

Submission concerning Ministerial office/public servant interaction

(By Michael Forde BA.LLB., Masters in Public Sector Management.)

Introduction

1. It is necessary to put the discussion into a broader philosophical picture. The issue concerns also ministerial responsibility and accountability, whether it be collective or individual. For present purposes, it is more helpful to discuss the latter, viz the individual responsibility of a minister and allegations of misconduct involving a senior ministerial adviser.
2. It is also helpful to hark back to the Fitzgerald Commission of Inquiry.¹ The issues raised by the questions posed have been touched upon previously. Subsequent legislation has attempted to deal with issues raised in the Report of the Inquiry.² When introducing the legislation the then Premier stated Premier Wayne Goss in the Second Reading Speech³:

One of the matters to which the Fitzgerald inquiry paid particular attention was the need for high standards of integrity and ethical behavior in the public service. In particular, the report of inquiry dealt with the proper role of the public official in a Westminster-style of Government and public administration, and many of the commission's recommendations were concerned with the quality of public administration.

3. It is not intended to deal in any detail with the facts of the public hearing into allegations of official misconduct involving a former senior ministerial adviser as findings of fact have yet to be made. Certain facts will be referred to in order to make this submission relevant.

The Fitzgerald Report

4. The Report contained the following statements⁴:

Legislative changes or changes to the mechanics of public administration cannot, of course, be the complete answer to misconduct and inefficiency. Propriety and ethical behavior are difficult to encapsulate in legal and structural terms.

Codes of conduct for public officials, already partially developed by the present Government, must be extended to deal satisfactorily with such important things as the correct relationship between such people as public servants and their Ministers.

Ethical education must also play a role in long term solutions to problems. Such education would help individuals to find the correct balance between competing

¹ Report of a Commission of Inquiry pursuant to Orders in Council 26 May 1987 to 29 June 1989 pp132-133.

² Public Sector Ethics Act 1994.

³ Queensland Hansard, 19 October 1994, p 9687.

⁴ para 3.5.6

considerations, and should help groups of employees to establish a supportive atmosphere within which it would be harder for corruption to flourish.

Education and good management would also eradicate relatively minor misbehavior such as misuse of public resources and deliberate time-wastage, which help develop attitudes which lead, in turn, to more serious misconduct.

The quality of internal management and supervision has a significant influence on the behavioral standards of employees. Equally, in the absence of meaningful work, staff find other ways to occupy their time.

These comments are just as relevant to the present inquiry.

5. Touching upon the issue of independence and impartial advice is the topic of contract employment touched upon in the Fitzgerald Report⁵:

Contract employment, rather than permanent tenure, does not make political interference or bureaucratic partiality any more likely, nor does it decrease the chances of public servants reporting misconduct.

Public servants can be manipulated and intimidated whether their concern is for advancement or for the renewal of a contract.

There are significant advantages, on the contrary, to a system of contract employment.

A sound contract system should achieve the object of providing an effective incentive to improve efficiency and productivity within the public service. Contract employment also provides a greater opportunity for the regular interchange of employees at senior levels between the public and the private sectors. If the wrong persons are appointed for the wrong reasons to senior positions they will only be there for limited periods. There will be reduced opportunities for the bureaucracy to be politicized to a degree which is difficult, if not impossible to reverse.

Whatever optimism was held by the writer of the Report, it is suggested that it must be tempered by the reality that a person on a contract may not want to upset his or her political masters. The neutrality of the public servants may be distorted by the politicization of senior management.⁶ The learned authors raise the question as to whom the public servant bear loyalty: to the people, to parliament, to the government or cabinet, to the minister, to the department or units within the department, or to a set of superordinate principles (such as religious or ethnic beliefs)? It may be productive to look at the persons who allege that they have been intimidated by the senior ministerial adviser and the career path which they had both before and after the period concerning the grant to the Queensland Rugby Union. Such an inquiry may be of some moment in assessing their evidence.

⁵ para 3.5.3

⁶ O'Faircheallaigh Wanna and Weller, *Public Sector Management in Australia: New Challenges, New Directions*, Second Edition, Centre for Australian Public Sector Management, Brisbane, Australia at pp240-241.

