

## **Seventh Annual St Thomas More Forum Lecture**

### **Public Office and Public Trust**

Chief Justice Robert French AC  
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#### **Introduction**

Thomas More was an exemplar for all holders of public office. He has been called the Christian English Cicero. A brief reflection on his extraordinary life appropriately frames this lecture. He was born in 1477 and attended St Anthony's School in London until 1489 when, at the age of 12, he became a Page for Archbishop and Chancellor Morton. He began his studies at Oxford at the age of 14 and was admitted as a pre-law student at New Inn, London at the age of 16 in 1493. He studied law at Lincoln's Inn until he turned 23. He was called to the Bar in or about 1501. His father was a judge and was keen for him to devote himself entirely to legal practice. However he studied Greek philosophy, theology, history and literature and thought about becoming a priest. His father almost disinherited him for these frivolities.

With Erasmus, who became his friend and admirer, he translated the dialogues of Lucian who, he said:

... everywhere reprimands and censures our human frailties with very honest and at the same time very entertaining wit. And this he does so cleverly and effectively that although no one pricks more deeply, nobody resents his stinging words.

He worked hard to develop his legal practice beginning, as many young lawyers do with what one writer has called 'humble and eminently practical' cases.<sup>1</sup> In 1511,

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<sup>1</sup> G Wegemer, *Thomas More as Statesman: A Brief Sketch* (2001) at 4.

after having borne him four children, his wife, Jane, died. He married Alice Middleton within one month of her death. Although they were not kindred spirits and she was seven years his senior, she raised his four children and proved to be 'a good and loving woman'.<sup>2</sup>

More found the challenge of balancing his work and his family life a difficult one. He wrote:

I am constantly engaged in legal business, either pleading or hearing, either giving an award as arbiter or deciding a case as judge. I pay a visit of courtesy to one man and go on business to another. I devote almost the whole day in public to other men's affairs and the remainder to my own. I leave to myself, that is to learning, nothing at all.<sup>3</sup>

In 1518, More joined the service of King Henry VIII as Master of Requests. In 1521 he was knighted. He was appointed as Ambassador to Bruges and Calais. His daughter, Margaret, married William Roper who was later to write his biography. He became speaker of the House of Commons in 1523 and High Steward at Oxford in 1524. In 1525 he was appointed Chancellor of Lancaster. In 1529 he was appointed to the highest judicial office in England, that of Lord Chancellor. Henry was declared Supreme Head of the Church in England in 1531 by which time More was aged 54. He resigned his office on 16 May 1532. Henry asked for him to be indicted in 1534 but was refused three times by the House of Lords. More was questioned by a Royal Commission in March of that year and interrogated at Lambeth Palace and imprisoned for refusing to take the oath regarding the Act of Succession. He was tried on 1 July and executed on 6 July at the age of 58.

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<sup>2</sup> Wegemer, n 1 at 5.

<sup>3</sup> Wegemer, n 1 at 5.

Before he joined the service of King Henry, he wrote a poem in Latin, which is relevant to the topic of this lecture. It was entitled "The Consent of the People Both Bestows and Withdraws Sovereignty". In English translation it read:

Any one man who has command of many men  
owes his authority to those whom he commands;  
he ought to have command not one instant longer  
than his subjects wish. Why are impotent kings so proud?  
Because they rule merely on sufferance?<sup>4</sup>

Also relevant to the topic is his respect for the rule of law encapsulated in the famous words of his son-in-law, Will Roper:

were it my father stood on the one side and the devil on the other side (his cause being good) the devil should have right.<sup>5</sup>

Those words, and More's life, frame the topic of this lecture, which concerns the general nature of the obligations which attach to holders of public office and the analogy that can be drawn between those obligations and the concept of a public trust.

## **Public Officers**

The holder of public office in a representative democracy is expected to behave, in his or her official capacity, according to standards which overlap and have different sources. The fields of inquiry about such standards are ethics and the law. These fields overlap. Sometimes ethical principles are reflected in legal rules. To take a simple example – the acceptance by an official of a bribe in return for a favourable decision is generally recognised as unethical behaviour. It is also a serious crime. Ethics, as a distinct field of inquiry leading to identification of

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<sup>4</sup> Miller: et al (eds), *The Complete Works of St Thomas More* (Yale University Press, 1984), Vol 3 Pt II at 169.

