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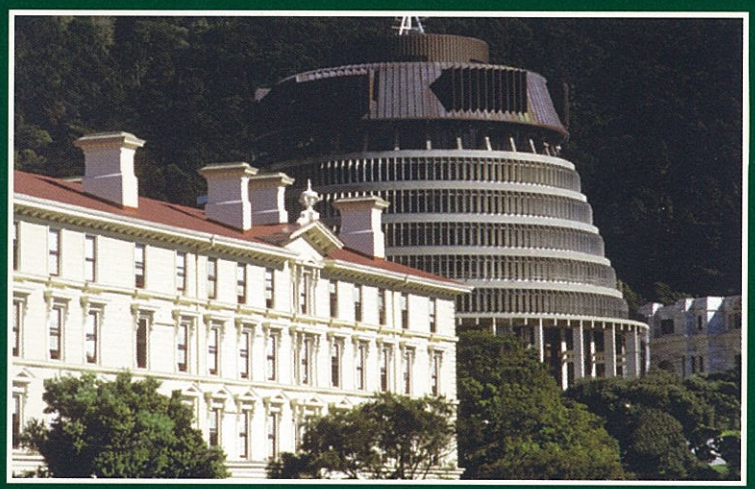

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THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Rt Hon Sir Kenneth Keith
Juliet Philpott
Duncan Webb
Fiona Wright
Elisabeth McDonald

VICTORIA UNIVERSITY OF WELLINGTON
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Address for all other communications:

The Student Editor
New Zealand Journal of Public and International Law
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand
e-mail nzjpil-editor@vuw.ac.nz
fax +64 4 463 6365

# KEEPING THE CROWN'S CONSCIENCE: A THEORY OF LAWYERING FOR PUBLIC SECTOR COUNSEL

***Duncan Webb****

*In theory, public sector counsel should have few problems in adhering to their professional duties; after all, they usually have only one client. However, given the complexity of government and the human tendency to identify with real people rather than deemed legal persons, it can be easy for public sector counsel to misalign loyalties. Whatever counsels' personal relationships within the entity, the lawyers' duty of loyalty is owed to the entity in its broadest incarnation and not to any one part of it or person within it. It is on this basis that the author seeks to articulate a theory within which public sector lawyers may consider their role and determine the appropriate course of action.*

## *I INTRODUCTION*

Despite the fact that we rarely turn our minds to it, we each have a working theory about what it means to be a lawyer and therefore how we ought to act in any given circumstance. The dominant model applied by lawyers to their own professional lives is one in which the lawyer is wholly committed to assisting clients in their individual endeavours, to the fullest extent possible under the law. In particular, the role of a lawyer is generally seen as that of assisting his or her client, within the limits of applicable professional rules, to achieve the objectives of the client within the constraints placed on the client by the state — that is to say the law. While this view might not be clearly articulated in the professional rules,[1] it is generally consistent with them.

* Professor of Law, University of Canterbury. This is a version of an article presented to the Lexis Nexis Public Sector Forum in Wellington on 28 September 2006.

1 An example which comes close to such an articulation might be found in the American Bar Association Model Code (American Bar Association, Chicago, 1983) which provides in Ethical Consideration 7-1 that:

> The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations. The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have

This approach makes no sense when applied to lawyers working in the public sector. It is largely meaningless to suggest that the role of the lawyer employed by the state is to ensure that his or her client's conduct is judged and regulated in accordance with the law, that the client is accorded all the rights and benefits available under law, and that the client is entitled to pursue those rights and benefits by any legal means. In particular, the client of the public sector lawyer is the apparatus that confers rights and benefits, enforces law, and adjudicates issues. It is for this reason that a distinct theory of lawyering for public sector counsel is needed.

## *II THE STANDARD CONCEPTION OF LAWYERING*

While the standard conception of lawyering is not often discussed in either professional or academic circles, it underpins the way we conceive of what it means to be a lawyer and is the background against which we measure the actions of a lawyer and the appropriateness of professional rules. In this sense it is a "deep" or underlying theory. While not an overtly articulated or embraced theory, the standard conception is the foundation upon which professional behaviour, expectations and regulation are built. Thus, in ordinary discourse to say that a relationship of lawyer and client exists is also to say duty of loyalty is owed. As such the lawyer–client relationship is by definition one of trust and confidence.[2] These concepts of loyalty and partisanship (often referred to together as "zeal") are at the heart of society's and the profession's conception of lawyering.

Underlying the duty of loyalty to the client is the value of personal autonomy for all citizens, which is at the heart of the liberal ideal. From the emphasis of client autonomy is drawn the conception of the lawyer who, as a neutral partisan, assists clients in realising their goals through accessing their rights. This is what has become known as the standard conception of lawyering.[3] Critics have used the term "hired gun"[4] to describe this position — objecting that on this view that lawyers need not (and possibly ought not) question the moral foundation or wisdom of instructions given by their clients. This view suggests lawyers ought to act entirely in their clients' interests as the client conceives them. The hired gun is entirely professionally committed to the client's cause and adopts the client's point of view without any moral commitment; such a lawyer is morally

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his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.

2 See for example Geoffrey Hazard "Conflict of Interest in Estate Planning for Husband & Wife" (1994) 20 Prob Law 1, 13 where it is argued that where interests conflict the concept of co-representation is incoherent and oxymoronic.

