

# Ethics and Public Office

## Sir Zelman Cowen Memorial Oration

Chief Justice Robert French AC

Monash University, Melbourne, 10 September 2014

Zelman Cowen was a man of special measure and it is my pleasure to deliver this oration in his memory. His life is too well known and the stories of it too often told in a variety of ways and in a variety of forums for me to repeat them tonight.

It was a life of high achievement. It was also a life of public service as a scholar, who enriched our understanding of the Australian Constitution, as a teacher, as an educational leader and, ultimately, as the Governor-General of Australia. He occupied that high office as a man with a deep appreciation of the Constitution and constitutional practice, coupled with a matured experience of public life, a man fit to receive the nation's formal law-making and executive powers. The law-making power derived from the function of the Queen as part of the Parliament under s 1 of the Constitution and his function as her representative under s 2 of the Constitution. The executive power derived from s 61 of the Constitution. Zelman Cowen also understood the third branch of government, the courts, which exercise the judicial power of the Commonwealth. In 1959 he published the first edition of his definitive text on *Federal Jurisdiction in Australia*, the second edition of which he co-authored with the late Professor Leslie Zines in 1978 and the fourth edition of which is now in preparation by Geoffrey Lindell.

Deep understanding and matured experience are invaluable attributes in the holders of public office. They mean little without an ethical framework. Zelman Cowen's life of service was conducted within such a framework. It is the idea of ethics directly relevant to the exercise of public office that is the subject of this oration.

The search for a workable ethical framework for public office does not require an extended philosophical inquiry covering great ethical thinkers from Ancient Greece to the present time, although the duty to exercise public power in the public interest has been

recognised by philosophers back to the time of Plato and Cicero.<sup>1</sup> A modest but workable ethical framework can be anchored to the purposes for which public office is conferred and its nature as an office of trust. With that anchoring, the ethical framework should be one upon which most people who understand that we live in a representative democracy governed by the rule of law, can agree. In that context, I recently received a very nice letter from Sir Zelman's son, Rabbi Dr Shimon Cowen, attaching a transcript of a conversation he had with my predecessor, the Honourable Murray Gleeson, in September 2011, in part about the role of the judge in applying the law. It presents a particular example of the general argument. In the opening paragraph of the transcript, Rabbi Cowen put to Murray Gleeson the proposition that:

There is a concept of 'universal ethics' which ultimately arbitrates ethical human conduct.

He asked him how the application of the law took such universal ethics into account. Murray Gleeson responded with a careful answer:

The idea of a level of justice over and above the positive law is widely accepted but its practical implementation requires care.

In his view the enforcement of the law by courts is subject to an obligation of 'legitimacy'. That is an important term when it comes to thinking about ethics in public office. It must be defined otherwise it remains simply a conclusionary epithet. It is, of course, defined. The ordinary meaning of the word 'legitimate' is 'conformable to law or rule; lawful, proper'.<sup>2</sup> It therefore imports, so far as judges are concerned, all the requirements of their office including diligent attention to their tasks, honesty, fairness, impartiality, independence and competence. In the context of public office holders generally the definition of the word 'legitimate' directs attention to the purpose for which the office was created, its powers

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<sup>1</sup> Gerard Carney, *Conflict of Interest: Legislators, Ministers and Public Officials* (Transparency International, Berlin, 1998).

<sup>2</sup> *The Shorter Oxford English Dictionary*, (Oxford University Press, 5th ed, 2002) 1570.

conferred and the conditions and limits attaching to the exercise of those powers. Those purposes, conditions and limits define a working ethical framework. It is not my idea or anybody else's idea of universal ethics. But universal ethics are above my pay grade. The universe is a large place and the repository of many mysteries.

