

RESEARCH REPORT NO 26

IF MEN WERE ANGELS

POLICY ADVICE IN POLITICAL TIMES: THE ROLE OF POLICY OFFICERS

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If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.²

We should be willing to forgive the gender-exclusive language, and focus on the message: James Madison wrote this passage in 1788, still 21 years before becoming President of the United States, and 211 years before American women won suffrage.

The quotation is not merely illustrative. The separation of powers is a feature of the Australian *Constitution*³ and hence of the environment in which policy advisors operate.

Madison knew that men are not angels, and that governance was by men over men.⁴ Good governance, he argued, demands checks and balances, both institutional and procedural. Mere reliance on integrity and good intent is insufficient. The paper, as are many in *The Federalist* series, is a paean to the rule of law as a foundation of liberty.⁵ The separation of powers was a cornerstone of Madison's reasoning: keep the executive, legislature and the judiciary separate, and implement checks and balances to avoid the excesses that human frailty might bring.

This may seem familiar to students of Australian political institutions. The separation of these powerful, co-equal arms of government was derived from the work of the French philosopher, Montesquieu, who theorised three arms of government, defined by principles, functions and

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² The Federalist No. 51: *The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*, Independent Journal, Wednesday, February 6, 1788.

³ Although not so much at the State level: *Australian Workers' Union of Employees, Queensland v State of Queensland; State of Queensland v Together Queensland, Industrial Union of Employees* [2012] QCA 353, [59] per curam: 'While constitutional law is a fertile field of surprises, it may confidently be concluded that the *Constitution of Queensland 2001* does not contain any constitutional principle of separation of powers.'

⁴ Madison also authored the Bill of Rights, a document he strongly opposed, but agreed to write and include in the Constitutional framework as a compromise to win the support of the Anti-Federalists: no stranger he to murky politics.

⁵ *The Federalist* may indeed be one of the most brilliant set of political documents ever written: see Morris, R.B. (1987) *The Forging of the Union: 1781-1789*. New York: Harper & Row, p. 309. They are principled, deep and broad, and written pseudonymously by 'Publius', probably being four leaders of the constitutional movement. Madison's authorship to the paper quoted from above is attributed by textual analysis. He never did claim authorship, and No.51 is sometimes attributed to Alexander Hamilton who was to become Secretary of the Treasury and chief of the Army. The full set of *The Federalist* papers is widely available on the Internet, including at <http://thomas.loc.gov/home/histdox/fedpapers.html>.

responsibilities, and held separate.⁶ He did this actually in the Westminster context, which Australia mimics in the States and adapts federally. The separate structures are shown in Table 1.

Table 1: The separation of powers in Australia and the USA

	Australia	US
Executive	The Ministers of State, who must [a] be members of parliament, presided over by the Queen's representative. The Departments (under the Ministers) are sometimes called the administrative arm of government.[b]	The President, surrounded by the appointed Secretaries (comparable to Ministers) who together form the Cabinet and who are the chief executives of the federal executive departments.[c]
Legislature	The Queen and the elected members of the Houses of Parliament (just one house in Queensland and the Territories)	The 535 elected Senators and Representatives [d], presided <i>ex officio</i> by the Vice-President [e], although the Senate elects from its number a President of the Senate <i>pro tempore</i> .
Judiciary	The High Court and the federal courts (separate from the executive and legislature under the Constitution); the State Courts.[f]	The Supreme Court and the federal courts

[a] At least by convention if not constitutional fiat.

[b] See eg <http://australianpolitics.com/key-terms/public-service>.

[c] See list at http://www.usa.gov/Agencies/Federal/Executive.shtml#Executive_Departments.

[d] The House of Representatives also includes 6 non-voting members: the Resident Commissioner of Puerto Rico and 5 Delegates from various US Territories. There are two Senators from each of the 50 States.

[e] The most obvious transgression of the pure separation of powers un the United States.

[f] State court separation from the executive functions is partly theoretical, although more stringent in recent years. See *Australian Workers' Union of Employees, Queensland v State of Queensland*; *State of Queensland v Together Queensland, Industrial Union of Employees* [2012] QCA 353; Kearney, G. (1993) *Separation of Powers in the Westminster System*. Paper presented to A.S.P.G. Queensland Chapter, 13 September 1993. There are also myriad administrative review entities that do not enjoy judicial independence eg the ordinary members of the Queensland Civil and Administrative Tribunal

⁶ In *De L'Esprit des Loix* (The Spirit of the Laws) published in Paris in 1748. Text available at <http://www.constitution.org/cm/sol.htm>.