3 See for example the defence of such an approach by Tim Dare "Mere Zeal, Hyper Zeal and the Ethical Obligations of Lawyers" (2004) 7 Legal Ethics 24. More recently see Anita Bernstein "The Zeal Shortage" (2006) 34 Hofstra L Rev 1165; also Sylvia Stevens "Whither Zeal? Defining 'Zealous Representation'" (July 2005) Oregon State Bar Bulletin 27–28.

4 See especially David Luban "The Adversary System Excuse" in David Luban (ed) *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (Rowman & Allanhald, New Jersey, 1983) 83.

neutral (or even transparent). The distinctive features of the hired gun are the absolute commitment to the cause of whoever the client is for the time being and the willingness to work for any cause — regardless of its moral foundation. While the hired gun will counsel the client as to the best strategy to further the client's interest, he or she will not presume to counsel the client about the appropriateness of the wider ends sought.

The hired gun view of the lawyer flows from a Kantian liberal approach to social ordering. Liberalism promotes the pursuit of individual self-interest and downplays the importance of the interests of others or of the community. Moreover the liberal ideal places considerable importance on the law as the only legitimate constraining force on citizens' activities. The result is a liberal stance under which it is inappropriate to constrain third parties' actions simply because they are considered ill-founded, unwise, or even repugnant — provided they are legal. This is, after all, the foundation of plurality and tolerance upon which modern society rests.

At the heart of this conception is the total professional commitment of the lawyer to the client without recourse to the lawyer's personal views on the matter. Wolfram has said:[5]

> [T]he principle stems from concepts of individual autonomy. Each individual in a society is the holder of rights, and the legal system provides mechanisms by which individuals can assert and claim the consequences of their rights.

The individual, and the right to self-determination (or personal autonomy), are core aspects of most liberal approaches. Often these are linked to an approach which sees the law as a compact between conflicting interests or interest groups within society. by which the extent of citizen's respective autonomy and the fetters on it are settled.[6] On this analysis, the law is the arbiter of rights, and any disagreement about the appropriateness of the distribution of rights under law, or the procedures it adopts, should be raised using the accepted law-making procedures. In the sense that the law is the community's agreement on these matters it has moral force. There is an evolutionary assumption that over time the law will develop into a reasonable framework although within that framework disagreement may still remain.[7]

## *III THE HIRED GUN IN THE PUBLIC SECTOR*

This hired gun or standard conception of lawyering flowing from a liberal theory of citizenship is wholly inadequate in providing a model for public sector lawyers. While it has merit in explaining why, when acting for citizens (both natural and corporate), lawyers act the way they do, it is incoherent as a basis for justifying actions by lawyers working in the public sector. In particular, the

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5 Charles Wolfram *Modern Legal Ethics: Hornbook Series Practitioner's Edition* (West Publishing Co, Minnesota, 1986) 581.

6 See, for example, Joseph Raz *The Morality of Freedom* (Clarendon Press, Oxford, 1986).

7 John Rawls *Political Liberalism* (Columbia University Press, New York, 1993).

standard conception is premised on ensuring that all citizens have (at least in formal terms) equal access to the rights accorded by law. In a sense this is about ensuring that all citizens have an equivalent relationship with the state and the law. It would therefore be inappropriate for a lawyer acting for the state to shape his or her actions on the basis of a model of lawyering which presupposes that the lawyer is acting for a citizen.

To suggest that the lawyer who is acting for the state or an agency of the state has such liberal arguments at his or her disposal is a nonsense. A lawyer motivated by such liberal concerns who is acting for the state would presumably behave not as a hired gun but in such a way as to ensure that the citizen is accorded all (and only) those rights provided for by law. To suggest that a lawyer acting for the state should act as some kind of hired gun promoting "the interests of the state" at the cost of citizens undermines rather than promotes the liberal ideal. At a theoretical level (practicalities later) the interest of the state is to ensure that interactions between citizens occur within the constraints of the law and that all citizens enjoy the rights to which they are entitled under law. It can never be in the interests of the state to deny these benefits to its citizens.

The paramount value of autonomy in conjunction with a procedurally and substantively complex legal system means that, under the standard conception, lawyers are an essential corollary to any meaningful self-determination by citizens. The lawyer's function in such a setting is to assist in a neutral way in ensuring the client is accorded all of the rights and liberties to which the client is entitled under law.[8] The lawyer might not agree with the client's objectives and may think that the law under which they are determined is unjust; however, the liberal compact requires the client's rights and liberties to be determined according to the law and not according to the lawyer's moral values or those of any other value system. When a lawyer is acting for a citizen the standard view is that the only appropriate guides for a lawyer's conduct in his or her relations with a client are the law, the rules of procedure and the professional rules of conduct. Certainly no personal sense of morality or justice of a lawyer should affect clients' rights or their ability to vindicate them through their lawyer.

The standard conception, however, goes further and suggests that there is no obligation on the lawyer to take a "good faith" view of the law and ensure that clients pursue their goals within the spirit of the law, or that the proper administration of justice is upheld. It is in respect of this latter point that I suggest the role of the lawyer in the public sector differs.