6. Questions for consideration

- What protocols, procedures or constraints should be in place to guide ethical and mutually respectful interactions between a minister's office and public servants?
- How can public servants be empowered to challenge or question a request or direction from the minister's office that they consider to be inappropriate?
- What needs to be done to ensure that public servants at all levels understand their obligation to provide independent, apolitical and impartial advice, and to maintain the freedom to do so?

Protocols, procedures and constraints

7. Section 78 of the Financial Accountability Act 2009 (FAA) requires that each accountable officer must nominate an appropriately qualified employee to handle certain responsibilities in the relevant department. For present purposes, the accountable officer is the chief executive of the department.⁷ The requirements under s 78 include the provision of assistance in risk management and identifying deficiencies in risk management. There also exists the Codes of Practice under the Public Sector Ethics Act 1994. Ethical behavior is one of the principal means by which political and administrative accountability is maintained.⁸ The learned authors also refer to the Electoral and Administrative Review Commission⁹. The chief executive officer of a public sector entity such as a department, must ensure that each public official has reasonable access to a copy of the ethics principles and obligations which apply to the particular public servant.¹⁰ The Act further requires that a public servant or official should disclose fraud, corruption and administration of which the official becomes aware. (s 9) Assuming for the moment that the conduct of a ministerial adviser is regarded as fraudulent or at least amounts to maladministration, the duty lies upon the relevant public servant to disclose it presumably to his or her superior or even the minister. The personality of the ministerial adviser does not define that duty. There is a positive ethical obligation on the public servant not to allow himself or herself "to be improperly used".¹¹ If the relevant public servant was not aware of that duty then there is a failure of the system and in particular the chief executive officer to ensure that such information is reasonably available or known. If the public servant does not obtain satisfaction by disclosing in the manner suggested, then there is the Whistleblowers Protection Act 1994 which is more definitive. It allows disclosure by the public servant without jeopardizing his or her employment.¹² The type of conduct that can be disclosed includes official misconduct, maladministration or negligent or improper management affecting public funds.¹³

⁷ FAA s 65.

⁸ O'Faircheallaigh, Wanna and Weller, *op cit* p 229

⁹ EARC 1991:15.

¹⁰ s 19 Public Sector Ethics Act 1994.

¹¹ s 9(2)(a).

¹² ss 39-41 Whistleblowers Protection Act 1994

¹³ ss 15-17; see the discussion in Box & Forde, *Probity and Managing Procurement: How to avoid corrupting the process*, Lexis Nexis Butterworths, 2007 at [8.26-8.28]

8. If an issue arises which is of concern to a public servant, and which may involve official misconduct, then that officer "must notify the commission of the complaint, subject to section 40".¹⁴ The responsible minister could be kept informed. If the ministerial adviser was acting outside the instructions of the minister, the problem could be resolved forthwith. The adviser could be asked to resign. He is appointed by the minister and may be dismissed by the minister. Even if a public servant is intimidated by a ministerial adviser, there is a duty to report any breach of the FAA. The intimidating behavior should not define the duty owed by the public servant either under the FAA or the CMC Act or under his or her ethical code of behavior.
9. The minister is responsible for any conduct of his or her adviser. That responsibility is defined under the principles of responsible government as ministerial responsibility. Various commentators differ as to its efficacy. In discussing this concept, Corbett¹⁵ comments:

At this point, textbooks on government typically go on to describe the role of ministers, the hierarchical organizations of government departments and the upward accountability of public servants to their minister. This orthodox view of accountability is still relevant, indeed still dominant, but is no longer uncontested...

A major constitutional controversy turns on the question of whether it is the minister individually who is accountable to parliament for what goes on in the departments, and especially any mistakes made, or whether the Cabinet as a whole bears the responsibility. If the latter is the proper view, then Cabinet can rescue the hapless minister who may have got into hot water. The minister need not resign because the government as a whole accepts responsibility for the policies which may have led to the minister's difficulties. But if the former doctrine, that of the individual responsibility of ministers, is regarded as fundamental, then a minister ought to resign when serious errors are made.¹⁶

In the present case, the minister may not have been aware of the suggestion by her adviser that monies be used for a purpose other than the formal arrangement i.e. recurrent expenditure and the nature of the distribution. They are questions to be determined. Assuming that the minister was not aware, it does not detract from the proposition that primary responsibility rests with her. What action she takes against her adviser is a matter for the minister. Whether any conduct by the ministerial adviser is so serious as to amount to criminal conduct has yet to be determined. What action her Cabinet colleagues may have taken to make the minister accountable is academic.