An ethical framework for public office holders defined by the purpose, for which their office was created, does not require the underpinning of a religious tradition. Indeed, explicit attachment of an ethics of public office to such a tradition may undermine its legitimacy. In the context of the Christian religion, Professor Max Charlesworth, a Catholic philosopher, once wrote that 'Christian and non-Christian alike — have to make do with the ordinary ethics of human inquiry.'<sup>3</sup> So too, Andrew Dutney, a Professor of Theology at the Flinders University and past-president of the Uniting Church in Australia, observed 'that there is no more a Christian ethic distinct from all other ethics than there is a Christian mathematics distinct from all other mathematics.'<sup>4</sup> In an obituary for Zelman Cowen published in the *Australian* newspaper on 10 December 2011, he was quoted as expressing pride in his religious heritage. He found it difficult to believe that there was not some original creator. What flowed from that he did not know. Importantly, he observed:

I try to live decently, contribute decently, ... because that's the right way.

Consistently with his own view of a 'right way', it is possible to make very basic ethical propositions about public office that accord with the idea of legitimacy and the idea of public office as a position of trust attracting fiduciary obligations reflecting those imposed by contemporary administrative law. It should also accord with the principles of the rule of law and a larger conception of the relationship between the State and its subjects.

The basic ethical proposition is this:

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<sup>3</sup> Max Charlesworth, *Religious Inventions: Four Essays* (Cambridge University Press, 1997) 151.

<sup>4</sup> Anthony Dutney, *Playing God — Ethics and Faith* (London, HarperCollins Religious, 2001) XI quoting philosopher and theologian, Professor Allan Sell.

The holder of a public office must discharge its duties and exercise its powers for the purposes for which the office exists and for which the powers are conferred and only for those purposes and according to the conditions and within the limits of the power.

That is a rather minimalist proposition. It neither inspires nor uplifts. But it corresponds generally to legally enforceable rules and necessarily encompasses honesty, diligence, fairness and rationality. It is not unduly restrictive for it can accommodate the legitimate exercise of public power through a wide range of widely defined purposes. It permits whatever can be done lawfully by public office holders. The choices they make may involve, at a high governmental or parliamentary level, the formulation of public policy and its reflection in legislation, or giving effect to such public policy through administrative decisions. In a larger and more contestable ethical framework than that which I have proposed, judgments can be made about whether policy or administrative decisions are good or bad. A parliamentary policy reflected in legislation fixing certain tax rates and social welfare benefits may give effect to what some people regard as a fair and equitable distribution of community resources. Other people might regard the same choice as unfair and inequitable. The basic ethical framework attaching to all public office can accommodate conduct which people can judge as right or wrong according to some larger ethical perspective, but not as an unethical abuse of public power.

By way of example, the Australia Parliament is given very wide law-making powers. It has the power under s 51 of the Constitution 'to make laws for the peace, order and good government of the Commonwealth' on the various subjects which are set out in that section. That is a familiar form of provision conferring constitutional power on parliaments. It does not limit the exercise of the law-making power by reference to a criterion of peace, order and good government. It does not authorise the High Court of Australia to strike down a law on the ground that it is not for the peace, order and good government of the Commonwealth. That judgment, for better or for worse, is a matter for the Parliament, which is ultimately accountable to the people.

There has been some debate in some cases in New Zealand and the United Kingdom about the possibility that there are some restraints on that widely expressed law-making

power by principles deeply rooted in our democratic system of government and the common law.<sup>5</sup> However, no law has been disallowed in either of those countries or in Australia on that basis.

The purposive approach to the ethical exercise of public power is not as arid of traditional concepts of good behaviour as its bare formulation might suggest. It is connected to, and enhanced by, very old ideas about public office as a species of public trust. That in turn is connected to the idea of a fiduciary relationship, a concept of private law. There is a strong school of thought that the idea of fiduciary relationships underpins the ethics and the law governing the exercise of public power. Fiduciary relationships in private law include those which exist between a trustee and its beneficiaries or between a solicitor and a client. They are relationships of trust. The law imposes enforceable obligations on those fiduciaries, obligations which are derived from the doctrines of equity developed in the Chancery Courts of England and transported to Australia in the 19<sup>th</sup> century. Those obligations were succinctly described by Professor 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 principal's interests *ahead* of their own; it requires fiduciaries to act altruistically.<sup>6</sup>

Translating that statement to public office in a representative democracy, a public office holder, acting ethically, would be required to be loyal to the people whom he or she serves and to put their interests ahead of his or her own. That proposition applies to parliamentarians, Ministers, and appointed officials, including judges.