The standard conception does not require mindless (or bloody minded) pursuit of the client's interests to the extent of breaking or ignoring legal and professional constraints. In fact it requires quite the opposite. It requires the lawyer to act within the law and professional rules at all times. While regulatory frameworks should be used and construed in the client's favour wherever possible,

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8 Dare, above n 3, 28.

this does not legitimise an outright bad faith approach to the law. The zeal demanded by the standard conception is not "hyper zeal"[9] or "zealotry".[10]

## *IV TEMPERED ZEAL*

It is then generally accepted that when a lawyer acts for a citizen-client he or she should do so with an ordinary rather than extraordinary measure of zeal — lawyers should, as far as the law and professional rules permit, put the interests of their clients above the interests of other individuals, state organisations, or wider values (such as the interests of justice). I suggest that a lawyer acting for the state ought to temper this zeal in a way which for many lawyers would appear counter-intuitive and quite possibly inconsistent with professional obligations. However, it should be made clear that there is no suggestion that the public sector counsel has no duty of loyalty to the state as his or her client. Moreover, in some (perhaps most) cases, the degree of loyalty or zeal will be identical to that owed by a private sector lawyer. This article is modestly suggesting that the nature and extent of the duty of loyalty must take into account the position of the public sector lawyer and the obligations of his or her client.

The introduction to the Rules of Professional Conduct for Barristers and Solicitors observes that many lawyers will be employed in the state sector and elsewhere and states:[11]

> No matter which branch of legal work the salaried practitioner engages in, and whether or not private practice is combined with the salaried occupation, the contents of this publication apply to every practitioner.

This can give rise to difficulties. Unless the way in which the rules apply to practitioners in public service is clearly understood it may be that the lawyers involved fail to act effectively, and in fact may breach their professional obligations. In *Pasini v Vanstone* government lawyers were acting for both the Attorney-General's Department and the Government of Mexico in pursuing an application by Mexico to extradite an accused for trial. It was there observed:[12]

> There well may be good reason for not translating in an unmodified form to the public sector the common law's objection to a person serving "two masters" in the same or related matters — an objection affecting lawyers in the private sector with increasing stringency …. Nonetheless the public still is entitled to appropriate reassurance that the integrity of the advisory function in the public sector does not appear to be compromised through an adviser in a given instance being in a position of conflicting responsibilities.

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9 Ibid.

10 Bernstein, above n 3, 1165.

11 Rules of Professional Conduct for Barristers and Solicitors (7 ed, NZLS, 2006) 3.

12 *Pasini v Vanstone* [1999] FCA 1271 para 50 Finn J.

While the words of Finn J seem to suggest that there will be cases where the duty of loyalty might be diluted when acting for the government, his honour is clear that the duty of loyalty is still important.[13] In this sense government lawyers (like corporate counsel) have the same obligations as lawyers in private practice, and appear to owe the same professional duties to their client. A corollary of this is that the same privileges will also attach in respect of such matters as the right to appear in court and privilege attaching to communications.[14] However I suggest that, given the public sector context when these duties are applied, a lawyer in the public sector usually ought not to act with the same unfettered loyalty as his or her private sector counterpart.

The concept of tempered zeal is not a straightforward one. In many senses loyalty appears as an absolute concept. It might appear a contradiction to suggest that a lawyer can be a little bit loyal. However, notwithstanding this observation, practicing lawyers have few difficulties in tempering their loyalty in numerous situations. Absolute loyalty would leave no room for the management of conflicts of interest when acting concurrently for clients with potentially conflicting interests. It is clear that lawyers do manage to limit their obligations and curtail their loyalty in these situations in a way which makes simultaneously working for two clients possible.

The reason that I argue for tempered zeal has been alluded to already. The theory of lawyer zeal makes sense only in terms of lawyers ensuring that citizens are not deprived of the rights to which they are entitled under law. It is the obligation of the state to ensure that citizens are accorded their rights. Thus where one lawyer is acting for a citizen against the state, and the other lawyer is acting for the state against the citizen, in a sense at least both lawyers have the same objectives (although different methods). Consider the mundane example of a lawyer acting for a client who injured his back when making his bed.[15] The question arises under New Zealand law as to whether this is an "accident" under section 25 of the Injury Prevention, Rehabilitation, and Compensation Act 2001. The lawyer for the citizen will of course forcefully present every argument to the Accident Compensation Corporation (the "Corporation") that the event concerned met the requirements of being an accident. There is no suggestion that the lawyer should present to the Corporation his or her honest or good faith view of the merits of the case. It would, however, be inappropriate for a

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13 See also *Hughes Aircraft Systems International Ltd v Airservices Australia* (1997) 146 ALR 1 (HCA). In that case the Attorney-General's Office gave advice to multiple government entities involved in the negotiation of the tender for air traffic control systems. The complainant was the plaintiff (Hughes) and not one of the entities who had allegedly suffered from the conflict. Hughes therefore could not avail itself of the duty of loyalty owed to other parties in its claim and the matter was left largely unresolved.