The separation of the three powers, at least in theory, leavens human temptation through:

- oversight of each branch by the others;
- non-encroachment of one on the other; and
- separating not just the institutions but also the individuals holding offices from membership of any other arm.⁷

This is powerful stuff, and might be helpful—but for the real-world intrusion of government departments that dwarf the scale and budget of the other arms (but not their authority). And it fails to catch the dominance of the executive and ever-expanding complexity of government.⁸

It is in these behemoths of departments that policy officers ply their trade.

So where do they fit in a model designed to separate the executive from judicial and legislative action?

Here is what one judicial officer thought as long ago as the 1950s:

The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart. They also have begun to have important consequences on personal rights. They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.

Courts have differed in assigning a place to these seemingly necessary bodies in our constitutional system. Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.⁹

Australia's system of government shares the dramatic rise of administrative power described in the quote above. And it lacks the tidy constitutional structures designed to make men (just a little) angelic. There are many intersections and interstices among the three Australian arms.¹⁰ And the 'fourth arm' has expanded massively since federation through departments of government.¹¹

⁷ cf Vile, M.J.C. (1967) *Constitutionalism and the Separation of Powers*. Oxford: Clarendon Press.

⁸ Compare a functional, non-institutional approach proposed by Glyn Davis (1995) in *A Government of Routines: executive coordination in an Australian State*, Macmillan, Melbourne.

⁹ *Federal Trade Commission v Ruberoid Co*, 343 US 470, 487-88 (1952), per Jackson, J., dissenting.

¹⁰ Ministers must also be legislators; our absentee head of State, represented by the Governor-General and Governors, presides over Executive Council and is simultaneously constituent in the Parliaments. The Courts operate in the Queen's name; make law-like Rules of Court; and may find themselves charged with administrative authority.

¹¹ Some integrity agencies (including corruption commissions, ombudsmen; auditors-general etc) claim fourth arm status for themselves. See Asher, A. (2011) *Integrity agencies: the fourth arm of government*. Public Sector Leadership 2011: Rethinking and improving service delivery. Sydney, 12 May 2011 (http://www.ombudsman.gov.au/files/12_May_2011_Integrity_agencies_the_fourth_arm_of_government.pdf).

Fingers in every pie. Policy officers create laws¹², guide executive decisions¹³, and judge cases¹⁴. Yet mere mortals, not angels, are we who make and advise on policy.

Competing duties

Public servants in Australia are ethically obliged to serve the government of the day.¹⁵ This means they must serve not self-interest but favour public interest ahead of their own, and to uphold the system of government.

The Australian Public Service Act 1999 includes a stated set of 'APS values'¹⁶:

10 APS Values

Committed to service

1. The APS is professional, objective, innovative and efficient, and works collaboratively to achieve the best results for the Australian community and the Government.

Ethical

2. The APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does.

Respectful

3. The APS respects all people, including their rights and their heritage.

Accountable

4. The APS is open and accountable to the Australian community under the law and within the framework of Ministerial responsibility.

Impartial

5. The APS is apolitical and provides the Government with advice that is frank, honest, timely and based on the best available evidence.

The *APS Code of Conduct* in s.13 of the Act reinforces these values with 13 additional points of guidance including:

- (1) An APS employee must behave honestly and with integrity in connection with APS employment.
- (2) An APS employee must act with care and diligence in connection with APS employment.
- (3) An APS employee, when acting in connection with APS employment, must treat everyone with respect and courtesy, and without harassment.
- (4) An APS employee, when acting in connection with APS employment, must comply with all applicable Australian laws. ...¹⁷

¹² Prepare Bills and draft regulations, codes of practice and conduct, standards etc. Ministers rarely have competitive capacity.

¹³ Policy advice and administrative advice intertwine like holly and ivy and can bind decision makers in subtle and blatant ways.

¹⁴ By preferencing one set of facts over another in their advice; by including this stakeholder and excluding that; by favouring this set of instruments over that; by reliance on one analytical methodology over another.