10. Any inquiry into the conduct of a minister or her adviser raises a more fundamental issue. Should the CMC or any other body question the role of a minister or those for whom she is responsible in relation to policy issues? O'Faircheallaigh¹⁷ comments:

¹⁴ Section 38 Crime and Misconduct Act 2001,(CMC Act).

¹⁵ Corbett, D., *Australian Public Sector Management* Allen & Unwin,2nd ed., at p 23.

¹⁶ See also Box & Forde, *op cit*, at [1.13-1.17]

¹⁷ *et al*, *op cit* at p 222.

Over the years, many ministers have criticized various review bodies for intruding into matters that are allegedly beyond their jurisdiction. Some have regarded decisions by tribunals or courts as threatening parliament's right to determine policy issues or a minister's right to decide on particular cases. While such comments reflect the fact that politicians will always feel a certain hostility towards any system that subjects their actions to critical and public scrutiny, they do raise a real dilemma....

Accordingly, any review of administrative decisions will inevitably introduce a degree of tension into responsible government, but that tension can be accommodated and is outweighed by the benefits of review.

11. Although these comments refer primarily to administrative review, any decision made in relation to grants to sporting bodies may be subjected to review by a disgruntled body which misses out. As long as the decision is made under an enactment e.g. the FAA then a person or body aggrieved could challenge the decision. The decision in the present case involving a ministerial adviser was related to a grant to the QRU for capital works. The monies were, in part at least, used for recurrent expenses including a grant to the University Sports Academy. That decision by the public servant to allow monies to be used for recurrent expenses is a decision which may be challenged if under an enactment.¹⁸ This in itself is a constraint on the public servant, apart from his or her duty under the FAA or the Code of Ethics.
12. It is submitted that there are sufficient protocols, procedures and constraints existing to deal with the issues raised. It may be a matter of better education of public officials by those who supervise them. By reinforcing the available lines of redress for public servants who have some concerns about the conduct of a ministerial adviser, those in charge would provide the necessary confirmation of what is required. If the individual minister accepted responsibility for the acts of a policy adviser, then there are sufficient restraints on that individual. A minister must accept primary responsibility. Sacking the adviser is one course open. Whether the misconduct was so serious as to corrupt the process or amount to a criminal act is doubtful.¹⁹

Empowering a public servant

13. It is submitted that some of the issues raised above also touch upon this topic. The various Acts of Parliament and code of ethics have been referred to. A change of culture is required to allow public officials to assert themselves in accordance with their duty. This may be a matter of changing the attitudes of those reluctant to report maladministration and those who supervise them. Pressure from the minister's office should not be the basis for ignoring the statutory duty placed upon the public service. There is provision in the Whistleblowers legislation to protect those who do inform of any maladministration.²⁰ However, as noted by those authors, the whistleblower legislation does not promote much confidence in those who want to expose

¹⁸ *Concord Data Solutions Pty Ltd v Director-General of Education* [1994] 1 Qd R 343.

¹⁹ Nicholls QC et al, *Corruption and Misuse of Public Office*, Oxford University Press, 2006 at paras 3.54-3.61 where the case of Shum Kwok Sher [2002] HKCFAR 381 at 409-410 per Sir Anthony Mason is referred to.

²⁰ Box & Forde op cit at [8.27]

misconduct. The Commonwealth is presently looking at amending the whistleblower's legislation. Perhaps the Queensland legislature should re-visit the area.