<sup>5</sup> W Roper, *The Life of Thomas More* (1822) at 41.

standards of behaviour, however, can be difficult and contentious. That is because, apart from statements of great generality, there is no single ethical theory which all can agree will provide a complete guide to ethical behaviour by public officials or by anybody in a position to exercise power over others. That difficulty is an aspect of the challenge facing theories of ethics generally.

Professor Margaret Somerville once described 'doing ethics' as 'the great contemporary exploration of our moral universe, an exploration that parallels that of our physical universe throughout the new science'.<sup>6</sup> We have yet to find a satisfactory theory of the physical universe – a theory of everything. Theorising about the moral universe or universes is no less challenging. There are nevertheless those who are willing, for a suitable fee, to help organisations and even governments to understand what is ethical behaviour and to guide them through difficult decisions said to have an ethical dimension.

Some years ago, I found a website set up by an organisation based in Pennsylvania and called 'Ethics Quality Inc'. The organisation offered 'Ethics and Cultural Management Services'. It advertised 'Ethics Training Aids for Employees'. One of those aids was promoted in the following terms:

101 Fallacies and Ethical Lower Forms.

This handy four page 8-1/2 x 11" colour laminate highlights eleven deductive and five inductive fallacies and over 40 specific lower forms, totalling over 101 of the most common logical fallacies and ethical lower forms. The shortest part to improving organizational ethics is to prevent these forms from corrupting the ethical reasoning process. To prevent them, one must first be aware of them. Put this laminate into the hands of all employees and ethics will improve.<sup>7</sup>

The price was \$12.95 with discounts for volume over two dozen.

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<sup>6</sup> M Somerville, *The Ethical Canary – Science, Society and the Human Spirit* (Viking, 2000) at XIII.

<sup>7</sup> Ethical Quality Incorporated, Ethical & Cultural Management Services.

There is no doubt that the demand for ethical advice in the public and private sectors is pervasive. There is in Australia a plethora of ethics committees set up in universities, hospitals and other institutions and as statutory bodies under Commonwealth and State laws. The *Gene Technology Act 2000* (Cth), part of a national scheme for the regulation of gene technology, sets up a Gene Technology Ethics and Community Consultative Committee.<sup>8</sup> Its function is to provide advice, on the request of the Regulator or the Ministerial Council, on 'ethical issues relating to gene technology' and a number of related issues.<sup>9</sup> Appointees to the Committee must have skills or experience of relevance to gene technology in relation to one or more of 'law' or 'ethics' or a range of other issues.<sup>10</sup> Professor Somerville once referred to judges as the 'contemporary Bishops' and courts as 'cathedrals of a secular society'.<sup>11</sup> It seems that these days the metaphorical label might attach to ethicists and ethics committees, although perhaps they should be less grandly entitled 'ministers' and 'church halls' respectively. The existence of such bodies, both statutory and non-statutory, providing ethical advice to public office holders necessarily raises the question: how does one determine whether an ethics committee is working well or not and whether it is giving good advice or bad advice? What are the quality control standards for ethicists? If I were the relevant minister and were faced with a choice of two possible appointees to a gene technology ethics committee, say Professor Somerville from McGill University and Professor Peter Singer from Princeton, who would I choose and on what basis would I make that choice? Would I say that Princeton outweighs McGill? Would I say that Singer's views are a bit too utilitarian for my liking and that those of Somerville are closer to my personal values? Are there any ways of deciding who is the 'better' ethicist or is it just whistling in the wind even to ask the question? That is not a

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<sup>8</sup> *Gene Technology Act 2000* (Cth), s 106.

<sup>9</sup> *Gene Technology Act*, s 107.

<sup>10</sup> *Gene Technology Act*, s 108(3)(h) and (m).

