

Whose duty?

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Sometimes in the landscape of political-bureaucratic relationships, a new landmark appears that does cause us to pause and ask whether the map of the territory has changed, perhaps without our noticing it. Thus it was well over a decade ago when Warren Cooper challenged Perry Cameron's appointment of Frank Sharp to a senior management position in the Department of Internal Affairs, and the matter was debated for its significance for Chief Executive accountability¹. So have things been changed, or will they be changed, by another Minister's involvement in another Chief Executive's appointment decision?

In one sense the current issue has been tidied away. The Prime Minister reaffirmed the independence of CEs in appointment matters, the Minister lost his job, there will be an enquiry and possibly a court case. The media has moved on to the next feeding frenzy. But it is legitimate to ask what lessons we can draw from this episode about the independence of public service Chief Executives in employment matters.

Ross and Jonathan have both tried to focus on the responsibilities of senior public servants in the "purple zone" where their duties and the interests of the government may conflict. I want to talk about the responsibilities of politicians - not just to their CEs but also to the institution of public service, basically because the discussion needs some balance. It is not only public servants who have duties here.

The current case is represented as a question of trust. Could the Minister trust the public servant who was the Chief Executive's choice? There are two different types of "trust" to be considered. One is the personal trust that is the basic currency of politicians in their political lives. In politics, you make up your mind whether or not to trust somebody based on your assessment of their individual interests and projects, not on their official credentials. In a way it is not surprising that, given politicians' cultural assumptions about each other, they might believe that the same principles apply to their dealings with individuals in the public service.

The other idea of trust is the idea of trust in institutions. In the case of the public service, it is that senior officials should be trusted because they are part of an institution where both the written rules and the deeper customs and beliefs about role reinforce trustworthiness as a

¹ See for example Boston and Martin (1994).

basic value. For a Minister, acting in his official capacity in his or her dealings with the public service, the second type of trust – in the institution – is the one that counts.

It isn't just Ministers and the parties of government who should rely – and be able to rely - on that institution called the public service. It is the Opposition, because they expect to assume authority over it some day; and all the rest of us, because we rely on the public service to serve the interests of the state and not just the specific interests and projects of the ruling group.

That idea of a wider interest in the public service may sound odd in a Westminster democracy. Aren't all public servants simply there to serve the interests of the executive? I don't believe so. It is true that our public service has no entrenched constitutional status and role like the civil services of many other countries. But there is a body of law and custom that says that public servants will not act extra-legally, even when under direction from Ministers, and will also use the powers delegated to them responsibly and transparently. We all take confidence from that institutional frame for our public servants' behaviour.

The argument about "conflict of interest" has significantly muddied the waters as far as these principles are concerned. Conflict of interest is a quite useful concept relating to boardroom responsibilities of directors. It has been converted by rhetorical sleight of hand to the service of the current case. The trick is to imply that because some aspects of two cases - one of a company director, the other of a public servant - may be superficially similar, then others are the same as well. The discussion wasn't helped by an ambiguous treatment of the topic in the Auditor-General's recent report on the subject². I disagree with Jonathan that the report was helpful on the specific question of political interests. In fact, I see that – in response to the quite understandable inference many people took that he was advocating "loyalty registers" – the Auditor-General has made a further clarifying statement³. It now seems that he was referring only to the possibility of a register, probably just covering financial interests.

Let me return to the two different kinds of conflict of interest – financial and political. If I am a board member, with private investments, and the board discusses a matter that might affect the value of my investments, then I have to declare a conflict and stand down from the discussion. The principle might be extended to the fiduciary responsibilities of public servants in financial matters. If I am a public servant with investments that may be affected by a policy discussion where I have privileged information, then at the very least I ought to declare the interest and stand aside from participation in further discussion. Probably I ought not to have financial interests relating to my work in the first place. Secretaries to the

² Controller and Auditor-General (New Zealand) (2007b)

³ Controller and Auditor-General (New Zealand) (2007a)

Treasury have for example limited their personal investments to categories that could not specifically be affected by government policy decisions, or placed them in a blind trust.

However, in some public statements this useful principle for dealing with financial interests has been stretched to cover a situation in which a public servant has "interests" that - in someone's perception - might represent a political risk to the government. The implication is that these interests could be political, they could be family-related, or even just the attachments of romance or friendship. As many people have pointed out, that would place public servants in the impossible situation of being required to have no private political beliefs or affiliations that might run counter to the government's interests, or indeed any form of close association with others who might be construed as opponents of the government, because of *their* political beliefs or affiliations.

It is of course absurd to assume that this is possible in an open, pluralistic, politically active society like New Zealand's. And it has ever been so: our public service history has several well-known examples of public servants with specific political beliefs and for all I know close family members with even stronger and more public political affiliations. The principles for handling this potential conflict are equally well understood. They are not to stand down from discussions where secret information is conveyed that might be of value to the government's opponents. The rules are quite different, and quite simple, and ones that most senior public servants I knew lived and breathed. First, keep your politics out of your advice – difficult, perhaps, but not impossible. Second, never, ever, discuss confidential work matters with partner, family or friends.

I don't think adherence to that principle has got any weaker since I left the public service, judging by my contacts with senior and mid-level public servants since then, as sporadic as they may be. My main point is that Ministers are required, by their duty to us all – as well as to their CEs – to accept and respect that implicit undertaking by the public service. In other words, in this case, it would be out of order for a Minister to say he would not trust the CE's appointee. He is required by longstanding convention and, I would argue, by his Ministerial warrant, to trust her.

Finally, I am not a great fan of the "slippery slope" argument. It is quite possible that this event has simply served to remind us that Chief Executives are responsible for appointing their staff. CEs may well do their Ministers the courtesy of advising them any significant appointments – but the word used in the Cabinet Manual is indeed "advise" and not "consult"⁴. So in making appointments CEs have to have in mind their general duty to run the

⁴ "If a staffing matter is likely to become an issue of public concern or affect the administration of the department, it may be appropriate for the chief executive to advise the Minister on the issue." Cabinet Office (New Zealand) (2001), p 36. Incidentally, I'm not sure of its provenance, but it is plausible that this provision about advising on appointments was inserted in response to the Cooper-Cameron affair.

department efficiently and effectively; but they have no specific duty to Ministers on who they appoint. This principle is relatively clearly set out in the Cabinet Manual. The corollary is that Ministers should keep out of passing judgement on their decisions.

In the case we are pretending not to discuss today, should anything be done beyond reaffirming this principle? No doubt Don Hunn will reach some general conclusions both on its significance and the consequences, and will get lots of advice. But beyond this observation, I'll refrain from adding to it.

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