14 *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1972] 2 QB 102, 129 Lord Denning MR; *Re Director of Investigation and Research and Shell Canada Ltd* (1975) 55 DLR (3d) 713, 721; *US Steel Corp v United States* (1984) 730 F 2d 1465 (Fed Cir); *Waterford v Commonwealth of Australia* (1987) 71 ALR 673 (HCA); *Vance v McCormack* (2004) 154 ACTR 12. See also Kerry Willcock "Legal Professional Privilege and the In-House Lawyer" (1999) 27 ABLR 364.

15 *ARCIC v Stephens* (7 September 1998) DC AK 196/98, 45-98, Beattie J.

lawyer acting for the Corporation in such a situation to advocate refusal of cover to his or her employer or client in a similarly unfettered way. In this sense the lawyer acting for the Corporation would be expected to give their honest and good faith professional view as to whether cover is properly extended to the citizen within the legislative provisions and the scheme of the Act.

This example is relatively uncontentious when considering the role of the lawyer within a state organisation. Indeed a counsel within a private corporation is expected to give an honest and good faith view of the law (although a private corporation does not unilaterally decide the entitlements of third parties). However things become more problematic when the decisions of the executive are challenged before the courts. Lawyers acting for state entities, such as the Corporation, who appear before the court to defend claims by citizens who argues that they have been denied entitlements find themselves in an adversarial system. In such a context there is a natural tendency to adopt the zeal which is hailed as the hallmark of the advocate. The classical statement of such zeal is found in the famous words of Lord Brougham uttered before the House of Lords when defending Queen Caroline:[16]

> An advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, that client and none other. To save the client by all expedient means — to protect that client at all hazards and costs to all others, and amongst others to himself — is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other. Nay, separating even the duties of a patriot from those of an advocate, and casting them if need be, to the wind, he must go on reckless of the consequences, if his fate it shy old unhappily be, to involve his country in confusion for his client's protection.

For any lawyer this is a dangerous stance, and for the public sector lawyer, whether in court or not, it is positively wrong. I suggest that Lord Brougham's statement makes no sense at all for a lawyer acting for a public sector client. It is inappropriate to equate the interests of the state as the same as those of a client who is to be saved by all expedient means. The plight of a criminal accused being saved by some "expedient means" such as the rigorous application of the rules of evidence, the burden of proof or undermining the credibility of a (truthful) witness may, to many, appear excusable in the wider scheme of things. Similarly, the conduct of a lawyer in using every procedural tool and legal argument to sway a court to decide in favour of the commercial client raises only a few qualms. This is because we recognise those clients as having a legitimate right to use the law to its fullest extent to pursue their own ends, whether we agree with their ultimate cause or not.

This article argues that the legal advisers of a public sector entity ought to act differently than a lawyer who is acting for private clients. At the root of this contention is the suggestion that because

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16 Proceedings in the House of Lords, Trial of Queen Caroline (vol 2, Duncan Stevenson & Co, London, 1820) 7.

government deals on behalf of the citizens, the dominant consideration for lawyers in the public sector should be the public interest.[17]

When a lawyer acts for the state two problems arise with unfettered zeal. The most obvious is the recognition that the state has an obligation to accord to citizens their legal entitlements, and only to imprison, expropriate, tax, or the like within the bounds of the law. It is therefore inappropriate to use any device to set a matter decided on any grounds other than the law. This precludes the lawyer using tactics which seek to see the matter resolved in his or her client's favour on the basis of obscuring evidence, ignorance of law, litigation exhaustion or any other reason unconnected with the merits of the claim.

The second problem in acting with unfettered zeal to pursue the client's ends is that there is no easy way to determine who the client is or what the client's desired ends are. Where the client is an individual this issue raises few difficulties. Similarly understanding the client's objectives and instructions is straightforward: either the client will make clear the result he or she is after, or a few judicious questions will elicit the relevant information. When the client is a body corporate the issue may be a little more complex, but in general the views of the officers of the body will be a reliable guide.

When the client is the state there is no particular office holder who has the ability to identify what the desired ends of the client are. While the Attorney-General has the constitutional role of articulating the interests of the Crown the practical fact is that it is only in the most significant pieces of litigation or most difficult and important legal problems that this role is exercised. In practice instructions will be accepted through a particular officer in the government, however, it cannot be said that he or she is the client or, like a company director, is a reliable guide for the directing mind and will of the state. Moreover, when the client is a citizen we generally accept that he or she may have any desires or preferences which are not illegal. However the objectives of the state must not only be legal, they are expected to be legitimate.

The view that the Crown is presumed to have objectives of a legitimate nature can, however, be taken too far. It is not the place for a public sector lawyer to start formulating policy. What is in the interest of the public is largely for the government to decide, not its lawyers. As such, if the government through its various agents and organs requires certain steps to be taken, it is not up to its legal adviser to dilute or limit that advice because it does not fit with the lawyer's apprehension of the public interest. This would be a breach of the lawyer's duty of independence and an

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17 See Steven K Berenson "Public Lawyers, Private Values: Can, Should and Will Government Lawyers Serve the Public Interest?" (2000) 41 BC L Rev 789, 797–798. For a full exposition see Steven K Berenson "The Duty Defined: Specific Obligations that follow from Civil Government Lawyer's General Duty to Serve the Public Interest" (2003) 42 Brandeis LJ 13; Catherine J Lanctot "The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions" (1991) 64 So Cal L Rev 951, 955–957 and 980.

inappropriate substitution of the judgement of the government (or those in government appointed to exercise discretions) for that of the lawyer. This is, of course, not to say that the lawyer should not identify concerns and tensions that may be identified in a course of action of both a legal and non-legal nature. This is part of the expansive role of a lawyer. However as with private practice, a lawyer ought not to act as a gatekeeper when providing legal assistance to the government.