<sup>11</sup> Somerville, n 5 at 11.

subject for profound reflection tonight. However, it highlights one of the difficulties in any field of inquiry about the ethical dimensions of public sector decision-making.

There is a considerable demand today for what is called public sector ethics training. The term itself is used in a broad sense which sometimes covers compliance with legal obligations as well as other standards of behaviour which are broadly defined. By way of example, in Queensland, there is an Act of Parliament entitled the *Public Sector Ethics Act 1994* (Qld). It sets out 'ethics principles' declared to be 'fundamental to good public administration'.<sup>12</sup> These principles are:

- . integrity and impartiality
- . promoting the public good
- . commitment to the system of government
- . accountability and transparency.<sup>13</sup>

The first principle 'integrity and impartiality' might well align with rules of law to which I will refer later. The other principles are obviously capable of being manifested in a variety of different and possibly even conflicting ways.

Ethics principles are elaborated in the Act by reference to ethics values. The Act also provides for codes of conduct to be established<sup>14</sup> and 'Standards of practice for public service agencies'.<sup>15</sup> The Act imposes obligations on public officials to

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<sup>12</sup> *Public Sector Ethics Act 1994* (Qld), s 4(1).

<sup>13</sup> *Public Sector Ethics Act 1994* (Qld), s 4(2).

<sup>14</sup> *Public Sector Ethics Act*, Pt 4.

<sup>15</sup> *Public Sector Ethics Act*, Pt 4, Div 2, sub-div 1.

comply with the relevant code of conduct and any applicable standard of practice.<sup>16</sup> The transmutation of very broadly stated ethical principles into statutory obligations in this way, clearly raises challenges for those who would seek to apply them in practice.

The diffuse nature of some of the standards encompassed by the word 'ethics' in the context of the public sector, raises the general question about the nature of the ethical theory (if any) which underpins them. There have been many attempts to encapsulate a basis for ethical behaviour in the discharge of public office. A former Public Service Commissioner of the Australian Public Service, Peter Shergold, said that:

... the bottom line of accountability for public servants is ethical (did I meet the public purpose as effectively, equitably and openly as possible?)<sup>17</sup>

It is probably not controversial that ethical behaviour derives from a view that the actor holds of himself or herself in relation to others. In the case of a person occupying public office, the relationship will always be defined by the constitutional proposition that the office is held for the benefit of others. Public offices are created for public purposes and for the benefit of the public. It is not necessary to travel beyond the boundaries of utilitarian ethics to conclude that ethical behaviour by a person exercising public power requires that person to exercise that power honestly, conscientiously and only for a purpose for which that power was conferred. This is in one sense nothing more than a manifestation of the application of the rule of law to public decision-making. In our representative democracy, the Commonwealth, the State and Territory Parliaments are authorised by the Constitutions of the Commonwealth and the States, and the Self-Government Acts of the Territories, to make laws creating powers, duties, privileges and immunities. Each member of

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<sup>16</sup> *Public Sector Ethics Act*, s 12H.

<sup>17</sup> P Shergold, 'Ethics and the changing nature of Public Service' paper delivered at the Fifth International Conference: Public Sector Ethics – Between Past and Future, 5-9 August 1996.

parliament is a public officer with powers exercised collectively with other members of parliament and subject to rules and constraints, including constitutional limits upon the exercise of those powers. Many of the laws which they make confer powers on Ministers of the Crown and appointed officials of the executive government. They also define the jurisdiction and, within constitutional limits, the powers of the judiciaries within each polity. The powers which are conferred on any public official must necessarily be exercised only for the purposes of, and in accordance with, the law by which those powers are conferred.

Here, there is an intersection between ethics and the law. For what would be expected of the ethical exercise of public power in utilitarian terms is reflected substantially, although not entirely, in the rules defining the boundaries of lawfulness. There is a metaphor which straddles the divide between law and ethics. That is the idea of the public office as a public trust.

