 157, 194. *R v Secretary of State for the Home Department; Ex parte Doody* [1993] QB 157, 194, adopted on appeal in the House of Lords in *R v Secretary of State for the Home Department; Ex parte Doody* [1994] 1 AC 531, 566. Cited with approval in *Attorney General v Foster* (1999) 84 FCR 582.

³⁹ *R v Secretary of State for the Home Department; Ex parte Doody* [1993] QB 157 at 194

⁴⁰ *R v Secretary of State for the Home Department; Ex parte Doody* [1993] QB 157 at 194

⁴¹ *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560, 563. Applied in Australia by *O’Reilly v State Bank of Victoria Commissioner* (1983) 153 CLR 1, 11.

⁴² *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560, 563.

This is illustrated by the case of *Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs*.⁴³ In this case, the Minister authorised procedures for dealing with the large number of requests for ministerial interventions to grant protection visas ‘in the public interest’. A Senior Adviser of the Minister would sign a letter on behalf of the Minister about whether the Minister would consider the application for a protection visa. This means that a ministerial adviser was in effect signing letters determining substantive issues affecting the rights of asylum-seekers. In *Ozmanian*, although the letter was said to be sent at the request of the Minister, the Minister had in fact never seen the letter.⁴⁴ This would be an exercise of executive power if it was held to be valid.

At first instance, Merkel J held that the Senior Adviser made the decision on behalf of the Minister.⁴⁵ Although the decision was not made by the Minister, it was a decision made under the authority of the *Migration Act* as it was in accordance with the general procedures established with the Minister’s authority.⁴⁶

Despite this, Merkel J stated that the *Migration Act* has detailed powers of delegation which makes it less likely that the Carltona principle will apply.⁴⁷ Further, courts are reluctant to utilise the Carltona principle where the exercise of that power may have drastic consequences upon an individual, such as visa decisions.⁴⁸ Hence, the power under the *Migration Act* had to be exercised by the Minister personally or an authorised delegate.⁴⁹ This means that the decision made by the Senior Adviser was invalid.⁵⁰

Merkel J’s decision was overturned by the Full Federal Court on other grounds. The Full Court did not find it necessary to determine the ministerial adviser issue.⁵¹ Therefore the law in this area is not settled.

Nevertheless, from this case it can be surmised that there may be circumstances where the Carltona principle may apply to ministerial advisers based on statutory interpretation. This is more likely in decisions without drastic consequences for individuals and where there is no power of delegation within the legislation.

Where ministerial advisers exercise executive power, they are operating as part of the Executive. Therefore, they should be subject to appropriate accountability mechanisms. I will briefly outline two possible options for accountability: to Parliament and to the Courts.

⁴³ (1996) 41 ALD 293.

⁴⁴ *Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 41 ALD 293, 300.

⁴⁵ *Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 41 ALD 293, 305.

⁴⁶ *Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 41 ALD 293, 305.

⁴⁷ *Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 41 ALD 293, 309.

⁴⁸ *Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 41 ALD 293, 309.

⁴⁹ *Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 41 ALD 293, 309. This part of the decision was overturned by the Full Court of the Federal Court in *Bedlington v Chong* (1998) 87 FCR 75, *Raikua v Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 158 FCR 510, 523.

⁵⁰ *Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 41 ALD 293, 310.

⁵¹ *Minister for Immigration and Multicultural Affairs v Ozmanian* (1996) 71 FCR 1.

Accountability to Parliament

The recent decision of *Williams v Commonwealth* ('*Williams*') emphasises the concept of responsible government, with six judges utilising responsible government as the basis of their decisions.⁵² The majority judgments of French CJ, Gummow, Bell and Crennan JJ in *Williams* requiring statutory authorisation before entering into agreements to spend public money is based on the principle of responsible government.⁵³ Further, Hayne and Kiefel JJ utilised responsible government in their decisions that the Commonwealth's power to contract and spend is limited to their areas of legislative competence, but do not go the further step taken by the majority to then require statutory authorisation.⁵⁴

In *Williams*, responsible government is more central to the reasoning process of the judges than in *Lange v Australian Broadcasting Corporation* ('*Lange*').⁵⁵ *Williams* enforces a strong limitation on executive power in terms of the capacities of the Commonwealth to contract and spend without statutory authorisation. Such a possibility was flagged in *Lange* but *Williams* shows the High Court's determination to translate this into concrete limitations.

