

BOOK REVIEW

Yee-Fui Ng, *Ministerial Advisers in Australia: The Modern Legal Context* (Federation Press, 2016)

Ministerial Advisers in Australia: The Modern Legal Context by Dr Yee-Fui Ng, a Holt Prize Finalist in 2015, presents an impressive study of a contemporary issue of the utmost importance to the sustainability of the Australian system of responsible government, namely, the legal and political accountability of ministerial advisers. It argues that ministerial advisers should appear before parliamentary committees in the interest of executive accountability. The book is, first, a study of Commonwealth practices and, secondly, an outline of select case studies from the various state jurisdictions with a preference for Victoria.

The book powerfully combines empirical and doctrinal research strategies into an irresistible argument for the appearance of ministerial advisers before parliamentary committees. It finds support for this complete assessment on a myriad of references, unflinchingly appropriate in their currency and rigour, in addition to numerous interviews and freedom of information ('FOI') requests. The book follows a perfectly logical structure — largely thematic — allowing the argument to develop incrementally, almost without interruption, while the appendices are a brilliant example of the positive significance of empirical research to legal scholarship. It complements a correct research methodology with an approach to juridical analysis that is both thorough in form and reflective in substance.

The book boasts a confident command of the principles and practices that, together, comprise the constitutionality and legal regulation of ministerial advisers as well as the political sociology of this practice in the Australian system of government and public administration. Its treatment of the literature on the subject is equally masterful. The book excels as a constructive critique of the suboptimal accountability of ministerial advisers. It presents a lucid argument that, with the force of academic and jurisprudential analysis, persuasively carries its various recommendations, chief of which is the introduction of guidelines for ministerial advisers appearing before parliamentary committees. The other recommendations (such as the incorporation of ministerial advisers into the integrity framework or judiciary enforcing appearances of witnesses before parliamentary committees), may, perhaps, be less novel but are nonetheless meritorious and warrant serious consideration. These recommendations find support in an extensive bibliography that is a near perfect catalogue of the law and literature on the difficult relationship between the Australian system of responsible government and the practice of ministerial advisers. The research methodology is commendable for its effective use of empirical strategies. Indeed, the list of interviewees reads like a 'who's who' of Australian politics.

Chapter One: Introduction

Chapter one attempts to present a rationale for the explosion in the number of ministerial advisers in the employ of Commonwealth and state executives (423 ministerial advisers at the Commonwealth level as of October 2015). The rationale suggests a measure of distrust of the public service by new executives as the principal explanation for the hire of ministerial advisers. The chapter discusses the tension between efficiency (responsiveness) and accountability (impartiality) at the core of the public service. It is a powerful observation that gives strength to the book, which confidently asserts the value of accountability and, through it, justice over efficiency in a democratic system and yet allowing for operational freedom: ‘accountability is a core constitutional value’.¹ The book convincingly draws from the work of numerous legal scholars and political scientists in support of that statement: Birkenshaw, Cole, Galligan, Taggart, Harlow, Rawlings, Cane, McDonald, Aronson, and Groves. The motivation for the study is curious for its origin but nevertheless valid as a research question: the claim by Prime Minister John Howard (and Attorney-General of Victoria, Rob Hulls) that, by constitutional convention, ministerial advisers do not appear before parliamentary committees.

Chapter Two: The Expanding Universe and the Primordial Soup: Ministerial Advisers in a Framework of Australian Public Administration

Chapter two provides a careful analysis of the categories and roles of ministerial advisers and an analysis that even reviews their bands of appointment. Incidentally, the term ‘primordial soup’ appears throughout the chapter as it does in its title. It is a rather awkward expression for legal scholarship. The term does have significance for the study of biology (and the work of Alexander Oparin) but one wonders whether another expression may have been more appropriate. In any respect, the constant comparison that the chapter makes between the function of the ministerial servant and that of the public servant and their interrelationship is helpful. Moreover, it allows a uniquely candid insight into the very special relationship between ministers and their advisers, a relationship that relies on intimacy, trust, and confidence. The extracts from the numerous interviews that the author had with politicians at all levels of government give a sense of immediacy that adds a touch of reality to the book.

Chapter two cleverly explains the rise of ministerial advisers as an attempt to counter the passivity of the public service, ever sensitive to avoid the slightest political controversy. This phenomenon has not been without costs, however. The chapter reports a fairly widespread perception in government circles that the public service has dropped in quality as it no longer offers the kind of close engagement with the executive level of government that it once did. The loss of quality, the chapter posits, could also be a consequence of the different employment terms

1 Yee-Fui Ng, *Ministerial Advisers in Australia: The Modern Legal Context* (Federation Press, 2016) 13.

that now extend to senior public servants. Departmental secretaries no longer enjoy tenure and the executive government can dismiss them with relative ease as the case of *Barratt v Howard* demonstrates.² The book reports 9 per cent as the proportion of public servants on contractual appointments at the federal level, the highest ever. Inevitably then, the chapter intelligently suggests, the rise and rise of ministerial advisers challenges the very origins of the Australian public service in the Westminster tradition of impartiality. Ministerial advisers are too close to the patronage bureaucracy prevalent in the times before the Northcote-Trevelyan Report put an end to nepotism. Ministerial advisers are reminiscent of the spoils system that has dominated American government administration for decades. This development the chapter shows brilliantly with an attractive interplay of quotations styled as memories and anecdotes from the many interviews that the author has conducted with past federal and state ministers.