### **Public Office as Public Trust**

The idea of a public office as a public trust is one borrowed a long time ago from the principles of equity which define the duties of trustees. A person who holds property as its legal owner, but holds it for the benefit of another person is a trustee for that person. A trustee has fiduciary obligations to the beneficiaries. These have been described by Dr Sarah Worthington in the following terms:

Equity insists that beneficiaries are entitled to the single-minded loyalty of their trustees, or, more generally, that principals are entitled to the single-minded loyalty of their fiduciaries. Put starkly, the fiduciary duty of loyalty requires fiduciaries to put their principals' interests *ahead* of their own; it requires fiduciaries to act altruistically. ... The duty demands a general denial of self-interest: the fiduciary role proscribes certain perfectly legitimate activities unless the principal consents to the fiduciary's involvement. The fiduciary's personal autonomy is correspondingly constrained.<sup>18</sup> (footnotes omitted)

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<sup>18</sup> S Worthington, *Equity* (Oxford University Press, 2003) at 121.



On one account of its history, the story of the trust began with the Crusaders. As Dr Worthington explains in her text on *Equity*, Crusaders, before going off to war, would transfer ownership of their land to a friend to manage for the benefit of their families. Their object was to evade compulsory tax and inheritance laws that would apply if the Crusader was killed while he was away. Once the Crusader's land had been transferred to another, the Crusader had no rights at common law, nor did his family if he were killed or otherwise did not return from the crusades. The friend to whom the transfer had been made was not legally bound by family members. However, by the thirteenth century the Chancellor, on the petition of disappointed family members, began to enforce the moral obligations which had been undertaken by the trusted friend. Ultimately, the concept of the trust relationship and of fiduciary obligations evolved into the modern law of trusts and associated equitable doctrines relating to fiduciary obligations. The application of the metaphor of a trust, to holders of public office, can readily be understood. The office holder has power invested in him or her by law for the purposes of the law and only for the purposes of the law.

## **The Public Trust in History**

There is a long history which attaches the characterisation of a public trusteeship to the holders of public office. In the eighteenth-century case of *R v Bembridge*<sup>19</sup>, holders of public office were regarded as holding offices of 'trust concerning the public'. This reflected what Justice Paul Finn has called the 'circuitous route' by which English judges brought public officials 'into a fiduciary relationship with the public'.<sup>20</sup>

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<sup>19</sup> [1783] 22 State Trials 1 at 155-156.

<sup>20</sup> PD Finn, 'The Forgotten "Trust": The People and the State' in M Cope (ed), *Equity: Issues and Trends* (Federation Press, 1995) 131 at 133; cf PD Finn, *Public Trusts, Public Fiduciaries*.

The idea that public officers occupy a trust-like or fiduciary obligation was applied to Members of Parliament in the 1920s by the High Court in *Horne v Barber*<sup>21</sup> and in *R v Boston*.<sup>22</sup> Mr Horne was a land agent employed by Mr Barber to sell a property to the Victorian Government. The land agent employed as his representative, Mr Deany a member of the Victorian Parliament effectively as a lobbyist, on the basis that he would receive a share of the commission. Mr Deany, who made representations to the Minister about the desirability of the property, did not tell the Minister that he was acting in the matter as a commission agent. A dispute arose between the vendor of the land and the agent about the agent's entitlement to commission. The Supreme Court of Victoria held that the commission agreement was illegal and void because of the involvement of the parliamentarian. The High Court upheld that decision. Sir Isaac Isaacs in his judgment said:

When a man becomes a member of Parliament, he undertakes high public duties. Those duties are inseparable from the position: he cannot retain the honour and divest himself of the duties. One of the duties is that of watching on behalf of the general community the conduct of the Executive, of criticizing it, and, if necessary, of calling it to account in the constitutional way by censure from his place in Parliament – censure which, if sufficiently supported, means removal from office. That is the whole essence of responsible government, which is the keystone of our political system, and is the main constitutional safeguard the community possesses.<sup>23</sup>

He added:

... the law will not sanction or support the creation of any position of a member of Parliament where his own personal interest may lead him to act prejudicially to the public interest by weakening (to say the least of it) his sense of obligation of due watchfulness, criticism, and censure of the Administration.<sup>24</sup>

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<sup>21</sup> (1920) 27 CLR 494.

<sup>22</sup> (1923) 33 CLR 386.