¹⁵ Conceptualising 'the government of the day' in a minority government is vexed, and raises complicated problems for public servants who may be supporting a different government of the day during a parliamentary term.

¹⁶ To make these a matter of law is interesting in itself.

¹⁷ A pedantic lawyer might ask why legality is fourth, not first on the list!

The **Australian Public Service Values** are explained by the Australian Public Service Commission this way¹⁸:

The APS is responsive to the government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the government's policies and programs.

...

The APS works within, and to implement, the elected government's policies and outcomes.

Commonwealth public servants are required to be:

... knowledgeable about the Government's stated policies [and] sensitive to the intent and direction of policy.

Queensland's Public Sector Ethics Act provides:

6 Integrity and impartiality

In recognition that public office involves a public trust, public service agencies, public sector entities and public officials seek to promote public confidence in the integrity of the public sector and—

- (a) are committed to the highest ethical standards; and
- (b) accept and value their duty to provide advice which is objective, independent, apolitical and impartial; and
- (c) ...
- (d) acknowledge the primacy of the public interest and undertake that any conflict of interest issue will be resolved or appropriately managed in favour of the public interest; and
- (e) ...

7 Promoting the public good

In recognition that the public sector is the mechanism through which the elected representatives deliver programs and services for the benefit of the people of Queensland, public service agencies, public sector entities and public officials—

- (a) accept and value their duty to be responsive to both the requirements of government and to the public interest; and
- (b) accept and value their duty to engage the community in developing and effecting official public sector priorities, policies and decisions; and ...

8 Commitment to the system of government

(1) In recognition that the public sector has a duty to uphold the system of government and the laws of the State, Commonwealth and local government, public service agencies, public sector entities and public officials—

- (a) accept and value their duty to uphold the system of government and the laws of the State, the Commonwealth and local government; and
- (b) are committed to effecting official public sector priorities, policies and decisions professionally and impartially; and
- (c) accept and value their duty to operate within the framework of Ministerial responsibility to government, the Parliament and the community.

Like the Commonwealth public service, the Queensland public service has a Code of Conduct for all public servants, possibly supplemented by separate ones for individual departments and agencies.¹⁹

¹⁸ <http://www.apsc.gov.au/values/conductguidelines4.htm>.

¹⁹ <http://www.psc.qld.gov.au/publications/subject-specific-publications/assets/qps-code-conduct.pdf>

Thus there are competing principles embedded in the very nature of the public service itself:

- to serve the government of the day responsively yet impartially, above politics, yet somehow responsive to political demand; and
- to adhere to and promote the rule of law and the system of government.

What is 'the rule of law' and 'natural justice'?

One leading authority²⁰, suggests three components for the rule of law:

- (a) Sanction only under law: no-one is punishable except for a distinct breach of law (contrast wide, arbitrary, or discretionary power in officials);
- (b) Equality before the law: everyone, regardless of position, rank or status, is subject to the ordinary law;
- (c) Independent courts: remedies against government illegality are enforceable in independent courts.

There are many philosophical considerations for the interested reader to explore in the rule of law.²¹ The focus here is the implication for policy making, and requires a little extra exploration of a related concept, procedural fairness or natural justice. The rule of law (in the absence of angels) is about government by law.

Procedural fairness (sometimes called natural justice)²² is closely allied to the idea of government under rule of law. For example the Queensland Legislative Standards Act 1992 provides that consistency with the principles of natural justice is an incidence of sufficient regard being paid under an Act to the rights and liberties of individuals, one of the incidents of the rule of law.

The elements traditionally considered as the foundation of natural justice are:

1. the **prior hearing rule** requiring that before a decision is made adversely affecting a party's rights interests or legitimate expectations,²³ the decision maker must give the party:
 - (a) prior notice that the decision will be made
 - (b) the information on which the decision may be made, especially adverse information and
 - (c) a right to make a submission in reply;
2. the **bias rule** that requires the decision maker to be free of:
 - (a) any suspicion or apprehension of bias, such as the decision maker's own personal or financial interests being affected by the decision; "the absence of the actuality or

²⁰ Dicey, A.V. (1897) *Introduction to the Study of the Law of the Constitution* London: Macmillan. Language modernised! The rule of law is a vague and elusive idea, however and this formulation is certainly contestable. Compare Tamanaha, B.Z. (2004). *On the Rule of Law: History, politics, theory*. Cambridge: Cambridge University Press.

