The Integrity Commissioner and Ethics for Government Lawyers

An address to the Continuing Legal Education Program for Government Lawyers by the Hon Alan Demack AO, Queensland Integrity Commissioner
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On 20 June 2001, I addressed this continuing legal education program for Government Lawyers on the topic "Government Ethics". That address is accessible on our website www.integrity.qld.gov.au In the course of the address I examined the *Public Sector Ethics Act 1994* and the role of the Integrity Commissioner.

This afternoon I will speak more directly about a lawyer's responsibilities in the maintenance of a regime of public ethics.

Ethics and Law

As I have mediated on the *Public Sector Ethics Act 1994*, it has become clear to me that we use the word "ethics" to describe four different but interrelated concepts -

? The core values we have both as individuals and as a community;

? The study of the application of those core values in daily life;

? The obligations and expectations that those core values create;

? The decision-making process we use in applying the core values.

I believe this four part division is clear enough if one reads about ethics, but it is very clearly the basis upon which the *Public Sector Ethics Act 1994* is constructed. The Act recognises –

? Ethics principles – the core values of public administration;

? Ethics obligations – which describe how the principles are to apply in public administration;

? Codes of conduct – which expand ethics obligations and create performance obligations;

? The application of all these matters in decision making by public officials.

Once the ambit of ethics is recognised, it is easy to see how closely ethics and law are related. Once the obligations and expectations that arise from the community's core values are established, their acceptance is recognised by law. As the core values of the community change, the expectations and obligations that arise change, and the law that expresses those expectations and obligations changes.

The *Cremations Act 2003* is an interesting example of how this happens. Through most of the history of the common law, burial was the accepted means of disposal of a human body. In peace time, the responsibility for this rested with the deceased's personal representative, the person responsible for carrying out the terms of the deceased's last will. This was based on a set of community values which have slowly changed.

The new Act reflects those changed community values, and the expectations and obligations that flow from them. The deceased person's wishes that his/her body be cremated are to be carried out. Relatives, as well as the personal representative, may be involved in the process.

Collective Memory of Lawyers

In the process of expressing in legislation the expectation and obligations which arise from the community's core values, the collective memory of lawyers is an invaluable community resource. As a community we are fascinated by novelty, so that the mere fact that a particular law has been followed for a long time is said to be sufficient reason to want to change it. At this point, the collective memory of lawyers is very important. Once that is tapped, the appropriateness of the law may be clearly demonstrated, or the need for change may be confirmed.

The *Attorney-General Act 1999* has an interesting illustration of this. Section 3 includes –

> **(2)** The Attorney-General is—
>
> (a) the Minister who is designated by the Governor as Attorney-General or Minister for Justice and Attorney-General;
>
> or

(b) if the Governor does not designate a Minister as Attorney-General or Minister for Justice and Attorney-General—the Minister.

Why is (b) necessary? Surely in any naming of a Cabinet someone would be designated Attorney-General or Minister for Justice and Attorney-General. If no member of the Cabinet is so designated, why would another Minister be given the responsibility of administering the *Attorney-General Act 1999,* because that is the effect of referring to "the Minister"?

One can recall an instance where a person, who expected to be named Attorney General, had not been declared to be elected to Parliament when the Cabinet was named. This is an unlikely occurrence, but, nonetheless, it is best provided for.

The Role of the Integrity Commissioner

The Office of the Queensland Integrity Commissioner was created by the 1999 amendment to the *Public Sector Ethics Act 1994.* The purpose was to help Ministers and others to avoid conflicts of interest by seeking confidential advice from the Integrity Commissioner. Those who can seek advice are described as "designated persons". These are five broad categories -

? Government members of Parliament, including members of the Cabinet and Parliamentary Secretaries;

? Staff employed in the office of members of the Cabinet and Parliamentary Secretaries;

? Statutory office holders;

? Chief executive officers and senior officers employed in a department of government or a public service office;

? Chief executive officers of government entities.

Because the public sector is now a large and complicated structure, this cluster of people is also numerous and diverse. However, the general intention of the legislation, to provide senior public officials with access to confidential advice about conflict of interest issues, has been accomplished.

It is not so easy to demonstrate that this has achieved the purpose of encouraging confidence in public institutions.

Advice on Conflicts of Interest and Law

The *Public Sector Ethics Act 1994* defines a conflict of interest issue involving a person as an issue about a conflict between the person's personal interest and the person's official duties. This encourages the examination of the person's official duties as the first step in identifying a conflict of interest. In an information sheet which I prepared for chief executive officers and others, I identified official duties under three headings –

? Administrative obligations

? Ethics obligations

? Performance obligations

Under performance obligations I identified "instructions for task in hand". The importance of this aspect of official duties is well illustrated in the High Court decision, HOT HOLDINGS PTY LTD V. CREASY (2002) 193 A.L.R. 90.

The court considered an appeal from a decision of the West Australian Full Court to the effect that shares held by departmental officers who gave advice to a Minister tainted a Minister's decision and gave rise to a reasonable apprehension or suspicion that the Minister's decision was not an impartial one.

The Minister's decision was to follow a mining warden's recommendation that Hot Holdings be granted an exploration licence. One of the departmental officers, Mr Miasi, held 40 000 shares in a listed public company which had an option to purchase an 80% interest in the exploration licence if Hot Holdings was successful. The independent son of another of the officers, Mr Phillips, also had shares in that company.

