**Politics and Law 3X**

**Public Sector Reform**

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| **The traditional public service model** | **The modern public service model** |
| Frank and fearless advice | Criticised for lacking independence |
| Loyalty to the government of the day | Mixed loyalty to government and party |
| Permanent tenure | Fixed contracts |
| Department based | Skill-set based |
| Chain of responsibility (Westminster tradition) | Confused responsibility |
| Slow advancement | Flexible |
| Criticised as obstructive to reformist governments | Merit-based promotion |
| Criticised as having narrow experience outside Canberra | Policy achievement focus |
| Criticised for promotion as being restricted to internal staff | Use of broad, external experience |

Reforms started in Keating government 1993-1996 with greater use of contract staff for specialist programmes. Extended under Howard with greater appointment of advisers within ministerial staff who were loyal to the party (and the PM’s Chief of Staff).

Problems seen are the increased role of advisers and the confusion created over their ability to direct the public service on behalf of the minister (no longer permitted under the Code of Conduct for Ministerial Advisors) and their role in the communication chain (take a bullet for the minister). This was seen with ‘Children Overboard’ and the subsequent ‘Senate Inquiry into a Certain Maritime Incident’. It identified a failure of advisers to correctly inform ministers of important information. Since then, recommendations have focused on the need for all communication to be back up in writing (establishing a paper trail) and are now required under the Code of Conduct for Ministerial Advisors (2008). The new Code does not require ministerial staff to appear before parliamentary enquiries, limiting the extent to which they can inform of how decisions were made.

The relationship between the public service and ministers can be difficult. Ministers rarely have a background in the portfolio whereas many career public servants have a lifetime of experience. At times, ministers can be ‘set up’ by their own public servants or the public service leak against a minister.

There is also concern about the role of the Office of Prime Minister, especially the Chief of Staff. Many advisers and the ministerial chiefs-of-staff reported directly to the PM’s chief-of-staff, creating either extraordinary control in the OPM (Howard) or magnifying problems (Rudd).

‘Ahead of the Game: Blueprint for Reform of Australian Government Administration’

This report was written in 2010 and identified four key areas of public service reform:

1. Focus on reducing duplication in departments.
2. Focus on improved service delivery partnerships with the states.
3. Develop greater cross-agency relationships for planning and leadership.
4. Greater articulation of the roles of Secretaries and the Public Service Commissioner.

The reforms recommended were passed by Parliament unanimously in early 2013. A significant reform was the increased independence of the Secretaries.

The extent to which this increased independence has been seen is difficult to determine. In the recent Parliament, the Coalition claimed that some Secretaries worked against the Opposition. During the 2013 election campaign however the Secretaries of Treasury and Finance publically distanced themselves from the government’s claims against the Opposition’s costings.

Within his first hour as Prime Minister, Tony Abbott removed three department secretaries. It was implied by political commentators that they were removed because of their relationship to policy developments of the previous government. See the attached article.

**Abbott and the Public Service**

Andrew Podger, September 20 2013

Prime Minister Tony Abbott’s decision to [sack three departmental secretaries](https://theconversation.com/public-servants-victims-of-long-coalition-memories-18372) within hours of his swearing-in earlier this week has not attracted the same shock John Howard’s decision to sack six secretaries caused in 1996.

At that time, Paul Keating’s removal of secretaries’ tenure in 1994 was yet to be exercised. However, 17 years later, secretaries are painfully aware that tenure has gone and, while dismissals are not common, failure to re-appoint is certainly a frequent occurrence.

Perhaps Abbott’s move was not a “night of the long knives”, then, but sadly it was a failure to respond positively to Kevin Rudd’s attempt in 2007 to restore the concept of a public service with a significant degree of independence from political pressures. It has also (again, sadly) clarified that the [Public Service Amendment Act (2013)](http://www.comlaw.gov.au/Details/C2013A00002) does not provide any serious constraint on prime ministerial discretion over secretary appointments and terminations, despite the rhetoric of the Second Reading Speech and the unanimous support in parliament for the legislation.

Rudd’s decision to retain all the secretaries he inherited – including several with histories of close association with the conservative side of politics or records that gave reason for Labor to query their non-partisanship – gave hope to the Australian Public Service (APS) leadership that a corner had been turned which future governments of either persuasion would follow. That is, that new governments would not act unexpectedly on suspicion of partisanship or lack of professional integrity, but would allow a period to test the loyalty and competence of the secretaries they inherit.

Rudd followed up his approach by other measures pressed by Senator John Faulkner to strengthen the professional non-partisanship of the APS. These included: involving the Public Service Commissioner in appointments and terminations, removing performance pay, setting five years as the standard contract period (rather than the increasing use of three year contracts) and the introduction of a code of conduct for ministerial staff.

Several of these are now reflected in the Public Service Act after amendments agreed unanimously earlier this year. The amended act also now requires appointments and terminations by the governor-general, a presentational change but one I and others had hoped conveyed an important principle about the status of the APS as an institution.

