

Paper for submission to Public Sector

**A Third Force?
Ministerial Advisers in the Executive**

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Introduction

In his 2002 Annual Report to Parliament the State Services Commissioner suggested that recent increases in the number of political advisers in ministers' offices had 'raised fears in some quarters about the potential for the politicisation of the Public Service' (Wintringham, 2002, p. 10). Michael Wintringham went on to note that recent events in the United Kingdom and Australia had triggered debates regarding the role of political advisers, and the bearing their activities have on relations within the executive branch.

This article contains a preliminary exploration of some of the roles, relationships and accountabilities of ministerial advisers in New Zealand. It also reviews equivalent arrangements in Australia and the United Kingdom where, partly as a result of controversial events such as the so-called 'Moore/Sixsmith' and 'children overboard' affairs, there has been rather more debate around the use and regulation of advisers than there has been in New Zealand. Such lessons as may be discerned, however, are at this stage tentative in the extreme. Our principal purpose at this point is to establish the groundwork for further

research directed at the contribution of what is now routinely referred to in the United Kingdom as the 'third element' of the executive branch (Wicks, 2002a, p. 3).

Special advisers in the United Kingdom

Special advisers have been a feature of the executive environment in the United Kingdom (UK) since the time of Lloyd George. But since 1997, as a result of Labour's desire to strengthen the centre of government the number of those once described by Wilson as 'an extra pair of hands, ears and eyes and a mind more politically aware than would be available to a Minister from political neutrals' (Wilson, 1976, p. 5; cited in Wicks, 2002a, p. 6) has climbed appreciably. In 1996 there were 38 special advisers, but in 2002 ministers employed some 83 advisers (27 of whom worked in one or other of the specialist units within the Prime Minister's office at No. 10). Of that number, 11 are employed principally in a communications capacity, 30 or so deal largely with speech-writing, and the remainder engage in various policy-related activities (Wilson, 2002, p. 387).

Special advisers are employed under the 1995 Civil Service Order in Council as temporary civil servants within departments. However, there is a core difference between career civil servants and special advisers: while the former are expected to adhere to the civil service conventions of neutrality and objectivity, the latter are appointed by ministers to provide an expressly partisan 'voice' within a department' (Neill, 2000, p. 68). In general terms, the role of advisers is to contribute 'a political dimension to the advice available to Ministers ... while reinforcing the political impartiality of the permanent Civil Service by distinguishing the source of political advice and support' (Ministerial Code, para. 50). Amongst other activities, advisers review policy proposals from the point of view of the governing party, manage the political risks associated with policy development and implementation, prepare speculative policy papers reflecting the preferences of the minister's party, and brief party members (both MPs and officials) on issues of government policy.

The parameters within which special advisers operate are established in various documents.

Advisers sign a Model Contract for Special Advisers. Employment contracts are between advisers and departments, although the appointing authority is the relevant minister. The contract specifies those parts of the Civil Service Code of Conduct which apply to advisers (see below), but recognises the particular character of the advisers' role by removing the requirement that appointment be on the basis of an open, competitive process, and by specifying that the period of appointment ends with the demise of the government, or with the departure of the appointing minister.

With the exception of those provisions regarding the duty to act impartially and objectively, special advisers must adhere to the Civil Service Code of Conduct (CSCC). Should special advisers offend against the code, any subsequent disciplinary action is the responsibility of the relevant permanent head of department.

In addition, special advisers are subject to a Code of Conduct for Special Advisers (CCSA). Between 1997-2001 advisers were governed by the contents of the Ministerial Code and the CSCC, but following the recommendations of the Committee on Standards in Public Life (Neill, 2000) and the Public Administration select committee (House of Commons, 2001a) the government implemented a dedicated code for advisers in 2001. The CCSA clarifies that advisers are 'employed to help Ministers on matters where the work of Government and the work of the Government Party overlap and it would be inappropriate for permanent civil servants to become involved', and exempts advisers from the requirement to act impartially and objectively. It specifies the tasks advisers may be required to undertake, imposes a duty on all advisers to respect the impartiality of career civil servants (and contains procedures for civil servants who wish to raise matters regarding the conduct of advisers), and clarifies the respective roles of advisers and departmental information staff *vis a vis* contact with the media.