14. As is suggested by O'Faircheallaigh et al, by increasing the power of senior levels of management in the public service, there may be in fact more politicization in their appointments.²¹ Those managers may be more attuned to the political agendas of their minister. A robust ministerial adviser may find that type of manager more willing to bend the rules.
15. It is submitted that the public service is sufficiently empowered to deal with a robust ministerial adviser. It is a question of whether the managers are willing to assert their independence, neutrality and impartiality in performing their duty. O'Faircheallaigh et al summarise the position as follows²²:

Ethical standards in the public sector emanate from the practical operation of a political system of administration. Ethics are not god-given, invariable creeds which are imposed on the system from without. Rather, ethical behavior is a constantly refreshed conventional code of practice that largely originates from within. In this sense, political conventions, value expectations, bureaucratic norms, legislative requirements and formal and informal codes of conduct all combine to produce a somewhat ambiguous mix of ethical practices...Certainly, it is already apparent that managerialism initiates challenges to the traditional ethical codes and conventions existing in the public sector codes and conventions that already faced significant problems in any case.

The learned authors were referring to the changes from the traditional public service to that of allowing more flexibility to senior managers or chief executive officers. That change also involves moving from the traditional tenure of office for those officers to contract employment. As was noted by Corbett²³:

The career service tradition is still strong, though it is being challenged by contract employment...

Corbett went on to speak of the high turnover in senior executive appointments.²⁴ Another commentator²⁵ remarked:

Under the Westminster conventions, the role of the public service is to provide the government of the day with advice which is professional, impartial and fearless. Indeed, security of tenure has long been associated with public employment as a positive encouragement of such behavior. The assumption is that a distinction can and should be drawn between making policy and implementing it, and that the public service's role is confined to the latter activity. Above

²¹ *op cit* p 240.

²² *op cit* p 242.

²³ *op cit* p 26.

²⁴ *ibid* Chapter 8 p 158.

²⁵ Peter Coaldrake, *Working the System*, UQP 1989 at p71.

all, the loyalty of the public service should be to the government of the day, yet the qualities instilled in public servants, and encouraged by their conditions of employment, supposedly ensure an ability to adapt flexibly and readily to changes of minister, policy, priority and government.

It could be said that contract employment has encouraged that flexibility. However, it is submitted that job security and the willingness to offer fearless advice to a minister do not necessarily go hand in hand. The ministers appointed over the past 20 years both at state and federal level, are more inclined to appoint persons at the senior level who are more attuned to government policy. The effect of this upon all levels of the public service should not be underestimated.

Understanding by public servants of the obligation to provide independent, apolitical and impartial advice and to maintain the freedom to do so

13. The Integrity Commissioner for Queensland made a most telling remark²⁶:

You can't have an ethical culture unless the leaders embrace that ethical culture, more so than anyone else. Their behavior is under the microscope, they set the standards, and if they depart from the standards the damage is terrible... that's why all what is happening is so terribly disappointing because there are so many people committed to the proper concepts of public service.

Mr Crooke was commenting on former ministers taking corporate jobs and being involved in lobbying. When commenting on the concepts of independence, being apolitical and impartial, Coaldrake observed²⁷ (it must be remembered that these comments relate to the late 1980's):

Public services everywhere have difficulty in applying these conventions to the circumstances of modern government. A century ago, when many of these traditions were developed, the activity of government was both limited in scope and predominantly clerical in character. Since that time the party system has become entrenched, while the activities of government have broadened in both scope and complexity. The distinctions between making and administering policy have consequently become blurred, in the process threatening and sometimes confounding traditional notions of ministerial responsibility and public service neutrality.

Further, Coaldrake²⁸ contends that contract employment is widely regarded in the public service "not so much as an efficient and flexible system of public management, but as a further and very blunt attempt at politicization." There continues to be some perceptions in the community of this politicization involving the public service, the ministers and their advisers.²⁹

²⁶ Gary Crooke, interview with Courier Mail, 18-19 November 2006, pp 54-5.

²⁷ *op cit* at p 72.

²⁸ *ibid* at p 76.

²⁹ Briggs, L, *Public Sector Ethics in the 21st Century: The New Vulnerabilities*, Public Administration Today Issue 16 Jul – Sep 08, p26.

14. In some ways, that statement has direct relevance to the problems posed in the present submissions. The public service as an independent and impartial service has been weakened by both the devolution of responsibility to senior public officials and with it contract employment and the party system, particularly if one party has been entrenched for many years. The style of government becomes entrenched. The words of Mr Crooke reflect perhaps the lack of leadership of both ministers and senior management in setting appropriate ethical standards both of advisers and the public servants with whom they work.³⁰ Briggs³¹ talks of a need to change the environment so that “public servants can be frank in their advices.”