It is true nonetheless that Rudd and Julia Gillard and their ministers did not always demonstrate Faulkner’s appreciation of the proper role of the public service. The manner in which Rudd and Wayne Swan used Treasury to shield their own accountability for economic and budgetary policy was hardly consistent with the distinctions between politics and administration, or with the lines of accountability that Faulkner had been trying to clarify.

This was also true in other policy areas, including immigration and climate change, exposing and using public service advice – selectively of course – for political ends. Perhaps some officials allowed themselves to be used too much, but most fault surely lies with ministers and the then-government. To the extent that fault lies with officials, I personally had hoped Abbott would show the same magnanimity Rudd demonstrated in 2007 and allow the relevant secretaries to prove (or otherwise) their ability to serve his government before acting to terminate appointments.

Most commentators have not been critical of the decision to terminate the contract of [industry department head Don Russell](http://www.sbs.com.au/news/article/2013/09/18/ausaid-be-absorbed-department-foreign-affairs-and-trade). Certainly, he demonstrated partisanship when on prime minister Keating’s staff and Abbott has good reason to be uncertain of his capacity to serve the conservative government loyally. But Rudd might equally have had doubts about some secretaries he inherited, such as [Michael l’Estrange](http://www.theaustralian.com.au/archive/news/chaos-reigns-in-rudds-office/story-e6frg6no-1111116694941), who had played a prominent role on John Howard’s staff as Cabinet secretary.

In my view, l’Estrange was a highly competent and professional secretary who never – in that role – showed partisanship, serving Rudd and Gillard well. Could Russell have done so for Abbott? My guess is that he could have had he wished to stay on, given his long APS experience and his sharp intelligence.

The other two (agriculture department head Andrew Metcalfe and Resources, Energy and Tourism’s Blair Comley) should definitely have been kept on. Both are proven career public servants who were asked to take on jobs in amongst the most politically sensitive fields imaginable.

Perhaps they allowed themselves to be used to promote the then-government’s policies. But arguably that was true of some secretaries Rudd inherited, such as Peter Boxall and Jane Halton. Halton, for example, attracted concern on the Labor side because of the manner of her [defence of the Children Overboard case](http://www.smh.com.au/articles/2002/06/28/1023864657707.html).

The issue is whether these apparent, excessively responsive behaviours justify dismissals by a new government despite the overall competence of the individuals concerned. In Metcalfe’s case, the new government had first-hand knowledge, after he [criticised](http://www.news.com.au/breaking-news/immigration-department-secretary-andrew-metcalfe/story-e6frfkp9-1226169050176) their asylum seeker policies while in his former role as head of the immigration department in 2011.

The case of treasury secretary Martin Parkinson is not yet clear after it was announced that he would [leave his post](http://bigpondnews.com/articles/Politics/2013/09/18/Parkinson_around_for_one_last_budget_907251.html) midway through next year. I do not know the extent to which he is being pushed out rather than willingly contemplating another role, but if he too is being pressured to go without Abbott having yet tested his competence and loyalty, that is most unfortunate.

The one good element of the Abbott announcement was the appointment of [two career public servants](http://www.news.com.au/national-news/federal-election/prime-minister-tony-abbott-sworn-in-and-then-a-public-service-shakeup/story-fnho52ip-1226721972029) to fill the vacancies. That at least does show some respect for the APS.

What messages is Abbott giving secretaries and the APS? It is just possible there is one positive message: to be very careful about the fine line between explaining and marketing government policies. As the late Canadian academic Peter Aucoin [opined](http://www.canberratimes.com.au/national/public-service/promiscuously-partisan-bureaucracies-20120430-1xu31.html), we have seen too much “promiscuous non-partisanship” in recent years: public servants willing to serve whichever side of politics is in power, but to do so with excessive responsiveness giving the public reason to doubt the impartial professionalism of their advice and administration.

In my view, this was becoming a major problem under the Howard government, and did not diminish appreciably under the Rudd and Gillard governments.

My fear, however, is that that is not the main message intended, nor the main one received. More likely is the message that public servants must indeed be even more careful in their advice – whether in public or private – and not do anything that might provoke retribution. They should also be wary of taking on politically sensitive tasks.

If the message was for a genuine return to professionalism, impartiality and non-partisanship, then that would have best been imparted by retaining the secretaries Abbott inherited and advising them all clearly what the Government expects in terms of loyalty. The APS leadership – particularly the APS Commissioner and the Secretary of Prime Minister and Cabinet (both of whom are thankfully strong traditionalists) – would then have responsibility to clarify that this does not permit “promiscuous non-partisanship” and that it does require “frank and fearless” advice.

Given the decisions taken, however, the APS Commissioner and PM&C Secretary just have to do their best to encourage the APS not to be even more risk averse and to meet their responsibilities for frank and fearless advice.

**Democracy in Australia – Responsibilities of ministerial advisers**

Ministerial advisers are employed by ministers to assist them with political issues associated with their portfolios and with their roles in the Parliament. While ministers are elected and responsible to the Parliament, their advisers are not. Some ministerial advisers are seconded from the public service, while others are appointed from other backgrounds. In both situations their accountability has been somewhat unclear.