The struggle between partisanship/patronage and merit/efficiency is the very essence of the ministerial adviser problem at all levels. The problem becomes more difficult when the inexperience and lack of skills as well as the personal ambition of so many ministerial advisers surface in extreme cases such as the Junie Morosi affair. Initiatives to centralise the recruitment and appointment of ministerial advisers (eg Ministerial Staff Advisory Panel, Government Staff Committee, Government Staffing Committee) are too inconsistent to be effective. It, ultimately, comes down to a contest between ‘serial loyalist’ public servants and ‘personal loyalist’ ministerial advisers. In an exercise of the agent-principal relationship, chapter two, then, calls for greater ministerial delegation to the public service as a workable solution and a rational choice despite the Weberian conceptualisation of the public service as an overpowering class. There are constraints though to such delegation, from the APS Code of Conduct to the Regulatory Impact Statement process. These constraints, formal and informal, combine together to ensure that public servants do not overpower ministers. In fact, the opposite is very much the case to the extent that ministerial advisers now come into conflict with public servants. Ministerial advisers are only ever loyal to their minister, to whom they are attached by a personal retainer. They receive next to no training and come under no formal review mechanisms. A Statement of Standards for Ministerial Staff (Statement of Standards) does exist but it has no legislative base and processes under it are not entirely transparent. Only two cases are known to exist — Forrester and O’Rourke — and both were resolved in favour of the ministerial adviser in question.

Chapter Three: Regulation through Law

Chapter three deals with what is perhaps an even more important question, the accountability of ministerial advisers or, more precisely, its lack thereof. The regulation of ministerial advisers may be constitutionally adequate but it is certainly not constitutionally optimal. The chapter makes a call for greater accountability. That call rests on two proposals: a proposal for judicial review

of the exercises of statutory and non-statutory executive power by ministerial advisers as a mechanism of legal accountability and a proposal for the appearance of ministerial advisers before parliamentary committees as a mechanism of political accountability.

The first question is ‘whether the decisions or public actions of ministerial advisers that affect individuals are reviewable by the courts’.³ The chapter considers the two main avenues of judicial review: jurisdiction under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) and jurisdiction under ss 75(iii) and 75(v) of the *Australian Constitution* (s 39B of the *Judiciary Act 1903* (Cth)). Chapter three considers the jurisdiction, grounds of review, and benefits of review for both the *ADJR Act* and s 75 of the *Australian Constitution*. The answer to the question is clear and without fault: ‘where ministerial advisers exercise pure executive or statutory power, their decisions are subject to judicial review under ss 75(iii) or 75(v) of the *Constitution*, or the *ADJR Act*’.⁴ The chapter acknowledges that s 75 of the *Australian Constitution* ‘covers a broader range of decisions than the *ADJR Act*’⁵ but, ultimately, decides in favour of the latter because of its more flexible range of remedies.

The second question is how ‘individuals are able to obtain evidence relevant to the actions of ministerial advisers’.⁶ Chapter three considers the FOI process and discovery in litigation. The study shows that these strategies are not altogether effective because of interference by Cabinet exemptions and public interest immunity considerations.

Chapter three concludes with a powerful assertion. The Statement of Standards limits the role of ministerial advisers to a liaison between ministers and the public service but the contemporary reality of Australian politics has widened the scope of that role beyond its legal boundaries. The problem is that the Statement of Standards is neither enforceable nor reviewable and so the accountability of ministerial advisers is rather questionable. Nevertheless, the chapter is right to draw a distinction between individualised accountability and generalised accountability. Individualised accountability, on the one hand, is adequate because some form of public law review is indeed available. Generalised accountability, on the other hand, is not adequate because of the many restrictions on the review of FOI and discovery.

Chapter Four: Regulation through Parliament

Chapter four makes the book a truly unique work of legal scholarship because it develops a novel proposal for the legal regulation of ministerial advisers. The mechanisms of constitutional and administrative law are not entirely fit for the purposes of responsible government, managerial imperatives aside. And the

