



Delegatus non potest delegare:
Defining the role of ministerial advisors

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Political and administrative accountability are key planks in any democratic system, and to seek to blur or obfuscate the lines of accountability is to damage and diminish the democratic process.

With recent Australian experiences in mind, especially in regard to ministerial advisers instructing public servants, this paper looks at certain changes proposed by the new British Labour Prime Minister, Gordon Brown, as he seeks to address perceived shortcomings in the democratic process, especially in regard to accountability, and the role of ministerial staff in particular. It examines relevant provisions in the Green Paper, *The Governance of Britain*, which outlines the Brown Government's vision and proposals for constitutional renewal and discusses the proper role of the executive in a democratic system, especially in regard to issues of process and accountability. By way of comparison, it also looks at measures introduced in Canada in relation to accountability of ministerial advisers. Finally, the paper looks at parallels in Australia, identifying accountability loopholes that could usefully be addressed, given the political will, by an approach similar to that taken in the United Kingdom.

The new prime minister, who succeeded Tony Blair in June, made it clear from the outset that his view of executive government differed markedly from that of his predecessor. In fact, his first act as premier was powerfully symbolic of a fresh approach: He revoked an executive order that enabled unelected political appointees – in this case, prime ministerial staffers – to instruct civil servants. Tony Blair's 1997 order in council formally empowered Jonathan Powell, chief of staff, and Alastair Campbell, press spokesman, to give orders to officials.¹

The formal delegation of ministerial authority is easily justified in terms of managerial efficiency and streamlined administration. But such a defence ignores the affront to principles of ministerial accountability and the Westminster system that such empowerment of unelected, and unaccountable, individuals inevitably entails. It represents a corruption of the executive, the parliament and the civil service. The

¹ *The Guardian*, 2007, June 28.

delegation power, as deployed, was to have serious consequences for the integrity of British government. One of those so empowered, Alastair Campbell, 'became the most powerful figure in Downing Street besides the prime minister'.

He was able to order most Cabinet ministers – Chancellor Gordon Brown was an exception – around more or less as he liked, and exert enormous power throughout Whitehall. In due course, in a frightening abuse, he was even allowed to chair meetings with intelligence personnel present.²

Mr Campbell's public prominence was further heightened through his efforts to make a case for Britain's commitment to military action in Iraq. He was accused, inaccurately if not falsely as it turned out, of pressing the intelligence community to 'sex up' its dossier on Iraq's weapons program.

The suicide of whistleblower David Kelly, a government scientist, over the affair prompted Mr Campbell's departure from Downing Street, and led to the government setting up an inquiry chaired by Lord Hutton. Hutton found that Mr Campbell had impressed upon the chairman of the government's Joint Intelligence Committee (JIC), John Scarlett 'that nothing should be stated in the dossier with which the intelligence community were not entirely happy'.

But Lord Hutton nevertheless expressed concern about the influence Mr Campbell exercised when he made it clear to Mr Scarlett on behalf of the prime minister that 10 Downing Street wanted the dossier to be worded to make as strong a case as possible in relation to the threat posed by Saddam Hussein's WMD.

I consider that the possibility cannot be completely ruled out that the desire of the prime minister to have a dossier which, while consistent with the available intelligence, was as strong as possible in relation to the threat posed by Saddam Hussein's WMD, may have subconsciously influenced Mr Scarlett and the other members of the JIC to make the wording of the dossier somewhat stronger than it would have been if it had been contained in a normal JIC assessment'.³

² Peter Osborne, 2005, *The Rise of Political Lying*, The Free Press, London, p. 153.

³ *Hutton Report*, 2004, Ch 12.

While the report vindicated Mr Campbell's claim against the BBC which reported that he had ordered the dressing up of intelligence, it did raise pointedly the nature of his influence and the possible response to this, albeit 'subconsciously', by civil servants. It is a style of government from which the new prime minister has clearly sought to dissociate himself.