²¹ For example, one suspects Dicey might frown on institutions like the AAT, VCAT and QCAT as insufficiently independent and not court-like. See also Krygier, M. "The Rule of Law: An Abuser's Guide" [2007] UNSWLRS 4; Meyerson, D. "The Rule of Law and the Separation of Powers" [2004] MqLawJl 1; Stewart, C.. The Rule of Law And the Tinkerbelle Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law. [2004] MqLJ 7.

²² *Judicial Review Act 1991* (Qld), section 20(2)(a); *Administrative Decisions (Judicial Review) Act 1977* (Cth) sections 5(1)(a) and 6(1)(a). As to the terminology, see Gleeson CJ's comments in *Plaintiff S157/2002* [2003] HCA 2; 211 CLR 476; 195 ALR 24; 77 ALJR 454.

²³ *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564

the appearance of disqualifying bias and the according of an appropriate opportunity of being heard”;²⁴

(b) a prior expression or views as to the decision;

3. the **evidence rule** requiring that decisions to be based on logically probative evidence, not on mere speculation or suspicion

These two related elements, the rule of law and natural justice, suggest important responsibilities for policy makers.

First, policies should be made with regard to the rule of law. Some of the relevant indicia include:

- ensuring clarity of the rights, entitlements and obligations;
- affording appropriate and independent review of decisions that affect liberty, property, the right to work and so on;
- limiting the discretionary power on officials and making exercise of discretion reviewable;
- coherence of policy, so as to limit conflicting obligations or competing rights.

Second, the policy-making process itself should be open and transparent (to the extent possible). But it is a brave policy officer who assumes authority to conduct consultation independently of the political realm. An even braver (or more foolhardy) one enters the political fray!²⁵

Third, policy advisors work in an environment that is not only contestable²⁶, but ethically ambiguous. I argue there are two main ethical questions in policy work (or making or advising on decision):

- is it the right thing to do? and
- whose interests are affected by it?

Each question might assist in framing policy advice that is enhanced by its asking.

Both questions might bring policy advisors into conflict with their obligation to be responsive in the politically charged context of government-not-by-angels.

Questions of ‘rightness’ are indeed value-laden, and represent a shift from the received wisdom of evidence-based policy. Yet as the next section shows, absent that astute questioning about rightness, institutions can stray far from the rule of law.

²⁴ *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 at 367 per Deane J.

²⁵ Search ‘Godwin Grech’ for a sad example; Ken Henry’s extensive review of tax policy is an example of the brave, and successful intersection of policy and politics, importantly, authorised politically: <http://taxreview.treasury.gov.au>.

²⁶ eg MacDermott, K. (2008) *Whatever Happened to Frank and Fearless? The impact of new public management on the Australian Public Service*. Canberra: ANU University Printing Service pages 25ff.

Conduct in public institutions

Look at some recent history: the Senate Children Overboard inquiry²⁷, the Palmer Report into immigration detention²⁸, the Cole Inquiry into the Australian Wheat Board's role in the Iraq food-for oil program²⁹, and the Davies Inquiry into Queensland public hospitals, 'Utegate'³⁰ and the home insulation scheme³¹. You will read tales of public institutions and individuals you could characterise thus:

- complicit,
- compliant, or
- cautious.³²

It should surprise no-one that public servants seek to further their careers. They do this by a combination of the same factors that motivate and propel anyone's career.

- Let the brilliance of their work shine through.
- Use relationships effectively.
- Tweak an advantage here and there.
- Stomp on the opposition.
- A few, a very small few, are actually corrupt.³³

(All is not bleak. See *Ahead of the Game*³⁴ and the Centre for Policy Development's *The State of the Australian Public Service: An Alternative Report*³⁵ for positive reviews.)

The ethical challenges of public policy are a little more subtle than for those who can touch the cash³⁶ or favour property developers³⁷.

²⁷ Commonwealth of Australia, "Senate Select Committee Report on a Certain Maritime Incident", 23 October 2002. http://www.aph.gov.au/senare/committee/maritime_incident_cttee/index.htm.