<sup>23</sup> (1920) 27 CLR 494 at 500.

<sup>24</sup> (1920) 27 CLR 494 at 500.

Justice Rich put it in terms of a trust:

Members of Parliament are donees of certain powers and discretions entrusted to them on behalf of the community, and they must be free to exercise these powers and discretions in the interests of the public unfettered by considerations of personal gain or profit. So much is required by the policy of the law. Any transaction which has a tendency to injure this trust, a tendency to interfere with this duty, is invalid. ... Courts of equity, in dealing with transactions between private persons, have always avoided as contrary to the policy of the law purchases by trustees from themselves ... This applies with greater force to public affairs and the obligations and the responsibility of the trust towards the public implied by the position of representatives of the people.<sup>25</sup>

In *R v Boston* a member of Parliament, along with two other persons, was charged with conspiracy. It was alleged that he had agreed to receive payments as an inducement to use his position as a member of parliament to secure the acquisition of certain lands by the Government of New South Wales. The validity of the charge was attacked on the basis that it was so wide that it would cover an agreement to pay money to the parliamentarian to use his position outside Parliament and to cover his involvement in transactions which might never come before the Parliament and which he might genuinely believe were highly beneficial to the State. The Court rejected that contention. Again, Isaacs and Rich JJ described Members of Parliament as 'public officers' and invoked the definition of 'office' in the Oxford Dictionary of the day which included 'a position of trust, authority, or service under constituted authority'.<sup>26</sup> Higgins J made a comparison with private trusteeship when he said of cases concerning bribery of members of Parliament and the criminal liability attaching thereto:

All the relevant cases rest on the violation of a public trust. 'The nature of the office is immaterial as long as it is for the public good' [*R v Lancaster*

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<sup>25</sup> (1920) 27 CLR 494 at 501-502.

<sup>26</sup> (1923) 33 CLR 386 at 402.

(1890) 16 Cox CC, 737, at p 739]. An agreement between a trustee and an estate agent to share commission on a sale is void and the trustee has to account to the beneficiaries for his share. But it is not an indictable matter, as it is not a public trust – a trust 'concerning the public' [*R v Bembridge* (1783) 3 Doug (KB), at p 332].<sup>27</sup>

And further:

He is a member of Parliament, holding a fiduciary relation towards the public, and that is enough.<sup>28</sup>

The importance of the public trust metaphor diminished over time with the rise of specific mechanisms for oversight and accountability, including: statutory regulation of the public service, parliamentary scrutiny of official action, the political accountability of ministers and the employment arrangements of officials. However, a loss of faith in these mechanisms in the late twentieth century was, as Justice Finn has observed, 'one of the principal stimuli to renewed interest in the 'public trust' and in its implications both for officials and for our system of government itself.'<sup>29</sup> Provisions of the *Independent Commission Against Corruption Act 1988* (NSW)<sup>30</sup> refer to 'breaches of public trust'. In codes of conduct for public officials at many levels, the trust or fiduciary concept is invoked.

The concept of the public trust and, more particularly, the notion of a fiduciary obligation, although metaphorical and analogical rather than an application of trust law, did foreshadow more contemporary ideas of administrative justice which are widely accepted in Australia today and to which I shall turn shortly.

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<sup>27</sup> (1923) 33 CLR 386 at 410-411.

<sup>28</sup> (1923) 33 CLR 386 at 412.

<sup>29</sup> Finn, n 20 at 134.

<sup>30</sup> *Independent Commission Against Corruption Act 1988* (NSW), ss 8(10(c), 12.