It is widely accepted that special advisers are an important adjunct of executive government: indeed. Sir Richard Wilson, a former head of the Civil Service, is not alone in maintaining that advisers are 'now established as a proper and legitimate feature of the constitutional framework within which Cabinet ministers work', and that their value lies in being able to 'help the department understand the mind of the minister, work alongside officials on the minister's behalf and handle party political aspects of government business' (Wilson, 2002, p. 387).

The 'Moore/Sixsmith' affair – which was triggered by feuding between advisers and officials, and which resulted in the resignation of minister and the dismantling of a department - threw a number of important issues into sharp relief (see House of Commons, 2002). In particular, it highlighted concerns that the growing influence of special advisers may (if it has not already done so) politicise the policy process by diminishing the role of civil servants (Neill, 2000, p. 73; Mountfield, 2002). The issue is not so much that advisers pressure civil servants to act in an overtly partisan manner, it is that at some point senior civil servants' contribution to policy formation and their access to ministers may be compromised by gatekeeping on the part of advisers, resulting in the 'marginalisation of orthodox civil service advice' (Mountfield, 2002, p. 3).

There is a view that this risk is overstated, and that the 3,700 or so members of the senior civil service are in no immediate danger of being overrun by a relatively small cadre of special advisers (Wilson, 2002). But the ratio of advisers to officials is arguably less important than the leverage which advisers exert at the heart of the executive, and the privileged access they have to ministers (House of Commons, 2001a; Wicks, 2002b). Thus, there is some disquiet regarding the potential for advisers to assume executive authority which is conventionally the prerogative of ministers.

The dual system of control which applies to special advisers contributes to the fuzziness around roles and relationships. Briefly, because an adviser is personally appointed by a minister (with the permission of the Prime Minister), but is also subject to the control of a permanent secretary, the 'lines of accountability and ownership can appear less than clear' (Neill, 2000, p. 73). When relations between special advisers and permanent officials are cordial, and when advisers refrain from trying to influence management or operational activities, this contradiction remains latent (House of Commons, 2002). However, when boundaries are transgressed (by advisers or civil servants), permanent heads of department may find themselves in the uncomfortable position of having to discipline, and perhaps fire, an adviser who has been appointed by a minister.

Looking ahead in the United Kingdom

While there is unease in some quarters with the increase in the number and influence of special advisers, there is no sense of systemic crisis in the UK. That said, the Moore/Sixsmith affair gave additional impetus to the pressure to clarify existing arrangements by extending Parliament's oversight of special advisers. Based on the principle that because advisers 'are paid out of public funds ... there must be accountability for [advisers] to Parliament' (Wicks 2002a, p. 14), there is now a measure of support for statutory regulation, either in the form of specific legislation for special advisers (as exists in Ireland) or via a comprehensive Civil Service Act (House of Commons, 2002; Mountfield, 2002; Neill, 2000; Wicks, 2002a).

Proponents of a Civil Service Act (to which the Blair government has committed) argue that legislation would substantially reduce the ambiguities in the current system, and address the seeming unenforceability of the existing non-statutory instruments (House of Commons, 2002). Future legislation will likely seek to clarify accountability arrangements by incorporating the codes of conduct for both civil servants and special advisers. There is a measure of support for granting Parliament the right to establish the total number of advisers at the start of each parliamentary term, with any subsequent increase

requiring affirmative resolutions in both Houses (Grice, 2002b; Neill, 2000; Wicks, 2002a; Wilson, 2002).