In addition, French CJ in *Williams* stated that the system of responsible government under the British *Constitution* was embedded in the federal *Constitution* and cannot now be disturbed without amendment to the *Constitution*.⁵⁶ It is unclear whether he is advocating for a stronger form of responsible government than the limited version in *Lange*, which provided that the doctrines of representative democracy and responsible government are limited to protecting only those institutions of representative and responsible government that are identifiable in the constitutional text.⁵⁷

Therefore, *Williams* may represent a resurgence of responsible government and the utilisation of parliamentary accountability as a mechanism for constraining the actions of the Commonwealth Executive.

Under the doctrine of responsible government, the Executive is responsible to the Legislature. As the High Court stated in *Egan v Willis*, the contemporary position in Australia is that whilst 'the primary role of Parliament is to pass laws, it also has important functions to question and criticise the government on behalf of the people' and 'to secure accountability of government activity is the very essence of responsible government'.⁵⁸ According to John Stuart Mill, the task of the Legislature is to 'watch and control the government: to throw the light of publicity on its acts'.⁵⁹

Sir Samuel Griffith provided an explanation about the main principles of responsible government, that is, the Crown does not act on its own volition, but rather follows advice of the

⁵² *Williams v Commonwealth* [2012] HCA 23 [60] (French CJ), [136] (Gummow and Bell JJ), [509]-[516] (Crennan J), [579], [595] (Kiefel J), [216] (Hayne J).

⁵³ *Williams* [2012] HCA 23 [60] (French CJ), [136] (Gummow and Bell JJ), [509]-[516] (Crennan J).

⁵⁴ *Ibid* [579], [595] (Kiefel J), [216] (Hayne J).

⁵⁵ (1997) 189 CLR 520.

⁵⁶ *Ibid* [58].

⁵⁷ *Lange* (1997) 189 CLR 520, 557.

⁵⁸ *Egan v Willis* (1998) 195 CLR 424, [42-3] (Gaudron, Gummow and Hayne JJ).

⁵⁹ John Stuart Mill, *Considerations on Representative Government* (Parker, Son and Bourn, London, 1861) 104.

ministers. Therefore ministers bear the responsibility of decisions they make. Ministers are responsible to Parliament and can only hold their position with the confidence of the people, reflected by the House of Representatives in Parliament.⁶⁰ The requirement of confidence from the House of Representatives is based on the principle that the House of Representatives is the people's house, and represents the interests of the people, while the Senate is the State's house. As Sir John Quick and Sir Robert Garran said: 'The Senate represents the States as political units. The House represents the people as individual units'.⁶¹ Therefore, the principle of responsible government has a democratic element and is linked with the concept of representative democracy as it provides that the Executive Government is accountable, through the mechanisms of Parliament, to the people who elected the Executive.

In terms of ministerial advisers, I argue that because their salary is appropriated from public funds⁶² and as they may increasingly be exercising executive power, the principles of responsible government apply to them.

Hence, ministerial advisers should be accountable to Parliament by being required to appear before parliamentary committees, such as those set up for the Children Overboard and Hotel Windsor incidents.

At the Commonwealth level, parliamentary privileges and immunities are governed by the *Parliamentary Privileges Act 1987* (Cth). This Act preserves the operation of section 49 of the *Constitution* that Commonwealth Members of Parliament have the powers, privileges and immunities of the United Kingdom House of Commons which existed on 1 January 1901.⁶³ According to *Lange*, section 49 of the *Constitution* provides the source of coercive authority for each House of Parliament to 'summon witnesses, or to require the production of documents, under pain of punishment for contempt'.⁶⁴ Therefore, at the Commonwealth level, the Senate has the power to compel the production of persons and documents. This includes the power to compel ministerial advisers to attend to give evidence and produce documents to a Senate Committee.