²⁸ <http://www.immi.gov.au/media/publications/palmer-progress/>; see also Commonwealth Ombudsman, *Inquiry into the Circumstances of the Vivian Alvarez Matter*, http://www.ombudsman.gov.au/files/investigation_2005_03.pdf; Report by the Commonwealth Ombudsman of an inquiry undertaken by Mr Neil Comrie, September 2005, <http://www.ombudsman.gov.au>.

²⁹ <http://www.offi.gov.au/agd/WWW/unoilforfoodinquiry.nsf/Page/Report>.

³⁰ <http://www.crikey.com.au/2009/06/22/utegate-explained/>; <http://www.thepunch.com.au/articles/utegate-explained-its-not-just-about-an-email/>; <http://newmatilda.com/tag/utegate>.

³¹ <http://www.homeinsulationroyalcommission.gov.au/>.

³² To the point of 'resistant'.

³³ <http://www.icac.nsw.gov.au/about-corruption/what-is-corrupt-conduct>; <http://www.ccc.qld.gov.au/corruption/information-for-the-public-sector/corruption-in-focus>; <http://www.ccc.wa.gov.au/AboutCCC/FAQs/Pages/default.aspx>.

³⁴ <http://apo.org.au/research/ahead-game-blueprint-reform-australian-government-administration>

³⁵ <http://cpd.org.au/2011/08/the-state-of-the-australian-public-service/>

³⁶ Ironside, R. & Munro O'Brien, J. "\$800,000 in coins stolen from Brisbane parking meters", *The Courier-Mail*, 31 March 2009 (<http://www.couriermail.com.au/news/in-coins-stolen-from-brisbane-parking-meters/story-e6freon6-1225698880291>)

³⁷ Cummings, L. "Guilty plea in Wollongong sex for [sic] development scandal", *The Daily Telegraph* June 29, 2010 (<http://www.dailytelegraph.com.au/news/icac-scalp/story-e6freuy9-122588582413>)

For example, policy advisors rarely make the big decisions (preparing instead advice for the collective consideration and wisdom of Cabinet), and rarely operate independently of hierarchical controls that might challenge flawed thinking or over-invested analysis.

Yet policy officers must serve the government of the day, simultaneously promoting the rule of law, and managing their careers.

And how do policy officers manage their careers? By letting their work speak for itself; building great relationships; maybe a few hardball tactics, and ... well, the big temptations are compliance, complicity and caution. Each can bring its practitioner into error, by failing one or both duties of responsive/frank and fearless and lawfulness.

Faith in institutions

While we might want to encourage individual virtue we would be unwise to rely upon it, and certainly to rely solely upon it.³⁸

We maintain a touching faith in institutions to protect the public interest and preserve the rule of law. This, despite the evidence that institutions are made of humans not angels and that they too fail. What is more, institutions are very poor at addressing the tempting trilogy of compliance, complicity and caution. Oversight through institutions is after-the-fact, and insensitive to the policy dynamic. Think of the roles and methods of the anti-corruption commissions and the courts.

The greatest bulwark against error from policy advisors lies in personal responsibility and integrity, coupled with a strong ethic favouring frank and fearless advice in the Westminster tradition.

But whatever happened to frank and fearless?³⁹

- It was outsourced (consultants are not subject to public service restraints!).
- It was politicised.
- It was converted into vast legislation.
- It crumbled under caution.

One conservative commentator put it thus: 'The Westminster tradition of a politically neutral public service has always been a self-serving fiction'.⁴⁰

Yet individual policy officers rarely frolic on their own. It is more likely that they view their roles through the prism of their careers, squarely raising the very conflict of interest to be avoided under the values and codes of conduct.

So it may be easier to be compliant.

It may be tempting to be complicit.

And it may be safe to be cautious.

But none of these is frank and fearless. None reaches the ideal of excellence nor fulfils the sometimes-competing demands of responsiveness and lawfulness.

Is it too much to ask of policy officers that they be the bulwark against this trilogy? That is topic for another paper.

³⁸ Adapted from Krygier, op cit.

³⁹ To use MacDermott's title, op cit.

⁴⁰ Berg, C. (2013) "Teaching the public service to obey its new masters" ABC, *The Drum*: <http://www.abc.net.au/news/2013-09-10/berg-teaching-the-public-service-to-obey-its-new-masters/4947780>.