3 Ng, above n 1, 67.

4 Ibid 93.

5 Ibid 80.

6 Ibid 90.

‘[y]ou either back them or you sack them’⁷ approach is hardly adequate either. Instead, the chapter proposes parliamentary accountability as an alternative mechanism but one in perfect alignment with the principle of responsible government. This principle means that the executive is subordinate to the Parliament.⁸ On that premise, the chapter ‘considers the basis upon which ministerial advisers should be directly accountable to Parliament’,⁹ not through such indirect mechanisms as question time but directly, through parliamentary committees, especially senate parliamentary committees, as the government rarely holds a majority in the Upper House and the scrutiny, therefore, can be more intense. The chapter recommends that ministerial advisers appear before parliamentary committees further to guidelines agreed between the government and Parliament. The chapter reviews the history and role of parliamentary committees and the principle of responsible government and concludes that Parliament has the power to send for persons, papers, and records, including ministerial advisers. There is no ministerial adviser-cum-public policy interest immunity. And, contrary to assertions by senior Commonwealth and state government figures like former Prime Minister John Howard and Victorian Attorney-General Rob Hulls, there is no constitutional convention that ministerial advisers do not appear before parliamentary committees. Even in the face of precedents like the ‘Children Overboard’ and ‘Hotel Windsor’ incidents at the Commonwealth and Victorian levels respectively, the empirical research reveals that political participants do not see themselves as bound by a convention that ministerial advisers do not appear before parliamentary committees. To enhance the parliamentary accountability of ministerial advisers, chapter four proposes three options:

First, ministerial advisers can be integrated into the current integrity framework of the Ombudsman, FOI, and anticorruption bodies. Secondly, courts could be utilised to enforce the appearances of witnesses before parliamentary committees through creating a criminal offence of non-appearance or failure to answer questions before a parliamentary committee. Thirdly, guidelines could be negotiated between the government and Parliament about the appearance of ministerial advisers.¹⁰

After a rigorous assessment of all three options, the chapter endorses the third as the most workable and the ‘best way to resolve the seemingly intractable disputes between Parliament and the Executive in respect of ministerial advisers appearing before parliamentary committees’.¹¹ The proposal for Parliament and executive to jointly develop ministerial adviser guidelines is entirely novel and benefits from a comparative study of United Kingdom practice, which is novel too. This proposal, the chapter recommends, should not exist in isolation:

7 Ibid 97, quoting Yee-Fui Ng, Interview with Kim Carr (Melbourne, 11 March 2014).

8 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and, in particular, *Williams v Commonwealth* (2012) 248 CLR 156.

9 Ng, above n 1, 98.

10 Ibid 177.

11 Ibid 187.

This includes enhancing the powers of the Ombudsman to investigate maladministration by ministerial advisers. ... In addition, documents produced by ministerial advisers should be incorporated in the FOI framework, and anti-corruption bodies should have jurisdiction to investigate the corrupt conduct of ministerial advisers.¹²

Chapter Five: Conclusion

Chapter five concludes the book. It starts off with a potent assertion: ‘accountability is a constitutional value that should be accorded greater weight than efficiency’.¹³ This assertion is important because it underpins the central theme of the book, namely, accountability. And the practice of ministerial advisers challenges that notion:

The introduction of ministerial advisers ... introduces a possible element of patronage into a system historically based on merit. The rise of ministerial advisers has led to the reduction of the influence of the traditional public service, and has blurred the lines of accountability between Ministers and the public service.¹⁴

The conclusion reassesses the regulation of ministerial advisers in Australia. The appropriation of salaries and employment of ministerial advisers is indeed constitutional, and administrative law does provide certain mechanisms to review their public actions and activities. The present system is adequate but it is not optimal. The proposal is to optimise the accountability of ministerial advisers through parliamentary scrutiny. The book ends on a reflective note and calls for a more nuanced approach to governance and, in particular, executive regulation:

there are failings at an institutional level in the Australian system of public administration, which have been exacerbated by the rise of ministerial advisers in the Australian system of government, the strategic behaviour of political participants and the unreflective adoption of the ‘new public management’ approach.¹⁵

The book includes an extensive bibliography (a veritable library of record) and helpful appendices on the empirical research work that the author conducted, including ‘interview questions’ (app A) and ‘list of interviewees’ (app B) (among whom are such political notables as Peter Costello, Steve Bracks, and Geoff Gallop).

The book valiantly recommends the development of ministerial adviser guidelines. Chapter four proposes the themes that should inform those guidelines. It is unfortunate, though, that the book did not incorporate draft model guidelines as an attachment. It is unfortunate too that, while the book does indeed cover the Commonwealth system, the only consistent state case study is that of Victoria and so the book cannot genuinely claim to cover the whole of Australia’s polity.

12 Ibid 188.

13 Ibid 191.

14 Ibid.

15 Ibid 192–3.

Nevertheless, Victoria seems to be highly representative of every other state jurisdiction.

Purist legal scholars may read the book and observe that it is too much of a work of political science. That observation, if it were ever made, would not be fair. The book is an exemplary work of contemporary legal scholarship, one that benefits from interdisciplinary engagement and empirical research. The intent of the empirical research here is to explore and discover, which is laudable and shows a real curiosity for the topic. Dr Yee-Fui Ng is to be commended for her brave and brilliant intellectual initiative and *Ministerial Advisers in Australia: The Modern Legal Context* warrants thanks and praise as the first study of the regulation of ministerial advisers in Australia.

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