Traditionally ministerial advisers are seen to be accountable to their Minister personally, while the Ministers are accountable to Parliament. It has been argued that ministerial advisers are thus not required to appear before parliamentary committees. As a result, ministerial advisers have

⁶⁰ Samuel Griffith, 'Notes on Australian Federation: Its Nature and Probable Effects' (Paper presented to the Government of Queensland, 1896) 17-8 <<http://adc.library.usyd.edu.au/data-2/fed0017.pdf>>. Similarly, the Final Report of the Constitutional Commission in 1988 defined responsible government as being where 'the ministers are individually and collectively answerable to the Parliament and can retain office only while they have the confidence of the lower House, that is, the House of Representatives in the case of the Commonwealth and the Legislative Assembly or House of Assembly in the case of the States'.

⁶¹ Quick and Garran, above n 19, 447.

⁶² There has been a yearly appropriation of ministerial adviser salaries in Parliament since 1980 as part of the 'ordinary services of government'. See eg *Appropriation Act (No. 1) 1980-81* (Cth), *Appropriation Act (No 1) 2012-13* (Cth), Schedule 1, Department of Finance and Administration, Outcome 3.

⁶³ Section 5 *Parliamentary Privileges Act 1987* (Cth).

⁶⁴ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557-9. See also Parliament of Australia, Orders for Production of Documents (2005) <http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/guides/briefno11>.

generally tended not to appear before parliamentary committees based on the instructions of their Minister.

However, this argument 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.⁶⁵ The appearance of ministerial advisers before parliamentary committees would be to perform a similar function.

In situations such as the Children Overboard incident, the fact that ministerial advisers did not appear before the parliamentary committees allowed the Ministers to escape accountability by claiming they were not advised of the fact that no children had been thrown overboard, while the ministerial advisers did not present their account as they did not appear before Parliament. This creates an accountability gap where Ministers are able to plead ignorance to controversial policies and decisions and escape accountability in Parliament. Therefore, in accordance with recommendations of a Senate Committee, ministerial advisers should appear before parliamentary committees particularly where a Minister has renounced a ministerial adviser's action, refused to answer questions regarding the conduct of a ministerial adviser, critical information has been received from a Minister's office but is not communicated to a Minister or critical instructions have emanated from a Minister's office and not the Minister.⁶⁶

There is no strong rationale why ministerial advisers do not appear before parliamentary committees. The best way for this to happen is with the agreement between Parliament and the Government for ministerial advisers to appear based on negotiated guidelines. This has previously been done for public servants. Otherwise, there will be a perpetual battle of wills between Parliament, with their strong powers, and Government, with their political escapism.

Accountability to the Courts

Another potential accountability mechanism is if courts are able to judicially review the executive actions of ministerial advisers. To this end, it can be argued that ministerial advisers are 'officers of the Commonwealth' under section 75(v) of the *Constitution*. Section 75(v) is said to entrench a minimum provision of judicial review.⁶⁷ This means that Parliament is unable to remove the jurisdiction of the High Court 'by any form of words or any device'.⁶⁸

⁶⁵ Senate Finance and Public Administration References Committee, 'Staff employed under the *Members of Parliament (Staff) Act 1984*' (2003) xii.

⁶⁶ Senate Finance and Public Administration References Committee, 'Staff employed under the *Members of Parliament (Staff) Act 1984*' (2003) xiii.

⁶⁷ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

⁶⁸ *R v Commonwealth Court of Conciliation & Arbitration; Ex parte Brisbane Tramways Co Ltd* (1914) 18 CLR 54, 59.

It is clear that Ministers,⁶⁹ public servants⁷⁰ and Minister's delegates⁷¹ are 'officers of the Commonwealth'. However, this issue has not been determined for ministerial advisers.

