

COMMENTARY ON MEREDITH EDWARDS PAPER

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One of the interesting sides of what's happening with the performance of ministerial advisers in recent times has come to light through the children overboard committee – the Senate Committee on a Certain Maritime Incident. I have been involved in that committee's inquiry but this has been a longer term issue for us in Parliament House, and what I am about to talk about today comes from my views of involvement in that process. I want to make it clear that I am talking about my views and my involvement over some significant period of time within Parliament House and within both Minister's offices and Shadow Minister's offices rather than any of the views that my Shadow Minister may hold.

One of the issues that Meredith raised was a series of questions about current confusions and where confusions about roles and responsibilities and accountability may have arisen in recent times. I do not want to get into commenting on specific things that have come up during the Howard Government's time, but I want to talk more generally and with reference to a longer period of time.

Meredith asked the rhetorical question "If a ministerial staffer decides not to tell or show a minister something, then is the staffer accountable for that decision?" Now that was a very relevant question during one of the travel rorts incidents in the early time of the Howard Government, and in fact the Prime Minister's chief of staff was held accountable for not having shown the relevant material to the Prime Minister at the time. Graham Morris tendered his resignation. During the early days of the current government staffers were held accountable for not telling or showing a minister something. We have probably had some more recent examples where the same issues have arisen of a staffer not telling or showing a minister something and there being little accountability flowing from that decision. Certainly there has been relevance in the Certain Maritime Incident inquiry for what is or is not told to a minister or Prime Minister. Something that the Americans call "deniability" may well have been operating here where ministers do not wish to be told something, or where the staff know that they do not wish to be told something, or they are safer not being told something so that they can deny it afterwards. There is a valid question about whether that was operating during the election campaign in relation to the children overboard incident.

Meredith also asked the question "Have we reached a position where an adviser can be accountable for a minister's actions or inactions rather than the traditional approach of the minister assuming accountability, including for the activities of the adviser?" Correctly, Meredith indicates that the spot for doing that may well be the *Members of Parliament (Staff) Act 1984* (MOPS Act), which currently defines the terms and conditions of engagement of ministerial staff, but does not go to their roles and responsibilities. That is left completely in the discretion of the minister or parliamentary office-holder. There are valid questions, now, about whether that should continue to be the case – whether it should be completely discretionary on the politician involved or whether there are some guidelines, some

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parameters, which ought to be put in place, and the correct place for that may well be the MOPS Act. It is not something that has been addressed in the past, whenever governments and oppositions in parliament have addressed issues through the MOPS Act.

Meredith also posed some more rhetorical questions - what happens if an adviser asks a public servant for information that may take time to collect, or asks for a paper as background which the staffer claims is needed by the minister, or gives instructions – in effect directs - that work be done and claims to speak for the minister in wanting that work done. Some recent examples may actually be of ministerial staffers going one step further and making decisions and directing a department to implement those decisions.

Now, again, the information that has come out through the children overboard committee is relevant to that. It appears that staffers did not even put a cover of “the minister wants X to be done” or “the minister wants X approach to be taken here”, but said “this is what should happen – go and do it – go and make it happen”. Where caretaker conventions are relevant – that is during an election campaign – that becomes even more sensitive, and obviously even more political. That is really where the line is crossed of going into executive action. The issue of ministerial staff taking executive action is becoming more concerning and more relevant. Certainly as we have delved into what happened behind the children overboard incident, that taking of executive action was clearly an issue for us, the Parliament, considering that issue. We do not, of course, know whether that line – that differentiation – was relevant to the ministerial staff who were involved in making those decisions because those staff have not had an opportunity nor necessity to make public statements, including before the parliamentary committee, even though they have been asked on a number of occasions to come along and do so. They have been given a number of opportunities but they have not so far taken up those opportunities.

Meredith also raised the issue of “What is the role of public relations units in departments compared with that of the media advisers in the minister’s office?” Again, this has been a very relevant issue during the work of the children overboard committee. We have heard, though it took quite a bit of teasing out, the direction that was given by the minister’s office to a substantial public relations unit in the Department of Defence about the way the public relations activities should occur in relation to the border protection operation that the Navy was involved in. We have also heard that the Prime Minister’s office was involved in giving directions – in a very overt way – that the Prime Minister’s office was not interested in having images taken or portrayed by the Navy that were in any way sympathetic to the asylum seekers on board the leaky fishing boats. The Minister for Defence’s office was very active in ensuring that the public relations unit put that policy in place, and implemented that policy down to removing public relations officers off ships where that was appropriate. It is a very unusual situation and I am sure that sort of direction is unprecedented.