Another view disputes the merits of statutory limits, and proposes instead that, much as opposition parties currently receive 'Short Money' for the purposes of funding their parliamentary business, a specific appropriation could be made for special advisers (which would place an outer limit on the overall number of advisers but ensure ministers had some flexibility in their appointment and deployment) (House of Commons, 2001a, para. 30). The government has accepted the case of limiting the number of advisers via legislation (House of Commons, 2001b), but has expressed concerns that advisers' access to civil servants, and to advice generated by officials, would be unhelpfully constrained if advisers were constituted under a discrete category (UK Government, 2002).

There are various other ways in which the boundaries between ministers, special advisers and civil servants might be clarified. For instance, attention has also been drawn to the need to rectify the anomaly between the 1995 Order in Council, which describes the adviser's role as 'giving advice only to Ministers', and the provisions of the special advisers' code, which permit advisers to brief the media (House of Commons, 2002). A case for better induction and training, both for civil servants and special advisers, has been made, as has the argument for a more effective grievance procedure for officials who feel their impartiality has been compromised by the actions of advisers (House of Commons, 2002; Wilson, 2002). In the interests of providing some assurance regarding the calibre of advisers paid from the public purse, it has also been recommended that special adviser posts be publicly advertised (as does the First Minister in Wales), with the final choice of appropriately qualified candidates resting with ministers (House of Commons, 2001a).

Ministerial Advisers within the Australian Federal Government

The roles, responsibilities and accountabilities of advisers have also been topical matters in Australia, particularly in the period since the last Federal election and in the light of what has become known as the 'children overboard' affair, or a 'certain maritime incident'. The 'incident', centred in large part on the actions of 'political' staff in the Office of the Minister of Defence, Peter Reith. Prior to the November 2001 Federal election these staff released photographs of asylum seekers that purported to show them children being thrown into the sea as a protest against, or in an attempt to frustrate, being taken into custody by members of the Australian Defence Force. Subsequent inquiries indicated that the photographs were taken when the vessel carrying the asylum seekers sank, and that the Minister's staff were advised of this prior to the release of the photographs.

In 1972 the Whitlam Government introduced a 'new style of Ministerial office', with the employment of partisan advisers recruited from outside of the APS (Maley, 2002, p. 103). That Government's Royal Commission on Australian Government Administration (RCAGA, or the Coombs Commission) identified the importance of this change of style, and in 1974 the administration signalled its intention to explore a number of issues in relation to ministerial (i.e. non-APS) staff, including:

- the need to define their roles and those of departments, to avoid misunderstanding, overlap and 'clash';
 - the relationship of ministerial staff to those in departments and statutory and other bodies;
- the possibility of establishing closer and better understood links between staffs of different ministers;
the use of ministerial staff members in working groups which include departmental and/or outside members (RCAGA, 1979, p. 9; cited in Maley, 2002, p. 103).

The Report of the Royal Commission, while acknowledging a role for the ministerial office in communicating with stakeholders, was far more cautious on the matter of an explicit role for the office in the policy process. Indeed, the Commission:

... did not generally favour policy advisers in ministers' offices. The report recommends that where a minister feels the need for additional policy advice and analysis, 'it is preferable that he should take up these needs with his departmental head' as 'it will frequently be more helpful for him if the resources of the department are more effectively mobilised or stimulated to be responsive to his needs' (Maley 2002, p. 104).

The period of the Fraser Government saw a reduction in the number of ministerial advisers, but a significant increase in the resourcing of the Prime Minister's office, including by way of the employment of partisan advisers.

The election of the Hawke Government in 1983 presaged a significant increase in the number of ministerial advisers, an increase underpinned by an explicit policy commitment to bring a 'political dimension' to the process of policy development. Following the election of the Hawke Government, a Statement on Reforming the Public Service asserted that 'Ministerial control will be bolstered only if large numbers of politically committed people can have a close involvement in the development and implementation of policy' (Commonwealth of Australia, 1983; cited in Maley, 2002, p. 105).