15. When discussing this new world of management, O’Faircheallaigh et al³² comment that:

The power to use the process of accountability to ensure that monies are only spent as the government wished may exist, but these processes may put additional pressures on organizations used to other ways of operating. The view from the centre about the way that systems should work may be very different from the view on the periphery...

The structure of the organization will need to be disciplined and perhaps hierarchical in one place, much more organic and flexible in others. A number of strategies can be used to deliver services; an appropriate strategy will have to be picked and the choice will alter the likely impact of programs. Performance measures will of necessity be different, reflecting the variations in processes and outcomes required.

16. Although formal arrangements may be entered into, the carrying out of any program and moreover the use of public funds requires ongoing supervision of the process. The outcome must be determined and assessed in line with the original objective or arrangements e.g. funds for use on capital expenditure should not be used for recurrent expenditure unless flexibility is an essential part of the implementation of the program and then only with the approval of the minister or someone with the necessary authority. It is not known in the present case if the ministerial adviser had either the minister’s approval or implicit authority. The latter may have been based upon previous similar approval of expenditure accepted by the minister. The minister accepted that the process for grants was flawed.³³ That statement casts doubt on the efficacy of the system and not necessarily the behavior of individuals. The involvement of the minister may depend upon the nature of the personalities involved. Perhaps the final word should be left to Corbett³⁴:

Whatever may be the definitive view of a minister’s individual responsibility or the direction in which his or her accountability runs, there can be no denying the authority of the minister. That authority empowers the minister to intervene almost as much as he or she

³⁰ C Niland and S Satkunandan, *The Ethical Value of Red Tape! The Role of Specialised Institutions Ensuring Accountability (the NSW Experience)*, (1999) 58(1) Australian Journal of Public Administration p 80.

³¹ *op cit* p26.

³² *op cit* at Ch 18 and p293(f)

³³ Elks, S., *MP admits to flawed grants process*, The Weekend Australian November 28-29, 2009 p 7.

³⁴ *op cit* at p 25.

likes in the management of the department(s) within his or her portfolio. Some intervene in matters of detail. Others content themselves with setting broad policy goals and monitoring the department's performance in reaching them. Other ministers again are even less concerned and, in relation to the management of their departments, they are 'out to lunch'.

17. The grant to the QRU was part of a formal written document. The implementation of the grant was left to the ministerial adviser and a representative of the QRU. Presumably, the latter had the authority of the Board of the QRU to act as he did in using the grant or part thereof for a recurrent expense. Part of those funds were then transferred to the University of Queensland Academy of Sport. Whether those actions were within general policy guidelines accepted by the minister is not known. Perhaps the flaw in the process is something which needs to be rectified for future posterity. Those responsible for the application of the FAA, the CMC Act and the Code of Ethics should be looking carefully at their obligations. The concept of ministerial responsibility is still alive. The fact that a minister may have been busy with other matters³⁵ does not detract from her primary responsibility for both herself and her adviser. Of course, greater involvement has its own dangers³⁶:

If it is a government service that is inadequately delivered, the government, whatever its legal obligations, will be held responsible. It will follow that, sooner or later, ministers will insist that they have adequate impact on the decisions made about who gets the contracts and how they are delivered. That of course will bring its own problems, of potential cronyism and patronage, the blatant reappearance of pork barreling, particularly in the delivery of services and the awarding of contracts, and the muddling of any calculation of commercial returns as ministers try to reassert controls.

18. Although those comments are made in relation to the delivery of services, they are as relevant to grants to a sporting body. The role of the public servant in all of this can be confusing. What Briggs³⁷ recommends to foster a new ethics environment is as follows:

As I indicated earlier, the Rudd Government has emphasized the need to reinvigorate the Westminster tradition and has moved to restore confidence in it through a series of initiatives around agency head appointments, Secretaries incumbency and remuneration, relations with lobbyists, advertising and information activities, the conduct of Ministerial staff, and proposed amendments to the whistleblower and freedom of information arrangements.

Briggs further suggests that in order to foster a new ethics educational drive, the following should occur:

- A mandatory ethics component in all Australian Public Service Commission courses involving both ethical awareness and ethical decision making, especially for the SES and executive level staff

³⁵ Elks, *op cit*.