## *V WORKING ON THE FRINGE OF THE PUBLIC SECTOR*

It needs to be recognised that the term "public sector lawyer" is itself problematic. At its broadest it would encompass not only lawyers acting within a government department, but also those employed by Crown entities, local bodies, State-owned enterprises and possibly private sector lawyers acting on instructions from such bodies. While it is not proposed to enter into a definitional debate, it is important to remain sensitive to the fact that not all public sector lawyers are engaged in work of a similar nature for similar clients.

One way in which this problem arises is where lawyers employed by government departments are required to assist the department with commercial transactions which are ancillary to the discharge of the functions of the department. For example when the government is delivering welfare or health services it needs premises from which to do this. Frequently these premises will be leased from or built by non-government businesses and the associated contracts will be drafted and negotiated by the government's lawyers on one hand, and the business's lawyers on the other. We know intuitively that our call for fettered zeal in such a situation is not nearly as persuasive. Some might think that in such a situation the government lawyer should act in exactly the same way as the private sector counterpart, however this may be too hasty.

Certainly in negotiating a commercial contract the public sector lawyer is entitled to seek the deal that is best for his or her client — the government. Given the commercial environment in which the transaction is taking place it would seem naïve to expect the lawyer to have regard for the private sector business's interests in anything other than a Machiavellian sense. This is not problematic as the division of rights which is occurring in a contract negotiation context is wholly consistent with the legal framework which the government is expected to uphold.

However the issue becomes clouded when we come to ask whether the government lawyer ought to properly rely on strict legal rights in a situation when the parties have to resort to the law to settle some dispute. By way of example imagine that some Crown agency tendered a significant contract to build a bridge for many millions of dollars. The negotiations were hard-fought and a good price (for government) was struck. It transpires that perhaps the price was too low and did not take account of delays which might prudently have been predicted. Moreover, the weather has been particularly unseasonable and this has exacerbated the delays. The result is the imposition of penalties which in the circumstances are onerous (though not illegal) and it has become apparent that the contract simply cannot be completed at the agreed price. The contractor stands to make a

loss which may place their continued solvency in jeopardy. How should the lawyer respond when asked what course the Crown agency should take?

Our initial reaction may be to advise the Crown agency that they are entitled to take every commercial advantage that exists in such a situation. While there may be good commercial reasons for ensuring that the contractor does not "go under", short of this it might be advisable to enforce the rights of the Crown under the contract. However a strong contrary argument exists that in such a case the lawyer acting for the Crown agency should take a more circumspect approach. There is a significant difference in the example cited from one in which the client is a private citizen (whether a corporate or natural person). In such a case the lawyer can simply inform the citizen of the legal rights which exist, along with the practical alternatives. Some lawyers might even flavour the discussion with the merits of the positions of the respective parties. The client then has the option of deciding what course of action to take.

When acting for the Crown the identity of the client is particularly elusive. When acting for an individual there is no doubt as to the proper source of instructions. Similarly the rules of company law give reliable guidance as to how to determine the wishes and intentions of a company. In contrast, public law has not generally concerned itself with identifying the root of the "mind and will" of the Crown. Ministers are an obvious candidate in respect of the work of government departments; however in practical terms it is unlikely that the minister has any particular view on large parts of the operational goings on of the department. Neither is it clear that the secretaries or their deputies are entitled to fill the gap with their own views as to how the Crown ought to act in such a situation. While the constitutional role of the law officers of the Crown fill this gap in theory, in workaday legal work neither ministers nor the Attorney-General are going to be involved and instructions will be taken from mid-ranking civil servants.

It appears, therefore, that there is something of a void when it comes to asking what the Crown's desire is in respect of the question of whether the rights the Crown has under the contract should be exercised to the fullest extent possible. This becomes a question of business ethics. While in some cases in the corporate world the directors of a company (or those to whom such decisions are delegated) might decide to squeeze as much commercial benefit as possible out of the transaction, there are also numerous examples of cases where the contract would be revisited and terms varied or waived in light of the circumstances that have transpired. Moreover, in the corporate world the argument against any broad obligations of good faith and fair dealing is bolstered by the (perhaps receding) view that the sole purpose of a company is to maximize the dividend available for distribution to shareholders. Accordingly, considerations such as fair dealing have no place in such deliberations.