The public trust concept, however, has continuing relevance, at least in the United Kingdom, where the idea of a fiduciary duty owed by local authorities to their ratepayers, has been referred to in a number of cases. A recent and interesting example was the decision of the House of Lords in *Porter v Magill*<sup>31</sup> in 2001. The Conservative Party had retained control of a city council with a reduced majority in local government elections in May 1986. The leader and deputy leader of the council, believing that homeowners were more likely than council tenants to vote Conservative, established a policy under which the council would sell, in the exercise of its statutory powers, 250 council properties a year in eight marginal wards. After legal advice that targeted sales would be unlawful, the policy was revised to extend the sales to 500 across the city while maintaining the target of 250 sales in marginal wards. The council approved the relevant policy in July 1987. Opposition councillors gave notice of objection to the council auditor under the *Local Government Finance Act 1982*. The auditor found that the council had adopted the policy with a view to achieving electoral advantage for the majority party and that the leader and deputy leader were party to its adoption and implementation in the knowledge that it was unlawful and that the policy so promoted and implemented had caused financial loss to the council. The auditor certified that those responsible for the policy, including the leader and deputy leader, had caused the council to lose approximately £31 million. The certification in respect of the leader and deputy leader was upheld subject to a variation in the amount of the loss by the Divisional Court, but overturned by the Court of Appeal on the basis that the leader and deputy leader had acted on legal advice. In the event, the decision of the Court of Appeal was reversed on appeal by the House of Lords.

Lord Bingham set out the underlying legal principles. He relied upon a statement in Wade and Forsyth's leading text, *Administrative Law*.<sup>32</sup> He described the statement as 'a general principle of public law':

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<sup>31</sup> [2002] 2 AC 357.

<sup>32</sup> 8<sup>th</sup> ed (2006) at 356-357.

Statutory power conferred for public purposes is conferred as if were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended.<sup>33</sup>

Importantly, he added:

It follows from the proposition that public powers are conferred as if upon trust that those who exercise powers in a manner inconsistent with the public purpose for which the powers were conferred betray that trust and so misconduct themselves. This is an old and very important principle.<sup>34</sup>

The case illustrates the potential for the application of principles derived by analogy from equitable doctrines relating to private trust arrangements.

## **Administrative Justice**

The concept of public office as a public trust does not figure prominently in contemporary Australian law relating to the exercise of power by public office holders. But echoes of the concept of fiduciary obligation are to be found in the standards which the law imposes upon the exercise of official power by administrative decision-makers. This is an area in which Australian law has developed considerably, particularly since the 1970s when a number of important law reform measures were introduced by the Commonwealth Parliament to provide for judicial review and other forms of review of official administrative decisions. The package of reforms, known as the 'Administrative Law Package' established the Administrative Appeals Tribunal, provided easier mechanisms for judicial review of administrative decisions by the courts through the *Administrative Decisions (Judicial*

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<sup>33</sup> [2002] 2 AC 357 at 463 citing Neill LJ in *Credit Suisse v Allerdale Borough Council* [1997] QB 306 at 333.

<sup>34</sup> [2002] 2 AC 357 at 463.

*Review) Act 1977 (Cth)*, and provided for an administrative complaints process through the establishment of the Ombudsman.

The Commonwealth Administrative Law Package brought into being new mechanisms for merits and judicial review which were of general application. They brought before the Administrative Appeals Tribunal and the Federal Court, for consideration on the merits and for error of law or process, decisions ranging across a very wide spectrum of official powers. Some areas contributed more than others. Much Commonwealth administrative law was developed through decisions about veterans' entitlements, social security benefits, immigration and taxation. In the commercial sphere, regulators were challenged, particularly in relation to the exercise of coercive investigative powers. Those developments had an effect, as they were intended to, upon primary decision-making. As a legal member of the Social Security Appeals Tribunal in the late 1970s, before it acquired statutory status, I was able to observe the impact of the Commonwealth Administrative Law Package on the kind of documentation that was provided by officers of the department making decisions under the legislation.

It is not surprising that out of this increase in administrative review and judicial decision-making there should emerge discussion about the possibility of some unifying rubric such as administrative justice which would accommodate normative standards of general application to decisions made by public officials. A notion of '*administrative* justice' was perhaps necessary to avoid the colonisation of administrative decision-making and review by models of decision-making. For if one thing was always clear, it was that while judicial review was significant, the important questions about administrative justice had to be answered in the way that was able to be applied by persons holding office as decision-makers. In that category I include Ministers of the Crown and the whole range of officials exercising official power and forming part of, or arms of, the Executive Government.

