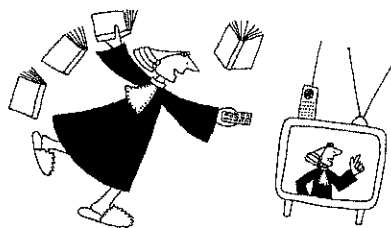


LAW & CULTURE



MINISTERIAL ADVISERS IN AUSTRALIA: *The Modern Legal Context*

Yee-Fui Ng; Federation Press; 2016; 240 pp;
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On taking government in 1972, Gough Whitlam brought with him the first cohort of politically engaged ministerial staffers. Evan Williams, one of Whitlam's speechwriters, tells of reporting on his first day to Sir John Bunting, the public servant who had headed the Prime Minister's department since 1959. Bunting took a Bible from a drawer and asked Williams to swear allegiance to the Queen.

Learning of this later, Whitlam jokingly wanted to know why the oath was not of allegiance to him; unwittingly crystallising the ambiguous questions of duty, loyalty and accountability that accompany the function to this day.

The number of Commonwealth ministerial staffers has grown from around 150 in 1972 to 438 in October 2016. Adding those employed in the states and territories, over 1600 people are now employed as personal staff to ministers. While many perform traditional support roles as administrative staff or drivers, a significant number are 'advisers' — engaged to provide political, policy and media advice and support thought beyond the proper remit of a non-partisan public service.

Yee-Fui Ng's monograph is the first comprehensive study of the legal and parliamentary accountability of these advisers. The ambiguous status of the adviser in law and practice presents a challenge for anyone setting out to explain how they might be held to account. Indeed, Ng employs the 'primordial soup' as an analogy for their barely regulated status. Yet their ever increasing number, influence over policy and administration, and evolving function as gatekeeper, determining flow of information and access to ministers, warrant a formal scrutiny hitherto lacking.

While the roles and functions of ministerial advisers at the Commonwealth level have been the subject of some fruitful study over the years, this has been largely confined to political science and public administration. Drawing on this research, Ng deftly sketches the origins and evolution of the adviser role since the Whitlam government.

Ng, a lecturer at the Graduate School of Business and Law, RMIT University and with experience as a departmental adviser, has interviewed a range of senior figures in Commonwealth and state (though mainly Victorian) politics, including no less than four former Premiers (Cain, Bracks, Brumby and Gallop), and former senior ministers including Peter Costello, Lindsay Tanner, David Kemp, Peter Reith and Kim Carr. Their often candid insights greatly enhance the narrative and analysis Ng brings to the exercise. Disappointingly, and perhaps reaffirming their shadowy

existence, there is no corresponding voice given to advisers to articulate their experiences and understanding of the role.

The ministerial interviews establish the rapid (and bipartisan) entrenchment of the 'McMullan Principle'. In 1995, then Minister for Trade, Bob McMullan declined to permit advisers to give evidence before a parliamentary committee on the basis that 'ministerial staff are accountable to the minister and the minister is accountable to the parliament and, ultimately, the electors'.

The force of this noble declamation is diminished by there not being even one resignation in Australian federal politics attributable to the principle of 'ministerial responsibility' for the failings of others.

The question of 'ministerial responsibility', both as decision-maker and as to accountability, weave through a relatively brief chapter on accountability of advisers through the courts — the brevity necessitated by the few instances of judicial review.

Ng nevertheless raises interesting questions about the application of the *Carltona* ('alter ego') principle in the Australian context. In *Carltona (Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560), the English courts held that the delegation of ministerial power was permissible, not only out of necessity (given the workload of ministers) but because as a matter of practice it would be subject to the substantial checks on ministerial responsibility by the Parliament. Considered by the High Court in *O'Reilly v State Bank of Victoria Commissioners (O'Reilly v State Bank of Victoria Commissioners* [1983] 153 CLR 1), the Australian application seemed to weigh more heavily on the former consideration than the latter.

The subsequent consideration of *Ozmanian v Minister for Immigration (Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs* [1996] 41 ALD 293) is a reminder of a time (20 years ago) when advisers would effectively determine protection visas by writing to advise asylum seekers of the outcome of their application. Perhaps those times are not that far distant with an adviser to the Attorney-General recently attending a parliamentary committee hearing alongside a former Solicitor-General so as to waive legal professional privilege on behalf of the government should the need arise.

Faced with the challenge of addressing what is really a lacuna, being the absence of effective parliamentary accountability for advisers, the final section of Ng's study brings together a rich tapestry of commentary and insight on recent developments in broader executive accountability. This draws on the *Egan* cases (*Egan v Willis and Cahill* [1996] 40 NSWLR 650; *Egan v Willis* [1998] 195 CLR 424; *Egan v Chadwick* [1999] 46 NSWLR 563), involving the powers of the NSW Legislative Council, and the *Williams* ('school chaplain') cases (*Williams v Commonwealth* [2012] 248 CLR 156; *Williams v Commonwealth*

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[2014] 309 ALR 41), which in addition to constraining executive expenditure, highlighted the importance of Parliamentary scrutiny of legislation.

Ng explores the political reluctance to hold advisers to account in parliamentary settings, primarily canvassing the series of inquiries launched in the wake of the 2001 'Children Overboard' controversy, and the less well known 'Hotel Windsor' affair in Victoria in 2010. These saw Commonwealth and Victorian parliamentary committees respectively dealing with matters in which ascertaining the role played by advisers was critical, if not central, to the questions at hand. Yet in each instance, the committees balked at summoning uncooperative advisers to give evidence.

What accounts for the reluctance of legislatures to call staffers to account in the same way as ministers and public servants? Some put it down to an informal pact between the major political parties, arguing that what goes around comes around. On that argument, however, oppositions would never have used parliamentary committees, estimates sessions, or the calls for papers held by ministers and departments, to hold governments to account.

Accordingly, there is much to the explanation offered by John Faulkner in 2002, during the Children Overboard affair. Faulkner said that while Harry Evans, the then Clerk of the Senate, confirmed the Senate's power to call advisers as witnesses, Evans warned Faulkner to be prepared to follow through should they be directed not to attend. Faulkner said the then Opposition balked at the threat of gaoling or fining staffers, who would have to be personally held in contempt, torn between obeying the Senate or their employer.

As the position and authority of advisers takes deeper root, oppositions are going to have to overcome these qualms if proper accountability is to be exercised. Making the case for the necessity and likelihood of greater parliamentary accountability, Ng argues for guidelines governing the appearance of advisers at committees.

There are times where it feels like Ng wants to nail down every conceivable angle and argument, whether warranted or not (as with a debate over whether the executive has to retain the confidence of the Senate). The book would also have profited from more detailed examination of the role of oversight bodies such as the Ombudsman and anti-corruption bodies, especially given the role of the Victorian Ombudsman in the Hotel Windsor affair. But these are minor quibbles with a book that will be the go-to text in future controversies involving advisers.

Published as a finalist for Federation Press' Holt Prize to commemorate its late co-founder, Chris Holt, 'Ministerial Advisers in Australia' will be a valued addition to the likes of Enid Campbell's *Parliamentary Privilege* and the various parliamentary manuals on practice and procedure, as guides on the legal extent of and checks on political power. It is to be hoped that sooner rather than later, Ng has to update it to account for substantive changes to the checks on staffers.

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