There can be no suggestion that the dominant motive of the Crown is profit. If the concept of the Crown having a dominant motive makes any sense at all (which is admittedly questionable) the motive cannot be inconsistent with the general welfare of its citizens, nor can it be inconsistent with the law. How then should the Crown be presumed to act when it has legal rights which it is entitled

(but not obliged) to enforce, but where enforcing them would cause hardship to a third party? I suggest that the lawyer acting for the Crown in such a situation should, in the absence of clear contrary guidance presume, that the Crown would want to treat those parties it deals with in the wider interests of the community. It should also act in a manner consistent with the principles of fair dealing and commercial responsibility which, if widespread, would lead to a more effective and fair business environment. This amounts to a presumption that the Crown will act with exemplary commercial morality. While the presumption has been argued here as flowing from first principles, it also accords with stated government policy.[18]

It is however possible that an entity discharging a government function, or carrying on a business, may not strictly be part of the Crown. Obvious examples are State-owned enterprises which are independent limited liability companies regulated in part by statute.[19] There is some guidance to be found in section 4 of the State-Owned Enterprises Act 1986 which provides that such entities must be "an organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so", although this is in the context of the wider objective to "operate as a successful business".[20] The general approach of government does seem to be to focus on the commercial objectives of State-owned enterprises and other Crown-owned companies.[21] However even in this context it is of note that there is an expectation that such entities will not take advantage of technical aspects of the law and are expected to adhere to the "spirit" of the law. This is most clearly articulated (somewhat ironically) in respect of tax policy where the *Owners Expectations Manual*, developed by the Crown Company Monitoring Advisory Unit in 2002 provides that:[22]

> Crown companies are also required to act as good corporate citizens by being good employers and by exhibiting a sense of social responsibility where able to do so. These objectives are not served by tax planning that is outside the spirit of the law.

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18 For an official recognition of this see The Treasury *Guidelines for Contracting with Non-Government Organisations* (Wellington, 2003) 4, which states as a principle of contracting that "The Crown and its organisations should act in good faith".

19 State-Owned Enterprises Act 1986.

20 See also similar references in Crown Research Institutes Act 1992, s 5; Reserve Bank of New Zealand Act 1989, s 169 .

21 See, for example, Crown Company Monitoring Advisory Unit *Owners Expectations Manual* (Wellington, 2002) which is drafted in terms which make quite clear the dominant objective of the entity being a successful business.

22 Ibid, para 6.5.

There are numerous other Crown entities which have a greater or lesser degree of independence.[23] There is no simple rule which will solve this issue. In such cases it will fall to the lawyer or lawyers concerned to consider the nature of the entities that they are proposing to act for and to determine whether or not they have a legal existence independent of the Crown. If this is the case then it may well be a conflict of interest to act for more than one entity.

## *VI ACTING IN WHOSE INTEREST?*

In theory public sector counsel should have few problems of conflict; after all they usually have only one client. However given the complexity of government and the human tendency to identify with real people rather than deemed legal persons, it can be easy for public sector counsel to misalign their loyalties. Whatever the counsel's personal relationships within the entity, the lawyer's duty of loyalty is owed to the entity in its broadest incarnation and not to any part of it or any person within it.

A problem in acting for the government is the fact that, as an organisation, it is enormous and the nature of its divisions is very unclear. There is also likely to be some natural competitiveness or organisational tension between the various organs of government, which could lead to some less than scrupulous practices. Also relevant is the fact that in some areas the government has adopted a contracting model in respect of transactions between different parts of the Crown. The structure of government and human nature mean that it is a natural reaction of individuals responsible for the wellbeing of parts of the public sector to see the interests of that part of the public sector in isolation.

While corporate counsel can take refuge behind relatively clear lines of corporate identity, the matter may not be quite so clear cut in the case of government entities. Thus for example, it is theoretically possible that the Ministry of Education, the Tertiary Education Commission, the New Zealand Qualifications Authority and the University of Canterbury could all seek legal advice from different counsel all employed in the public sector. Similarly, the Crown Law Office could be required to provide advice to multiple government departments which are negotiating with each other on important commercial matters.

In the latter case if the entities are seen as separate, the duty of loyalty would suggest that to act for more than one party would lead to a conflict of duties. However in many such instances the various entities are all part of the Crown. The concept of "the Crown" is a complex one and, at its boundaries, impossibly vague. However it is clear that all government departments are part of the

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23 Crown Entities Act 2004, s 7 identifies bodies corporate created by statute, incorporated companies owned by the Crown, subsidiaries of those companies, school boards of trustees, and tertiary education institutions. See also *Berryman v Solicitor-General* [2005] NZAR 512 (HC) where it was found that the Solicitor-General was not part of the Crown in respect of an application for discovery due to the Solicitor-General's high degree of independence.

Crown and therefore it is no more possible to have a conflict of interest between two government departments than it is to have a conflict between two branch offices of a limited company.[24] In particular, subsection 2(1) of the Public Finance Act 1989 provides that the Crown is the "Queen in right of New Zealand and all ministers and departments" which includes "any department or instrument of the government or any branch or division thereof".[25]

The "whole of government"[26] approach, which is increasingly becoming relevant in the public sector,[27] is also consistent with an approach which views organs of the Crown as parts of a larger unitary entity. On such an approach it would be wholly inappropriate for a public sector lawyer to see the interests of his or her client as limited to the interests of the department by which he or she is employed, and thereby consider it permissible to ignore (or worse, harm) the interests of some other organ of government. If we accept that the client is the wider Crown rather than the department the obligations of loyalty imposed on the lawyer are owed to the government as a whole.