³⁶ O'Faircheallaigh et al at p 297. See also Davis, G., Wanna, J., Warhurst, J. and Weller, P, *Public Policy in Australia*, 2nd Ed, Allen & Unwin, p 123-124 and Cole, R, *Responsible Government and the Public Service in The Australian Political System*, 2nd Ed by Lovell et al, pp418-425 at 420.

³⁷ *op cit* p26-27.

- Further promotion and if necessary upgrading of APS and SES induction training and ethics
- Encouraging and assisting agencies to better integrate ethics into their management systems
- Further advice, guidance and training on the differences between harassment, bullying and the legitimate exercise of management responsibility
- More analysis and debate, at both APS-wide and agency levels, of reports and investigations that are critical of APS performance and integrity, to review the decisions that were made from an ethics standpoint and to suggest alternatives.

19. Barrett³⁸ suggests the following approach to ethical dilemmas:

Indeed, this is a shared responsibility across all levels of management which should be reinforced by the governance framework, in particular by the Chief Executive and any Executive Board of Management or Leadership Group that has been established within that framework. Nor can we simply expect that staff will appropriately address any ethical problems and apply public service values set out in the *Public Service Act 1999* and, hopefully, reinforced by Chief Executive Instructions. Knowledge of the process is important but the question is, how can those processes be implemented for the benefit of all concerned? Indeed, public servants often confront ethical dilemmas where 'a simple right and wrong answer is not obvious.'

A practical approach is to identify and use staff who have the knowledge and experience of working with governments of different political persuasions, including in periods of transition. Such staff could be assigned to mentoring roles, particularly those most immediately and directly involved, as well as providing assistance in the preparation of guidance and relevant training courses. This would have the twin benefits of being seen to be a responsive and confident organization and of providing a degree of assurance that public service values and ethics are being applied. Another source of experience is the organization's Alumni Group. Such a Group has proved useful in both advisory and mentoring roles. At a time when the Public Service has lost a not insignificant portion of its corporate knowledge, the establishment and use of such an asset should be encouraged.

Conclusion

20. The integrity of the public service should not be underestimated. Cole puts the issue into context:³⁹

On the one hand ministers can personally exercise direct control over those matters which are brought to their notice. A diligent and conscientious minister is in a position to extend the impact of his presence by active participation in the budgetary and developmental work of the department. But the system depends very heavily upon the vocational integrity of public

³⁸ Barrett, P, *Values and Ethics Within a Public Governance Framework – Compliance Versus Performance*, Public Administration Today Issue 15, Apr – Jun 08, p54.

³⁹ *op cit* at p 423.

servants. Their sense of political authority, parliamentary and ministerial, is an essential disposition of officials in a system of responsible government and it is this sense which is above all fostered by the career service. It combines a fundamental acquiescence in ministerial decisions with the duty of ensuring that ministers are fully cognizant of those decisions.

The day to day business of ministers and officials is enlivened by the chain of accountability which joins all governmental activity to general systems of political control within the executive branch, the web of parliamentary scrutiny and the application of forms of judicial oversight to an expanding range of administrative decision-making.

21. Other commentators⁴⁰ suggest that:

Politicization of the public service in Australia has been tempered by a strong culture of Westminster public management practice, and the need for ministers to employ competent executives capable of managing large departments. When ministers employ incompetent senior executives, they are also exposing their own political aspirations to high-level risk as cases of misadministration are exposed in the media or by institutions of accountability such as parliamentary committees or the auditor-general.

22. Various suggestions have been made to improve the ethical dilemmas which a public servant may face. The role of the ministerial adviser is defined by the involvement of the minister responsible. A passive minister cannot avoid responsibility for the acts of her servant or agent. A robust ministerial adviser cannot define the duty owned by the public servants under statute or under a code of ethics. The onus is on senior management to create an atmosphere which encourages the education of officers concerning their relationship with ministerial advisers. The onus is on the minister to define the role of the ministerial adviser when acting in the course of his or her employment.



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⁴⁰ Ryan, N., Parker, R., Brown, K., *Government, Business and Society*, 2nd Ed, p134.