In *The Governance of Britain*, published in July 2007, the prime minister and his secretary of state for justice, Jack Straw, note that the nature of the relationship between government and governed, along with the integrity and credibility of institutions, and the rights and responsibilities of citizens, all serve to determine the health of the democracy.⁴ The Green Paper foreshadows legislation designed to clarify 'the legitimate and constructive role' of special advisers within government which the paper defines as a means of ministers obtaining 'the political advice they need' without compromising the political impartiality of the permanent civil service 'by clearly distinguishing the sources of political and non-political advice'.⁵ Addressing the issue of empowering such advisers with delegated powers, the paper deems it 'inappropriate' for advisers to perform such a role.⁶ The role of the special adviser has been succinctly described by the Canadian Privy Council Office:

The purpose of establishing a Minister's office is to provide Ministers with advisers and assistants who are not departmental public servants, who share their political commitment, and who can complement the professional, expert and non-partisan advice and support of the Public Service. Consequently, they contribute a particular expertise of point of view that the Public Service cannot provide.⁷

The UK moves will be welcomed by ministers and civil servants alike, restoring as they do a greater degree of accountability to the processes of governance, and establishing a clear distinction between political and non-political advice. The blurring of this distinction, either intentionally or otherwise, has clear implications for accountability.

⁴ The breakdown in trust was also a key theme of the Independent Review of Government Communications (the Phillis Review), the report of which was published in 2004. Many of its recommendations were adopted by Tony Blair.

⁵ *The Governance of Britain*, 2007, HMSO, CM 7170, Section 45, p. 22.

⁶ *The Governance of Britain*, Section 47, p. 22.

⁷ Privy Council Office, 2006, *Accountable Government: A Guide for Ministers*, p. 29.

http://www.pco_bcp.gc.ca/default.asp?Language=E&Page=Publications&doc=guidemin/accountable-guide_e.htm

The UK reforms have more than a passing relevance for Canberra. While no unelected official has been so formally emboldened and empowered as were Mr Campbell and Mr Powell, the power is exercised mostly at an informal and unregulated level. Anecdotal evidence suggests that the increasing incidence of instructions emanating from ministers' advisers, purporting to act on ministers' behalf, continues to be a source of friction and unease in the public service.⁸ As Anne Tiernan has noted, suspicion and distrust of the bureaucracy were features of the first Howard Government (1996-8),⁹ and while this has become less apparent over the years it has never entirely abated, especially among ministerial advisers, whose numbers have continued to grow.¹⁰

The exercise of 'plausible deniability' has now become part of the ministerial lexicon in Australia, and it represents a corruption of the process just as corrosive, but perhaps less visible, than occurred in the UK. As James Walter has written, there is clear evidence in Australia of staffers exercising forms of executive delegation in the names of their ministers by instructing public servants while the government itself imposes a barrier to their scrutiny by parliament.¹¹

Ministers from both sides of the political fence in Australia have resisted moves to have their staff either appear or answer questions at parliamentary committees. The practice has become known as the 'McMullan Principle', named for a former Labor minister who ordered his staff not to give evidence to a parliamentary committee, arguing that 'ministerial staff are accountable to the minister and the minister is accountable to the parliament and, ultimately, the electors'.¹² The 'Children Overboard' incident in 2001, in which staffers played a key role but were protected from questioning by parliamentary committees, was a prime case in point. Indeed, the then Public Service Commissioner, Andrew Podger, noted in his own evidence that there was 'a case for some articulation of

⁸ The author has worked as a consultant to government and has first-hand experience of the issue. He has spoken to a number of public servants on a background basis about the extent of the perceived problem.

⁹ Anne Tiernan, 2006, 'Advising Howard: Interpreting Changes in Advisory and Support Structures for the Prime Minister of Australia', *Australian Journal of Political Science*, Vol. 41, No. 3, September, p. 315.

¹⁰ The Prime Minister's Office alone has grown from an initial 30 in 1966 to 40 now.

¹¹ James Walter, 2006, *Ministerial staff and the 'lattice of leadership'*, Democratic Audit of Australia, Discussion Paper 13/06, April, p. 5.

