

QPSU Submission

Ministerial Advisers their place in the Westminster system of Government: Checks, Balances and Resourcing.

Introduction

The Westminster system of government has its foundation in the doctrine of the separation of powers. The three arms are the Executive, the Parliament and the Judiciary.

The executive comprises the Minister and their department. Since the Fitzgerald Inquiry there has been a myth develop that the doctrine of the separation of powers stops Ministers giving directions to their department.

The relationship between the Ministers, Premier and Director-Generals of Departments have undergone some significant and fundamental shifts as a consequence of changes in legislation and administrative practices.

The Public Service Management and Employment Act 1988 provided the following

'Responsibility of chief executive

12.(1) Subject to the Minister of the Crown for the time being

responsible for the department, the chief executive of a department is responsible for the efficient and proper management and functioning of the department in accordance with this Act and every other Act that provides for matters relevant to any activity within the administration of the department and is hereby authorised to do and suffer, subject to this Act and such other Act, all such acts and things as the chief executive thinks necessary or expedient to the proper discharge of his or her responsibility.

The Public Service Act 1996 shifted responsibility and control of Departmental CEO significantly from the Department Minister to the Premier.

The current *Public Service Act 2008* has defined the relationship between departmental Ministers and Director Generals as follows:

Extent of chief executive's autonomy

- (1) A chief executive is subject to the directions of the departmental Minister in managing the department.
- (2) However, in making decisions about particular individuals, the chief executive—
 - (a) must act independently, impartially and fairly; and
 - (b) is not subject to direction by any Minister.
- (3) Also, subsection (1) is subject to another Act—
 - (a) that provides that the chief executive is not subject to the directions of the departmental Minister about particular matters; or
 - (b) that otherwise limits the extent to which, or circumstances in which, the chief executive is subject to directions of the departmental Minister.

So whereas the Directors-Generals administration of the department was subject to the concurrence of the Minister, the Public Service Act 2008 has placed statutory limitations on Ministerial directions.

So whereas Supreme Court Justice Muir in *Murdock v McDermott* said the following

"19] Even if Mr McDermott had taken the Minister's views into account, it does not appear to me that he would have been in breach of his statutory obligations. The Minister, after all, has ultimate political responsibility for the affairs of the Department. The Director-General's responsibilities are expressed to be "subject to any direction of the Minister".

[20] It would be impractical, if not futile, of the Director-General to exercise a discretion vested in her in a way, which to her understanding, would be highly likely to provoke a Ministerial direction reversing it. It is unnecessary for present purposes to decide whether in such a case the Director-General would be in breach of duty should she merely implement the Minister's wishes. It is sufficient for present purposes to observe that the existence of such a power on the part of the Minister makes it apparent that the Director-General may have regard to the Minister's views in exercising powers vested in her under the Act. "

It is doubtful that a Minister could give direction to the Director General in respect of individual unless expressly stated by another act.

The growth in complexity and accessibility of Ministerial functions has led to the development of Ministerial Advisers with no clear statutory role within the public administration of the state of Queensland.

The lack of a defined role places both the advisers and public servants who interact with the advisers in unenviable positions to understand the appropriate ability to comply with request or instructions and conversely when it is appropriate not to comply with such requests.

The lack of defined roles also creates difficulties for organisations external to the public sector and provides them with opportunities to forum shop between the public servants, Ministerial staffers and Premiers' staff.

The situation is even more complex when the employment situation of Ministerial Advisers is taken into account. They are employed by the Director General of the Department of Premier and Cabinet and in effect have three masters, their own Minister, the Director General of the Department of Premier and Cabinet and the Premier through the Chief of Staff to the Premier.

The lack of clarity as to their statutory role, line of accountability and consequent training in these regards places good public administration at risk.

Roles of Ministerial Staff

Cabinet Submissions

Broadly speaking the Cabinet process involves the responsible Minister taking a submission to Cabinet. Each other Minister has the opportunity to provide written submission on the other Minister's submission. In practice this submission is compiled by department officers, the input of Ministerial staff or Ministers vary from Minister to Minister. Some Ministers have regular meetings with senior staff and are appraised of upcoming submissions and give general policy guidance to the submission, others have a more heightened interest and thus provide a high level of scrutiny over the submission either directly or through the delegated authority of their staff.

Without appropriate involvement from the Minister in the preparation of the response to a Cabinet submission there is a risk that matters would come to the Cabinet table for resolution and the responsible Minister may not be aware of opposition from a Ministerial colleague as that Minister's department may have submitted a concurring response to the Cabinet submission.