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24 This is reflected in the Cabinet Directions for the Conduct of Crown Legal Business 1993, cl 7 (Cabinet Office *Cabinet Office Manual 1994* (Wellington, 1994) para 5.15–5.18) which provides that "[w]here an opinion is sought from the Crown Law Office, on an issue over which there is a difference between departments, both or all of those departments should advise the Crown Law Office of their views. An opinion will be given to all of them jointly". See also the American Bar Association "Model Rules of Professional Conduct" (American Bar Association, Chicago, 2002) which notes in its introduction at para 18:

> [Government lawyers] may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the 'public interest' in circumstances where a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority.

25 See also the State Sector Act 1988.

26 Also referred to as an "all of government" approach in some publications. The State Services Commission provides in its glossary the following explanation of the term:

> A term with several broad shades of meaning, depending on context. For example, it may mean "vertical alignment": single agency, multi-agency, sectoral or inter-sectoral alignment with government's broader goals and objectives; "horizontal alignment": inter-agency or inter-sectoral planning, or integrated service delivery; a "whole of government direction" given under the Crown Entities Act 2004 by the Ministers of State Services and Finance to one or more categories of Crown entities, or to one or more types of statutory entity, for the purpose of both: supporting a whole of government approach; and improving public services, either directly or indirectly; a reference to all the constituent parts of the Executive Government of New Zealand; a reference to the legislative, executive, and judicial branches of the Government of New Zealand; a reference to all the agencies collectively of "central government" and "local government". Synonymous in this sense with "public sector".

27 The whole of government approach received statutory recognition in the Crown Entities Act 2004, s 107.

## *VII NEUTRALITY AND OBJECTIVE ADVICE*

Political tension is a further difficulty that lawyers acting for the public sector may face. It is a fact of political life that, on occasion, there is considerable tension between ministers who may both seek advice from respective (or worse, the same) counsel. There may also be compelling political or even security reasons for pressure to be brought to bear on a lawyer to arrive at a particular legal opinion. This may place particular demands on a lawyer's neutrality and independence. Probably the most glaring example of such pressure (and consequent compliance) is the now infamous "torture memos" in which the Office of Legal Counsel of the United States Department of Justice argued that torture of terrorism suspects was permissible under law.[28]

Where the conflict is between opposing views of different organs of government the Cabinet Directions for the Conduct of Crown Legal Business are of assistance.[29] Clause 6 of those Directions provides that where legal advice is obtained by a department whether from its own legal staff or otherwise, it must be obtained in accordance with the Directions. Those Directions make clear that where there are conflicting views between government entities the matter may be resolved by the Crown Law Office issuing a single opinion. They also reinforce the duties of confidence and the right of privilege attaching to legal advice given to the Crown.

The case where pressure is brought to bear on counsel to provide a convenient opinion raises considerable difficulties. In particular there are situations where there are no avenues by which such an opinion will be challenged and, in a sense, the opinion of counsel is seen as quasi-permission to adopt a particular course of action. The torture memos mentioned previously provide a good example. The professional obligations are clear. Every lawyer is obliged to provide frank and objective advice. To do less would be to fail in the duties owed to the client.[30] The duty to provide

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28 Jay S Bybee, Assistant Attorney-General, Office of Legal Counsel, US Department of Justice to Alberto R Gonzales, Counsel to the President "Standards of Conduct for Interrogation under 18 U.S.C." (1 August 2002) Memorandum. Available at numerous internet sites including The Washington Post www.washingtonpost.com (accessed 24 June 2007).

29 Cabinet Directions for the Conduct of Crown Legal Business, above n 24.

30 See Lawyers and Conveyancers Act 2006, s 4 (not yet in force) which provides that it is a fundamental obligation of a lawyer to "be independent in providing regulated services to his or her clients". There is no explicit rule requiring objective advice in the rules, but the need for the lawyer to exercise proper "professional judgment" runs through the rules. See for example rule 12.1 of the Australian Model Rules of Professional Conduct and Practice (Law Council of Australia, 2002) which provide that an advocate must render assistance "uninfluenced by the practitioner's personal view of the client or the client's activities, and notwithstanding any threatened unpopularity or criticism of the practitioner or any other person". Also in New Zealand commentary (1) to rule 1.01 provides that "[t]he professional judgement of a practitioner should at all times be exercised within the bounds of the law solely for the benefit of the client and free from compromising influences and loyalties". See also commentary (2) to r 1.03. In contrast, the United States Model Rule 2.1 provides that "a lawyer shall exercise independent judgment and render candid advice" (American Bar Association, Chicago, 2002)..

objective advice can be seen as more than simply to give advice as to the bounds of the law. While a lawyer is unlikely to be disciplined for failing to give objective advice, arguably it can be a significant factor in public sector mismanagement and even wrongdoing. At the heart of the problem lies the manner in which the lawyer approaches the legal issue upon which advice is sought. In some cases lawyers have looked at such issues with convenient myopia and have been blind to the wider context in which certain transactions have been located. Such a "don't ask me I'm only the lawyer" approach has facilitated significant abuses which, with hindsight, have been gross breaches of law.