Indeed the partisan policy role that had been so controversial and fiercely resisted in the Whitlam period was both asserted and legitimised from the outset of the Hawke Labor period (Maley, 2002, p. 105). During the Hawke/Keating governments there was a 63% increase in the number of ministerial advisers (and the numbers have continued to grow steadily under the Howard Coalition Government) (Maley, 2000a). Maley's research reveals that around half of the ministerial advisers in those governments were public servants on secondment, and that 70% had a career background in the public service.

Interestingly, the fact that the role of ministerial adviser is quite explicitly a partisan one does not militate against ministerial advisers being recruited from, and returning to the public service. As Maley notes:

A partisan public servant is a definitional impossibility in Britain, where public servants simply cannot work as 'special advisers'. Yet in Australia it is accepted with little debate that each year many public servants go to work in clearly partisan roles in ministers' office and then return to work in the public service (2002, p. 106).

Australian Prime Minister John Howard has suggested that one of the fundamentals of the Australian democratic process is '[a]n accountable, non-partisan and professional public service providing to a democratically elected government sound and fearless advice ... and ... preserving its value is a priority for my government' (Howard, 2001). In the same address, however, he goes on to say, in relation to contestability of advice:

Ministers can and do, of course, employ public servants in their private offices. It's appropriate that ministerial offices draw from the full range of skills – political and public administrative – that's available. And it's a tribute to the quality of training and range of experience offered within the APS that some of the finest Ministerial staff I have known had previous careers within the service. ... In many ways, it's the ideal – someone who understands the detailed workings of government but who is fully attuned and sympathetic to the Government's political and policy objectives (Howard, 2001, emphasis added).

Ministerial advisers now have a clear policy focus to their work, and see themselves as 'partisan policy advisers' (Maley, 2002, p. 106). And while most ministerial advisers work in the role for a relatively short period of time, a significant minority have worked for previous governments (Federal and/or State), and/or have moved in and out of adviser roles over a long period. Increasingly, the role of the ministerial adviser is that of the 'technical' policy specialist, with approximately half of the advisers included in

Maley's study of the Keating Government defined as specialists, with a deep knowledge of policy issues (Maley, 2002, p. 106).

The Report of the Senate Committee into a 'certain maritime incident' released on 23 October 2002, found that 'there is a serious accountability vacuum at the level of ministers' offices arising from the change in roles and responsibilities of, and the kinds of interventions engaged in by, ministerial advisers' (2002, p. xi). It went on to recommend that:

... the Australian Public Service Commission convene a Working Group of senior officials of the Department of Prime Minister and Cabinet and senior parliamentary offices of both Houses of Parliament, to develop a Code of Conduct for ministerial advisers incorporating a Statement of Values commensurate with Conduct and Values provisions that apply within the Australian Public Service. The report should also make any recommendations concerning mechanisms for dealing with any breaches of such a Code, or the handling of complaints arising from the actions of ministerial advisers (2002, p. xl).

Others have also suggested a regulatory approach to the issue. Holland, for example (echoing similar calls in the UK), has raised the possibility of ministerial staff being subject to the requirement to appear before Parliamentary committees, the insertion of conduct-related clauses in legislation, greater transparency of ministerial staff contracts, parliamentary regulation of numbers of and/or the conditions of employment of ministerial staff, and the establishment of a complaints review process beyond merely review by the Prime Minister (Holland, 2002).

On the other hand, there are those who maintain that the issue is systemic in nature, and that the remedy, in part at least, is a cultural one. For instance, John Uhr has observed that:

Official conduct will not improve until we as a political community have some common agreement on publicly credible specifications of role: for ministers, their staff and for other discretionary decision-makers. Knowing the responsibility of role means more than reciting provisions of public service legislation. It means knowing the public value of the responsibilities under one's care, and being prepared to account publicly for one's performance in realising that role (Uhr, 2002).

4 Ministerial Advisers in New Zealand

Events (and subsequent debates) in the UK and Australia provide a backdrop against which to consider the question of political advisers in New Zealand.

4.1 how many advisers?