¹² *Debates*, 1995, Senate, 17 February, p. 610; Ian Holland, 2002, *Accountability of Ministerial Staff?*, Research Paper No. 19 2001-2, Parliamentary Library, Parliament of Australia, June, p. 15

the values and code of conduct of ministerial officers'.¹³ The report of the Senate inquiry into the incident noted that there was 'a serious accountability vacuum at the level of ministers' offices arising from the change in roles and responsibilities, and the kinds of intervention engaged in by ministerial advisers'.¹⁴

There is no effective code governing the conduct of advisers, nor is there any professed interest in introducing one. Defenders of the status quo argue that staff are accountable because their ministers can be called to account for action stemming from staffers' advice. However, ministers can then claim that they were 'not advised' of the action in question. The minimal guidelines that do exist are both brief and narrow, contained in a section of the *Guide on Key Elements of Ministerial Responsibility*, which sets out only broad principles and requirements aimed at preventing conflicts of interest.¹⁵

While a similar situation previously obtained in Canada, the passing in 2006 of the *Federal Accountability Act* enshrined in legislation many of the former guidelines; it also brought ministerial advisers into the category of public office holders and subject to the scrutiny of the Conflict of Interest and Ethics Commissioner.¹⁶ A degree of regulation already exists in the United Kingdom with the Cabinet Office issuing a *Code of Conduct for Special Advisers* and a *Model Contract for Special Advisers*, the former setting out the general role and duties of special advisers and guidelines for conduct; it also provides guidelines for civil servants about requests from special advisers.¹⁷ However, a report in 2003 by the Committee on Standards in Public Life sought to go much further, making a series of recommendations, including legislative codification of advisers' roles and functions, a cap on the number of special advisers, and making ministers personally

¹³ *Senate Select Committee on a Certain Maritime Incident, Hearings*, 2002, 18 April, p. 1203.

¹⁴ *Report of Senate Select Committee on a Certain Maritime Incident*, 2002, p. xxxvii.

¹⁵ Prime Minister of Australia, 1988, *Guide on Key Elements of Ministerial Responsibility*, pp. 20-1.

¹⁶ *Federal Accountability Act* and associated *Conflict of Interest Act* http://www.faa-lfi.gc.ca/faa-lfi/faa-lfi00_e.asp

¹⁷ United Kingdom Cabinet Office, 2005, *Code of Conduct for Special Advisers* and *Model Contract for Special Advisers*. http://www.cabinetoffice.gov.uk/propriety_and_ethics/special_advisers/code/index.asp

accountable to parliament for the conduct of their special advisers.¹⁸ Much of this is reflected in the thrust of the recent Green Paper.

The grey and undefined area of authority, in which advisers operate, raises similar issues to those addressed by Lord Hutton in relation to 'influence'. Even if they do not direct public servants, the absence of any explicit code of conduct can, and often does, mean a lack of clarity which, in turn, can lead to 'disputes over the proper role of ministerial staff and the responsibility and accountability of the minister for their actions when controversy arises'.¹⁹ It places unfair pressure on sometimes very junior officials, especially when done via telephone with no protective paper trail.

It remains to be seen whether any Australian political leader will follow the example of Gordon Brown and seek to strike a blow for democratic government by returning a modicum of accountability to a process already damaged in the public eye. The evidence to date suggests bipartisan agreement on maintaining the status quo; as Ian Holland has noted, the first issue to be settled in any discussion about reform is 'whether any of the major parties wants to drive significant change to the accountability of ministerial staff in our parliamentary system'.²⁰

¹⁸ Committee on Standards in Public Life, 2003, *Ninth Report - Defining the Boundaries within the Executive: Ministers, Special Advisers and the Permanent Civil Service*, Ch. 7, http://www.public-standards.gov.uk/publications/reports/9th_report/index.asp

¹⁹ Alex Smith, 2006, *Ministerial Staff: Issues of Accountability and Ethics*, Parliamentary Information and Research Service, Library of Parliament, Canada, p. 6.

²⁰ *Accountability of Ministerial Staff?*, p. 23.