Public sector lawyers' functions are not limited to the narrow confines of the legal questions asked in relation to the issue placed before them. Moreover they are required to discharge their duties of fidelity and competence in all cases. There are also real difficulties in public sector lawyers providing opinions which are based on a bad faith approach to the law. While citizens may choose to arrange their lives on the fringe of the law, government should not frame its behaviour on such a basis. For example, a citizen may choose to adopt a tax plan that has a greater than even chance of being found to be a sham on the basis that the chance of detection is low, so the risk is worth taking. However it would be wholly inappropriate for a public sector lawyer to give an opinion that certain spending could occur because although there is a less than even chance that it was permitted, there is only a small chance of detection or sanction. Allied to this point is the fact that views rendered by counsel must be frank and "say it as it is", not couched in such a way as to sanction wrongdoing. A breach of such a principle is unfortunately more or less undetectable. While written advice may appear to be very frank and candid, such that the lawyer is able to say that the matter was explained to the minister or other public servant in a comprehensive and timely way, if that advice was given with a "nudge and a wink" its efficacy will be wholly undermined. Then what appears to be clear advice against illegal conduct becomes in substance the reverse. Public sector counsel has a role to point out and not implicitly or explicitly condone conduct of an organisation which is, or is likely to be, in breach of the law. Accordingly a lawyer should not give his or her views in a way which subtly endorses a breach of law or legal obligations. Neither should a lawyer signal to his or her client that certain information should be screened from the lawyer regarding inappropriate conduct which is to be engaged in. The lawyer may not take a "hear no evil see no evil" stance.

It is not open to a lawyer to agree to limit his or her duties in a way which grants impunity for breach of such duties.[31] In the context of public sector counsel this means that counsel may not accept instructions which are clearly incomplete or accede to ignoring the wider interests of the Crown. For example, it would be inappropriate to issue an unqualified legal opinion in respect of the regulatory compliance of a proposed course of action unless all aspects of the scheme and the wider

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31 See *Frost and Sutcliffe v Tuiara* [2004] 1 NZLR 782, para 24 (CA) Tipping J; *Farrington v Rowe McBride and Partners* [1985] 1 NZLR 83, 90 (CA) Richardson J, cited with approval in *Clark Boyce v Mouat* [1993] 3 NZLR 641 (PC) Lord Jauncey.

context in which it sat were known.[32] Lawyers should also be cautious of using "weasel words", which are warning signs to other lawyers reading an opinion that it is qualified, or even hypothetical, but are unlikely to alert a lay reader. Lawyers are also adept at using language to obfuscate in cases where the clear meaning is inconvenient. In giving advice to the public sector, counsel should not equip the other state servants to avoid the law by taking refuge in poor or incomplete lawyering.

A lawyer who is independent and can render frank advice not coloured by the considerable pressures around him or her is impressive indeed. However such an approach is required of public sector counsel. They are entitled and professionally obliged to apply and interpret the law in a good faith manner to the greatest extent possible in their clients' favour, but no more. Where the facts are clear and the law is at its legitimate interpretational boundaries, the lawyer may not manufacture, manipulate or obscure to facilitate a breach of the law, or its perversion to an illegitimate purpose.

In this regard some assistance as to how a public sector counsel ought to discharge his or her role may also be obtained from the position of the Solicitor-General. The constitutional convention is that the Solicitor-General will act with a high degree of independence in advising government and also in arguing cases before the courts on the government's behalf. The advice and advocacy rendered by the Solicitor-General must be independent of the interests of the government of the day. It has been said that "arguments for the Crown at all levels must be accurate, objective and restrained, and founded firmly on a tenable exposition of the applicable legal principles".[33] It is suggested that this approach applies to all lawyers who are tendering advice to public entities. [34]

This may, of course, be at odds with the immediate interests of the particular branch of government that the lawyer is acting for at the time. Such a view needs to be approached with

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32 Conversely, counsel should generally avoid giving heavily qualified opinions as this enables the entity to take a "but that doesn't apply to us" approach in presuming one of the qualifications lets it off the hook.

33 John McGrath "Principles for Sharing Law Officer Power — the Role of the New Zealand Solicitor General" (1998) 18 NZULR 197, 206.

34 An articulation of this approach in respect of litigation is to be found in the American Bar Association Code of Professional Responsibility (American Bar Association, Chicago, 1983) where in Ethical Consideration 7-14 it provides:

> A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.

See also § 156 of the Restatement (3d) of Law Governing Lawyers dealing with Representing Governmental Client for a detailed discussion.

caution and it is suggested that the duties of a lawyer acting for a government entity are unlikely to differ in a significant way from those of other lawyers.

## *VIII CONCLUSION*

The forgoing may appear to be depressing reading for public sector counsel, who were under the impression that their task was less fraught than that of their private sector counterparts. Not so — the challenges which may be presented to public sector counsel are as significant and as difficult to navigate or avoid as those which present themselves in private practice. However, public sector counsel do have some advantages. On the theory proposed public sector counsel ought not to be faced with the dilemma of how to act when required to assist with some abominable wrong. Government can never legitimately seek to pursue a heinous end. Public sector counsel also have the relative luxury of only having one client, though sight of this may easily be lost. While resolving tensions within that client may be difficult, senior public sector counsel may be placed in a position to discourage or dissuade the other functionaries in government from embarking on a course of conduct which would be a breach of the duty of good government by the state. While in the private sector it cannot be expected that counsel ought to act as a corporate conscience, this may not be so in the public sector. Given the nature of the public sector and the obligations of the State, it would seem that that body of lawyers who choose to serve that crown can legitimately be thought of as the keepers of the Crown’s conscience.