It is expected that the Ministerial staff will be aware of pending cabinet submissions that may impact on their Minister's portfolio and therefore appraise the Minister to ensure that their views are considered in the development of the Departmental response.

Thus there needs to be a very clear lines of accountability in the preparation and amendments to Cabinet Submissions, apart from directions about grammatical changes.

Amendments to Cabinet submissions and/or responses to proposed Cabinet Submissions that are substantive in nature must occur in a transparent and accountable manner.

Directions should either occur from the Minister or an adviser who has been provided with a written delegation from their Minister.

There is a need to provide for a statutory basis for instructions from Ministerial Advisers to Departmental officers to make substantive changes to Cabinet submissions.

The basis for this statutory provision should be a delegation of the Ministers powers under the *Public Service Act 2008* by a written and authorized delegation from the Minister to the Ministerial Adviser.

When an adviser seeks to exercise this delegation it should be a legislative requirement that written copies of the direction need to be provided to both the Minister and the Director-General of the Department of Premier and Cabinet within 10 working days of the direction.

Ministerial Correspondence

The volume of Ministerial Correspondence has dramatically increased, especially with the advent of modern technology. Emails in particular have made it much easier for members of the general public to communicate directly with the responsible Minister. Coupled with rising community expectations that accompany the new form of communications they has been exponential pressure placed on Ministerial Staff that scrutinize the correspondence and departmental staff that are required to research issues associated with the enquiry.

Responsibility of the final correspondence varies most Ministers have a practice where the Senior Policy Adviser or Policy Adviser signs routine correspondence on behalf of the Minister, there will be the rare occasion when the Minister insists on signing all correspondence but the general practice is that the majority of correspondence will be signed by a Ministerial Policy Adviser.

Thus there is a need for Ministerial Policy Adviser to be able to issue instructions on the content of the proposed responses and to prioritise the work from the relevant unit.

The Public Servant's responsibility should be to provide the facts and research as requested in accordance with approved style guides usually developed by the Minister's office in conjunction with the relevant departmental unit.

Public Servants should not be instructed to provide false or misleading material for responses. Should a public servant believe they have so been instructed they should without fear of retribution be able to raise the matter with their Director-General who should be obligated to raise the matter with either the relevant Minister and/or the Director General of the Department of Premier and Cabinet.

There is a need to review the increase in volume of work associated with dealing with Ministerial responses and the resources within the Ministerial Office to adequately perform the work in a reasonable manner taking into account the acceptable community standards for work/life balance for these employees.

Capital Works and Departmental Expenditure

Where capital works projects or Departmental Expenditure can be altered without recourse to Cabinet or a committee of Cabinet any direction to a Public Servant from a Ministerial Policy Adviser should only be permissible if the relevant Minister has provided a delegation to the Policy Adviser.

There is a need to provide for a statutory basis for instructions from Ministerial Advisers to Departmental officers to make substantive changes to Capital Works Programs and Departmental Expenditure.

The basis for this statutory provision should be a delegation of the Ministers powers under the *Public Service Act 2008* by a written and authorized delegation from the Minister to the Ministerial Adviser.

The Policy Adviser should be required to provide a copy of such instruction to the Minister and the Director General of the Department of Premier and Cabinet within ten working days.

Employment Arrangements

Employees working as Ministerial Advisers are employed on section 122 contracts. The very basis of the employment relationship places pressure on such employees to refuse to perform unethical instructions.

Coupled with the now legislative restrictions for these employees to work as lobbyist, there are virtually no career opportunities for such employees.

These factors limit the capacity of attracting highly skilled employees to work in these roles.

In similar roles where there are post employment restrictions employers including Government Owned Corporations pay the employees for not utilizing their skills or knowledge.

Administrative and support staff in Ministerial offices have skills that could readily be redeployed throughout the public service. Such staff should be recruited through a merit selection process involving a selection panel from the Ministerial office but be employed by the Department as tenured public servants.

If there is a desire that skills and knowledge acquired through advisers' work for the state should not be available for other entities to acquire, then there must be a real commitment to maintain these employees as employees of the state when leaving the role of Ministerial Advisers or arrangements included in the contract to compensate these employees for not working in related fields.

Recommendations.

Review the employment arrangements for Ministerial advisers with a view to increase employment security.

Review the employment arrangements of Ministerial Advisers in respect of post employment restrictions and the need to include in the employment contract compensation for such restrictions or provide that such employees be provided with a legislative basis to transition to tenured positions in the public sector.

Employee administrative and support employees in Ministerial offices in an appropriate department and as tenured employees.