Meredith also correctly identified the importance of the relationships between a minister and agency head, a minister and other people in the department, and a minister’s staff and other people in the department. There was certainly a widespread feeling amongst the Howard government when they came to power in 1996 that there was some politicisation of the public service, or sympathy of the public service for the previous government. Therefore an element of distrust existed in those relationships. That was reflected in the way that the Howard government dealt with the public service for a significant period of time.

They were not the first government to be distrustful of public servants on coming to government. The Whitlam Government was also very much of that mould in 1972, although they had had 23 years in Opposition in order to feel paranoid about the public service at the time. That distrust from the Howard government we saw as continuing for a significant period of time, and it was certainly reflected in the way minister’s offices were set up and operated and may continue to do so until today. Ian Holland’s paper referred to by Meredith does

reflect the cut in ministerial office numbers that occurred in 1996. There was a cut in advisers and the position of ministerial consultant was done away with, so that the total number of ministerial staff dropped dramatically at that time. Since then, they have built up again until the total number of ministerial advisers now exceeds the number of advisers and consultants that were in place during the Keating Government's period in office. Without that differentiation between advisers and ministerial consultants, I think it is fair to see a blurring of the role of the current ministerial advisers – they are undertaking the roles of both ministerial advisers as they were in the Hawke and Keating Governments, and also of the ministerial consultants that were on board at the time. We might see those roles as being both technical professional roles that the Hawke and Keating Governments had consultants on board for, and the more overtly political process oriented advisers roles. That distinction has now been blurred significantly in my view. Ministerial staff now approach both of those roles more or less successfully, but I think there has been a significant blurring and confusion of those roles and responsibilities, and it leads to certain ramifications when the issue of accountability is considered. For instance, ministerial consultants were often more accountable than advisers because they were on contract for a specific period of time for a specific task and so could be held responsible against the output for those tasks and responsibilities. That is certainly not the case now with federal ministers' staff.

A couple of points I wanted to finish up on. The children overboard committee has undertaken a roundtable on some of the public administration issues that have been arising during the work of the Committee. We all found it extremely useful to have an academic input into the issues of accountability that were arising. It was clear to everyone involved that the accountability mechanisms that were in place where Parliament holds ministers accountable, did not cover some of the issues that were arising in the Committee's work – particularly in regard to ministerial staff. The members of the Committee had dealt with this in a number of different ways – including asking for particular people to come along on a number of different occasions. It has been relevant to consider the subpoena powers of parliamentary committees and how much those are useful in ensuring accountability.

The Committee decided to appoint an independent assessor to assess the evidence in relation to a number of the people who have been invited to come along and have declined those invitations, particularly those who have declined on the direction of the Cabinet. The Committee is put in a difficult position where it could enforce subpoenas against particular public servants or former public servants or former ministerial staffers or former ministers, but where the people concerned are acting under the direction of Cabinet or individual ministers not to appear before the Committee. It would be an untenable situation to threaten public servants, for instance, with gaol where they are simply complying with the directions of their minister. The independent assessor will be assessing the evidence in relation to those people and advising the Committee. Essentially this will serve to identify where the real power lies in ensuring any form of accountability, and demonstrate the relevance of political pressure. If the evidence is assessed on a legal basis by an independent person, it will enable the identification of the political influences on any subsequent decision. Another issue relating to ministerial staffers is that, if there are likely to be adverse findings made by a committee in relation to them, they have a matter they must face – whether they exercise any natural justice rights that they might feel they have. So the issue gets turned around to them. The Committee has invited them to come along, and they must decide whether they have a position that they need to protect. The natural justice rights of these people are just as important as for the rest of the Australian society. If a parliamentary committee is likely to make findings, recommendations or comment that might be adverse to them, how much should they exercise their right to comment on the committee's work and the committee's findings?

The other statement that was made at the time that the independent assessor was appointed by the Committee, was made by the Opposition members of the Committee and in

relation to a way of taking these issues of accountability of ministerial staff one step further. When the Parliament sits again, the Senate will be asked to decide on a reference to a committee (the most appropriate being the Finance and Public Administration References Committee) in relation to the broad issues of accountability of ministerial staff - their appearance before parliamentary committees, the scope of the MOPS Act, the broadest definition of their roles, responsibilities and functions. The reference may also touch directly on issues of executive action by ministerial staffers. So there will be a way for the Parliament to take the issue one step further.

It was clear to the children overboard committee when we held the roundtable that there were important issues to be dealt with here which the committee was not in a position to do properly. So the opposition members of the committee made a public statement about wanting to put a reference to a parliamentary committee. I think that it would be important for everyone who had views about these issues to consider how best to put information before that parliamentary committee, because it is the way of taking this one step forward. The MOPS Act may well be the appropriate way to deal with the issues in legislation, but a parliamentary committee may be the best way to get the best result in terms of increasing the accountability and transparency of the actions of ministerial staffers.