An overarching concept of '*administrative* justice' is in some ways no less difficult to achieve than an overarching concept of '*ethical* conduct' in the exercise of public power. There is, nevertheless some utility in identifying normative standards which can legitimately be said to answer to the designation '*just*' and which are

capable of general application in our system of administrative law and practice. A statement of such standards can provide a framework by which we can not only judge systems, practices and particular decisions, but can provide a basis for their review and improvement.

These standards, I suggest, must be linked to the constitutional framework in which they operate, which includes a written constitution, representative democracy, the rule of law, formal or conventional separation of legislative, executive and judicial powers, and a milieu of recognised common law rights and freedoms. There are other desirable linkages to international human rights norms, or at least those which have been afforded recognition, if not statutory force, in domestic law, in treaties to which Australia is a party or which have entered the realm of customary international law and can therefore be taken as potentially informing the common law. The basic norms of administrative justice are evaluative and qualitative. They should be related to the requirement that power is exercised for the purposes for which it is conferred: that is the purposes of the law conferring it.

A minimalist approach to administrative justice asks the question – 'When Parliament enacts a law which empowers an official to make decisions affecting individuals, what are the minimum criteria by which those decisions and the processes by which they are made, can be regarded as just and in accordance with the purpose for which they are conferred?' An official empowered by a law to make a decision affecting the rights, privileges or liabilities of somebody else will meet the requirements of the law if he or she makes the decision:

- lawfully - in accordance with the rules and for the purposes which the law prescribes – this of course excludes decision making informed by dishonesty or conflict of interest;
- rationally - in the sense that the decision is logically open on the information properly before the decision-maker having regard to the law which he or she must apply;



- fairly – a central requirement of any form of justice. It is important to emphasise that fairness is not an optional moral extra in decision-making. Procedural fairness is linked to the requirements of lawfulness and rationality. The law requires that the decision-maker not be distracted from fact finding or the exercise of discretion by bias, nor handicapped by the absence of information which could have been provided by the person affected had he or she been given an opportunity to make a submission or comment on or rebut adverse information before the decision-maker; and
- intelligibly – by the provision of reasons so that the person affected by the decision, and perhaps the wider community, will know why it has been made. Absent intelligibility in the decision, the first three standards may be of diminished practical effect because the capacity to judge compliance with them and to seek review will be compromised.

In the context of express statutory powers conferred on public office holders which underpin the vast majority of official decision-making affecting individuals, I would regard these elements as the bare bones requirements of an understanding of administrative justice. They are persuasive and supportable because they are closely aligned to the requirements of the law, and they are underpinned by norms expressed in the law through the processes of representative democracy. They are partly based upon criteria applicable in judicial review. They may not be inspiring, but they are necessary to build consensus about what administrative justice involves.

Other aspects of administrative justice which import consideration of the wider interests of individuals affected by administrative decisions and also societal interests include:

- efficiency in decision-making, so that the cost imposed on the individual and the community by the process reflects an equitable distribution of burdens between community and individual;
- timeliness in decision-making;

- . accessibility and affordability by the citizen, extending to such things as the simplicity of application forms and processes; and
- . courtesy and respect for those involved in and affected by the decision-making process.

These aspects of administrative justice can also be said to be aspects of curial justice reflected in ongoing reforms to court processes over the last three or four decades.

Although there are different approaches to the concept of administrative justice and its theoretical underpinnings, my judicial cultural bias leads me to prefer an approach that is firmly rooted in the constitutional arrangements and assumptions upon which our society operates. Criteria rooted in these arrangements support standards which have a degree of legitimacy and a potential for general acceptance.

The norms which I have indicated and similar norms, forming part of a public sector culture and internalised by individual decision-makers, will go a long way to answering what many people would require as minimum standards of ethical behaviour. Beyond those norms, more broadly based ethical instinct for doing the right thing and not doing the wrong thing, can provide a buffer against ethical and legal error.

The life of Thomas More demonstrates an adherence to high personal ethical standards, the rule of law and his own conscience. I have focussed on ethics and lawfulness. Saintliness is a topic I will leave for another day.