Notwithstanding a tendency for some commentators to do so (Venter, 2002; Young, 2002), the trend towards larger ministerial offices cannot be attributed solely to an increase in the number of political advisers. The Ministerial Services Branch of the Department of Internal Affairs employs ministerial staff in a variety of capacities, and ministers also draw on the services officials seconded from government departments. Party Leaders, including leaders of the party or parties formally constituting the government at any given time, also have access to staff funded and employed by the Parliamentary Service. Indeed, it is difficult to establish precisely how many ministerial advisers there are. There is no formal cap on the overall number of advisers, and oversight of their appointment and deployment rests with the Prime Minister, as Minister responsible for Ministerial Services. That said, so far as staff employed within ministers' offices are concerned, it is possible to distinguish between those employed by Ministerial Services on an events-based basis, secondees from departments, and individuals working on specific, project-based contracts.

Ministerial advisers are employed on events-based contracts, whereas secondees, who are typically 'private secretaries' (DLOs in the Australian context), are employed to provide administrative support and liaison rather than partisan advice. While there has been a marked jump in the total number of staff employed in the executive in recent years, the number of ministerial (partisan) *advisers* is necessarily smaller than the number of ministerial *staff*.

Table 1: Events-based contact staff employed by the DIA (2003)

Designation	Number
Senior Private Secretary	23
Ministerial Adviser/Senior Adviser	22
Executive Assistant	8
Press Secretary/Media Assistant	21
total	74

The clearest means of establishing the number of advisers is to disaggregate the number of staff employed on events-based contracts by functional classification (see Table 1). Even that delineation is not entirely satisfactory, as some secondees are also remunerated (in part or whole) by Ministerial Services. However, by teasing out the functions performed by events-based contract staff it is possible to roughly distinguish between administrative tasks and political/advisory activities. Senior Private Secretaries tend to provide administrative rather than political support, and generally manage the ministerial office as an administrative entity. While the line of demarcation between the administrative and the political is, at best, indistinct, Advisers/Senior Advisers, Executive Assistants, and Press/Media staff tend to engage in more explicitly political functions. On that basis, it is reasonable to conclude that the presence of ministerial/political advisers is considerably smaller than might be inferred from the general trends towards larger ministerial offices.

4.2 regulating advisers

In a formal sense, the regulation of ministerial advisers is established largely through:

An employment contract. The authority to appoint ministerial advisers under the *State Sector Act 1988* rests with Ministerial Services (James, 2002).

A job profile which is signed as part of the terms and conditions of employment, and which specifies the mix of tasks for which an adviser is accountable.

The Public Service Code of Conduct (PSCC). Section 57 of the *State Sector Act 1988* enables the State Services Commission to establish minimum standards of integrity and conduct to which all employees of government departments are expected to adhere. The current code (revised in September 2001) establishes three principles of conduct. As employees of the DIA, ministerial advisers must (a) fulfil their lawful obligation to government with professionalism and integrity, (b) perform their official duties honestly, faithfully and efficiently, respecting the rights of the public and colleagues, and (c) not bring the public service into disrepute through their private activities.

In addition, advisers are subject to the DIA's own Code of Conduct (which modifies the core provisions of the PSCC to the department's specific circumstances). What is of particular note is that the code requires the department's employees to '[e]nsure that their personal interests or convictions do not interfere with the duty to serve the Minister through the Secretary of Internal Affairs', and, under a separate section headed 'Political Neutrality', to 'provide honest and *impartial* advice to Ministers and faithfully implement the policies of the Government of the day' (emphasis added).

4.3 looking ahead

With the advent of mixed-member proportional representation the environment within which ministers, officials and ministerial advisers function has become more complex.

It is in this more exacting context that the issues raised by the State Services Commissioner in his 2002 Annual Report, and with which this paper began, should properly be considered. Following his observations on the concerns regarding politicisation, Michael Wintringham went on to note that:

For the Public Service to work effectively with ministerial advisors (and vice versa) clear understandings or protocols are needed between Ministers and their chief executives (Wintringham, 2002, p. 12).