Mr Phillips and Mr Burton discussed the mining warden's recommendation in Mr Miasi's presence. Mr Miasi did not contribute to the decision making. Mr Phillips and

Mr Burton asked Mr Miasi to prepare a minute recommending the acceptance of the mining warden's recommendation. He handed the task to a subordinate.

In the Full Court, the fact that Mr Miasi had performed a peripheral role was said to be irrelevant. His shareholding raised the perception of bias. While recognising that Mr Phillips son's holding did not disqualify Mr Phillips, the court treated this as an additional factor tainting the Minister's decision.

The High Court allowed the appeal. In the course of dealing with the argument that the fact Mr Miasi played a peripheral role was irrelevant, Chief Justice Gleeson observed, "suppose the person with the pecuniary interest had been the typist". This succinctly emphasises that in considering whether there is a conflict of interest issue, it is important to ask what task the person with the personal interest is performing. Mr Miasi's task was to listen and prepare a minute. He contributed nothing to the decision the Minister actually made. That he had confidential information that he might improperly use to his personal advantage is a different issue, which again could not affect the Minister's decision.

Similarly, it is also important to identify the various administrative obligations which a public official has. Many arise from legislation. Others arise from the nature of the public official's employment. In most instances, these matters are matters of law. Indeed, the ethics obligations which are also part of a public official's official duties are expressed in *Public Sector Ethics Act 1994.*

While ethical conduct involves more than compliance with law, it is important that law is respected and applied. While the legislation and codes of conduct that apply to public officials are essential educational tools which enable the public sector to perform its duties, there is also a place for the punitive consequences that follow breaches of legislation and of codes of conduct. Legal sanctions do not make people good, but they do encourage people to eschew conduct which is prejudicial to good public administration.

It is for these reasons that I hold the opinion that government lawyers have a very important place in the regime of public ethics.

Professional Responsibilities

Section 7 of the *Public Sector Ethics Act 1994* provides –

(1) A public official should—

(a) uphold the laws of the State and Commonwealth; and

(b) carry out official public sector decisions and policies faithfully and impartially.

(2) Subsection (1)(b) does not detract from a public official's duty to act independently of government if the official's independence is required by legislation or government policy, or is a customary feature of the official's work.

Subsection 2 is very important, not just for lawyers, but for all professional people employed in the public sector.

The professional independence of a number of public officials is recognised in the legislation under which they function, for example –

? The Ombudsman
   o *Ombudsman Act 2001* s.13
? The Auditor-General
   o *Financial Administration and Audit Act 1977* s.49
? The Public Service Commissioner
   o *Public Service Act 1996* s.35
? The Public Advocate
   o *Guardianship and Administration Act 2000* s.211
? The Commissioner for Children and Young People
   o *Commission for Children and Young People Act 2000* s.17
? The Health Rights Commissioner
   o *Health Rights Commission Act 1991* s.11
? The Crime and Misconduct Commission
   o *Crime and Misconduct Act 2001* s.57
? The President of the Guardianship and Administration Tribunal

- o *Guardianship and Administration Act 2000* s.87

? The Director of Public Prosecutions has the duty to act independently in respect of the preparation, institution and conduct of proceedings, but is otherwise responsible to the Minister and, in some respects, subject to the direction of the Minister.

- o *Director of Public Prosecutions Act 1984* s.10

? The State Archivist is not subject to control or directions in making decisions about the disposal of public records.

- o *Public Records Act 2002* s.27

Professional people are employed by the State to use their professional expertise and judgment. This is particularly important for lawyers. Their opinions on legal issues must be reliable and accurate and not tailored to government expectations. Citizens have an expectation that the rule of law will be observed by governments. Whether this happens depends fundamentally on the unswerving commitment of government lawyers to professional integrity. This is not a new idea and there is no evidence to suggest that either in the past or at present, there has been, or is, any persistent deficiency in the performance of government lawyers. Within all professions there are debates about the correctness of particular decisions. What has to be avoided, if public confidence is to be maintained, is persistent bias in favour of political expectations.

Parliament of Queensland Act 2001

The role of the Member's Ethics and Parliamentary Privileges Committee (MEPPC) has been expanded by the *Parliament of Queensland Act 2001*. The MEPPC now has the responsibility of publishing and reviewing a code of ethical conduct for members (s.92(1)). In reviewing the code of ethical conduct for members, the MEPPC must have regard to –

1. The ethics principles and obligations set out in the *Public Sector Ethics Act 1994*; and
2. The desirability of consistency between standards in the code of ethical conduct and the ethics principles and obligations to the extent the principles and obligations are relevant to members and their functions, (s.92(2)).

This means that the ethics principles and obligations in the *Public Sector Ethics Act 1994* now have a fundamental place in Queensland public life. Particularly, the ethics principles have become the core values for public administration. They are, of course, -

? Respect for the law and the system of government

? Respect for persons

? Integrity

? Diligence

? Economy and efficiency (s.4)

These five dot points, or seven values if you ignore the dot points, have to be applied collectively with an appropriate sense of balance. None is of greater importance that the others. However, government lawyers have a particular responsibility in maintaining respect for the law. In countries with a long history of popular involvement in government, community groups have learned how to protect and advance their interests through legislation. To balance diverse community expectations in legislation requires consummate skill. When legislation is amended frequently to accommodate differing expectations, the result may be hard to respect.

Overall, I believe that the government lawyers responsible for legislation deserve the highest praise. I realise that often they are asked to do what is beyond human science and skill. I can do no more that encourage them to continue to maintain the highest standards, because so much hangs on their abilities.