According to case law, an 'officer of the Commonwealth' has to have an office of some conceivable tenure, be directly appointed by the Commonwealth, accept office and salary from the Commonwealth, and be removable by the Commonwealth.⁷² In *R v Murray and Cormie; Ex parte Commonwealth*, Isaacs J stated that:

The expression 'officer of the Commonwealth' has not a fictional meaning. It has a real meaning that the person referred to is individually appointed by the Commonwealth; and therefore the Constitution takes his Commonwealth official position as in itself a sufficient element to attract the original jurisdiction of the High Court.⁷³

In *Williams*, the fact that Commonwealth funding was used to employ school chaplains was not considered enough for the school chaplains to hold an office under the Commonwealth.⁷⁴ This means that a direct contractual relationship with the Commonwealth is more likely to satisfy the criteria of 'officer of the Commonwealth'.⁷⁵

Ministerial advisers fulfil these criteria as they are appointed and removable by Ministers and their salaries are appropriated from public money. They are also appointed as individuals and not corporations. The relationship between Ministers and ministerial advisers is close enough such that ministerial advisers would constitute 'officers of the Commonwealth'.

In addition, the main purpose of section 75(v) is to ensure judicial supervision over the exercise of executive and statutory power.⁷⁶ This is done by ensuring that actions of officers of the Commonwealth are lawful. Griffith CJ has indicated that where the meaning of the words of section 75 is ambiguous, 'the ambiguity should be resolved in favour of the power'.⁷⁷ Barton J also suggested that the context gives section 75(v) 'a very extensive meaning'.⁷⁸ Barwick CJ

⁶⁹ *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 65.

⁷⁰ *R v Commonwealth Court of Conciliation & Arbitration; Ex parte Brisbane Tramways Co Ltd* (1914) 18 CLR 54, 66, 86, *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 66. *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615, *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507, 545, *Re Minister for Immigration and Multicultural Affairs; ex parte Epeabaka* (2001) 106 CLR 128, 135, *Re Patterson; ex parte Taylor* (2001) 207 CLR 291, 498.

⁷¹ *Carter v Minister for Aboriginal Affairs* (2005) 143 FCR 383, 393.

⁷² *R v Murray and Cormie; Ex parte Commonwealth* (1916) 22 CLR 437, 452-3, *R v Commonwealth Court of Conciliation & Arbitration; Ex parte Brisbane Tramways Co Ltd* (1914) 18 CLR 54.

⁷³ *R v Murray and Cormie; Ex parte Commonwealth* (1916) 22 CLR 437, 452-3.

⁷⁴ *Williams v Commonwealth* [2012] HCA 23 [109].

⁷⁵ *Williams v Commonwealth* [2012] HCA 23 [109].

⁷⁶ Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4th ed, 2009) 40.

⁷⁷ *R v Commonwealth Court of Conciliation & Arbitration; ex parte Whybrow & Co* (1910) 11 CLR 1, 22.

⁷⁸ *R v Commonwealth Court of Conciliation & Arbitration; Ex parte Brisbane Tramways Co Ltd* (1914) 18 CLR 54, 66.

said that the High Court should itself be ‘jealous to preserve and maintain the scope of the power’.⁷⁹

Therefore, there is a strong argument that ministerial advisers are ‘officers of the Commonwealth’. As such, they are subject to judicial review through the original jurisdiction of the High Court. Thus, the remedies of injunction, prohibition and mandamus are available against ministerial advisers.

Conclusion

To sum up, researching the Executive is like the mythical city of Penthesilea. You advance for hours and it is not clear to you whether you are already in the city’s midst or still outside it. If you ask the people you meet, “Where is Penthesilea?” they make a broad gesture which may mean “Here,” or else “Farther on” or “All around you,” or even “In the opposite direction”.⁸⁰

Nevertheless, I argue that, although the contours of the Executive are like a soupy city diluted in the plains, the contemporary dimensions of executive power have now enlarged to encompass ministerial advisers. As ministerial advisers are now part of the operation of the Executive, so too should their accountability increase.

⁷⁹ *R v Judges of the Federal Court of Australia; ex parte the Western Australian National Football League (Incorporated)* (1979) 143 CLR 190, 201.

⁸⁰ Italo Calvino, *Invisible Cities* (Vintage, 1997) 156-7.