On the basis of both evidence and experience we would support the Commissioner's call for 'understandings or protocols' between ministers and their Chief Executives. The reality is that many ministers and chief executives already operate on the basis of an informal understanding as to the respective roles of departmental officials and ministerial advisers. Indeed, observation and experience would suggest that it is nigh on impossible for a ministerial adviser to operate effectively without having 'negotiated' understandings with his/her departmental colleagues, both within the ministerial office, and the department or agency.

However, from time to time tensions do arise between ministerial advisers and their departmental colleagues (as they do between public servants, both within and between departments). Given that no such concerns have yet surfaced publicly, it may be that the very 'understandings or protocols' which Michael Wintringham commends to ministers and Chief Executives are already in place, in various informal manifestations, and are working effectively. That said, if ministerial advisers have become (either *de facto* or *de jure*) a third branch of the executive, thought should be given to the formal framework within which their contribution to government processes might best be made.

The accountability arrangements which apply to advisers in New Zealand are rather less clear than those which exist elsewhere, especially in the UK. A particular anomaly arises out of the fact that advisers are subject to codes of conduct which enjoin them to act impartially, objectively and anonymously. As is recognised in the UK (House of Commons, 2001a, p. 3) and accepted within the Australian jurisdiction, ministerial advisers are a special type of public servant, and it seems nonsensical to hold them to account (or at least for that possibility to technically exist) against standards which proscribe the very activities they are employed to undertake. Along with the absence of a domestic equivalent of the UK's Model Contract and a dedicated code for advisers, this simply contributes to the lack of clarity regarding the accountability arrangements which do apply to ministerial advisers here.

Thus far in New Zealand there have been no events to rival those which have transpired in Australia and the UK. However, the imprecision of the existing accountability régime is such that disputes involving ministerial advisers are likely to occur (although the degree to which these become public is another matter). Future attempts to clarify advisers' accountability would ideally strike a balance between the public's interest in the public resourcing and activities of advisers with ministers' legitimate demands for political advice.

An obvious initiative in this direction would be the development and publication of a Code of Conduct for Ministerial Advisers (CCMA). Drawing on the comparative experience, such a code could usefully clarify the distinction between advisers and permanent officials by explicitly recognising the partisan nature of the adviser's role. A CCMA should also specify other appropriate standards against which advisers' behaviour could be assessed by clarifying which provisions of the Public Service and DIA codes of conduct also apply to advisers.

5 Conclusion

The principal purposes of this article have been to explore the emergence of ministerial advisers in New Zealand and, drawing on the comparative experiences of two nations with which New Zealand enjoys both some constitutional and political affinity, to suggest an agenda for future research. There are several important issues which we have not attempted to explore in any detail here, amongst which are the contribution ministerial advisers make to policy development, and the relationship between ministers' press staff, departments and the media.

In terms of a research strategy going forward – one that might provide an evidence base for policy-making in respect of a regulatory régime (should that be deemed necessary) – it will be vital to engage with ministerial advisers, senior officials (and in particular Chief Executives), and ministers.

At some point in the future, questions regarding the roles, relationships and accountabilities of ministerial advisers will arise publicly. The comparative experiences reviewed here provide a menu of institutional remedies, extending from codes of conduct to parliamentary oversight of the numbers and activities of advisers. However, those experiences also suggest that there will be instances in which a rules-based régime may be insufficient: formal accountability arrangements notwithstanding, failures occur. Perhaps, as Uhr suggests, the issue is one for the whole political and policy community to reflect on, with the objective being the development and sustenance of a culture in which discretion and an internalised sense of responsibility is appropriately exercised, and in which a shared sense of 'publicness' acts as a check on partisan excesses. Whatever the way forward, one lesson to be learned is that it is prudent to erect the appropriate arrangements before, rather than after, unfortunate events occur.

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