**An ‘accountability gap’**

Political Scientist Marian Sawer and other commentators are concerned about an ‘accountability gap’ between ministers and their staff that can be used by ministers to avoid accountability for their actions. This issue came into prominence during what has come to be known as the ‘children overboard affair’ (2001-2002). Prime Minister Howard and several of his ministers claimed there was evidence that asylum seekers on a sinking vessel in Australian waters had thrown their children into the water to force Australian sailors to take the asylum seekers on board the HMAS Adelaide, where they could then claim asylum. There were allegations that ministers or their advisers had been at various stages informed that this was not the case but that ministers had failed to make that publicly known. These were especially contentious claims because the event took place leading into an election.

In 2002, the Senate established a select committee to inquire into aspects of the ‘children overboard affair’, including the information that was provided to the Government on the issue. The Committee found that the practices of ministers and ministerial staff were “inimical to the transparency, accuracy and timeliness requirements that are vital for proper accountability”. It also found that there were no adequate mechanisms to hold ministerial staff publicly accountable for their actions.

The inquiry sought evidence from ministerial advisers. The Committee was particularly concerned that when ministerial staff were called to give evidence to the Inquiry, they were prevented from doing so by their ministers.

**Code of Conduct for Special Advisers - UK**

Dr John Uhr reported on the accountability of ministerial staff to the Senate Inquiry into a certain maritime incident. He compared the situation in Australia to the model used in the United Kingdom. He recommended three actions for Australian jurisdictions, based on the UK model, to improve the monitoring and accountability of ministerial staff. These recommendations were:

That there should be a public code linked to the Australian Public Service Code documenting the responsibilities of ministerial staff to make clear to the public, the public service and ministers and the advisers themselves what is expected from ministerial staff.

Ministerial advisers should be employed by the Cabinet Secretary rather than by individual ministers to make clear that their responsibilities are to the overall ministry rather than to the minister her-or-himself.

There should be a supervisory agency for ministerial advisers to provide a right of address for public servants or others with grievances and for the ministerial staff themselves.

The public code should make it clear that ministerial advisers are required to appear before parliamentary committees and inquiries when requested to do so, and that ministers do not have the right to direct their staff not to attend. Such an obligation is not intended to place accountability responsibility on ministerial staff unless they have acted beyond their designated roles or without the knowledge of the minister. It is rather a means of ensuring that ministers are fully accountable to the parliament and the electorate.

For ministers to be fully responsible to parliament for their actions, their personal and departmental staff must be available to provide evidence to parliamentary inquiries if called. The Community and Public Sector Union points out that ministerial staff and public servants have no option but to refuse to give evidence at parliamentary inquiries if so directed. Ministers must be barred from giving this direction.

**Current code for ministerial advisers**

In the Commonwealth Government, ministerial staff are bound by the Code of Conduct for Ministerial Staff, released in 2008. Those ministerial staff who are seconded from the public service are also governed by the Australian Public Service Code of Conduct, and are employed by the Australian Public Service Commissioner.

The Code of Conduct for Ministerial Staff requires that ministerial staff make declarations of their private interests and of the receipt of gifts. It asks them to facilitate prompt and clear communication between ministers and their department. It asks for recognition that executive decisions are the sole prerogative of ministers and public servants. It also makes clear that ministerial advisers cannot in their own right give directions to public servants.

The code does not require advisers to appear before parliament if called. The government’s response to the recommendation of the 2020 Summit (held in 2008) that ministerial advisers should appear before parliament when requested was:

“Ministerial advisers should have to appear before parliamentary committees when they are taking executive decisions.”

Following the release of the code, the government has expressed the view that, since the new code prevents advisers from making executive decisions, it removes the need for them to appear before parliamentary committees. This does not ensure full ministerial accountability.

**A higher level of accountability**

As Sawer notes, an unavoidable concern of a minister is to limit reputational and political risk. Clear and enforceable codes of conduct are required to ensure that ministers and their staff operate in an open and democratic manner. Reforms which include the three recommendations made by Dr John Uhr and impose requirements on public servants to attend parliamentary inquiries would close the accountability gap which emerged so strikingly in the inquiry into the ‘children overboard’ incident.

Furthermore, the office of the Prime Minister, with advice from the Government Staffing Committee, is responsible for the implementation of the code and any sanctions imposed. If the code remains as a guideline only with no sanctions specified, its enforcement, or even continued existence, becomes a political matter. This is especially risky since one of the times when advisers are most likely to break the code is when acting in politically delicate matters. The code should be incorporated into legislation to ensure its consistent and non-partisan enforcement. It should also be overseen by the proposed new Parliamentary Integrity Commissioner.

Source Analysis Questions

1. What is the ‘Public Service Commissioner’?
2. What is meant by ‘tenure’ in the public service?
3. Explain what is meant by ‘frank and fearless advice’.
4. Explain the philosophy behind the moving of department secretaries between very different departments.
5. Explain why it is difficult to get information from ministerial staff during controversial events.
6. Identify and describe three features of the Code for Ministerial Advisers.
7. Compare and contrast the relationship between the criticisms of the traditional public service model with the modern public service model.
8. Discuss the main points of the ‘Ahead of the Game’ report.
9. Evaluate the importance of advisers in ministerial officers.