Supporting the positive requirements of fiduciaries' duties, are prohibitions. Fiduciaries must not place their interests in conflict with their duty as a fiduciary.<sup>7</sup> They must not use their position as a fiduciary to personally profit. The idea of the fiduciary

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<sup>5</sup> See Chief Justice Robert French, 'Common Law Constitutionalism', Robin Cooke Lecture (Speech delivered in Wellington, New Zealand, 27 November 2014).

<sup>6</sup> Sarah Worthington, *Equity* (Oxford University Press, 2003) 121 (emphasis in original).

<sup>7</sup> G E Dal Pont and D R C Chalmers, *Equity and Trusts in Australia*, (Lawbook Co, 3<sup>rd</sup> ed, 2004) 135-36.

relationship embraces that of the trust. Murray Gleeson spoke of judicial office as a fiduciary office at least in an ethical sense when he said, in a speech delivered in 2000:

Judicial power which involves the capacity to administer criminal justice and to make binding decisions in civil disputes between citizens, or between a citizen and a government, is held on trust. It is an express trust, the conditions of which are stated in the commission of a judge or magistrate, and the terms of the judicial oath.<sup>8</sup>

He characterised the High Court as the agent of the Australian people, entrusted with the responsibility of ensuring observance of the federal compact and that characterisation signified the fiduciary capacity in which it exercises its power. With the private law analogy of the trust and fiduciary relationship in mind, it is time to place the topic in a larger context of the relationship between the State and its subjects.

In a speech in honour of Sir Zelman in November 2014, Peter Varghese, the Secretary of the Department of Foreign Affairs and Trade, quoted from an article written by the young Cowen in March 1939 in the Melbourne University Student Newspaper *Farrago*. The article was about the impact of dictatorship on national culture. It included the statement: 'The State exists as a convenience for those who compose it ...'<sup>9</sup> That sentence, which greatly interested Varghese and certainly interests me, points in the direction of the general idea of the State as having a relationship of trust with respect to its subjects. The Commonwealth of Australia, brought into existence by an Imperial Act but based upon a popular referendum and embodying principles of representative democracy and responsible government, was created as a State for the benefit of the people. That idea is not spelt out in terms in our Constitution. It is nevertheless a powerful idea informing the way in which we view the ethical and legal obligations of those who, on behalf of the State, exercise public power.

There has been much written about the idea of the State as a whole acting as a fiduciary. In a comprehensive monograph on the topic by Associate Professor Fox-Decent of

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<sup>8</sup> Murray Gleeson, 'Judicial Legitimacy' (Speech delivered at the Australian Bar Association Conference, New York, 2 July 2000).

<sup>9</sup> Peter Varghese, 'Sir Zelman Cowen Oration' (Speech delivered at the Australian Institute of International Affairs, Victoria, 20 November 2014)  
[www.http://dfat.gov.au/news/speeches/Pages/sir-zelman-cowen-oration.aspx](http://dfat.gov.au/news/speeches/Pages/sir-zelman-cowen-oration.aspx)

McGill University, he treated the relationship between the State and subject as one built upon the necessity of trust.<sup>10</sup> Generally, as he pointed out, a fiduciary is someone entrusted to make judgments and to exercise powers that the beneficiary is not entitled to exercise. An example is arbitration where two parties authorise an arbitrator to settle a dispute between them. Neither can undertake the arbitral role because neither can be both judge and party. Professor Fox-Decent went on to say:

More generally, this is exactly the circumstance presented by the fact of sovereignty, under which legal subjects must entrust the specification, administration, adjudication, and vindication of their rights to the state. Private parties have no authority to make the judgments or exercise the powers necessary to determine such matters; they do not get to make laws that apply to others, nor decide legal disputes.<sup>11</sup>

The de facto and de jure dependence of private parties on the State and their vulnerability to State power is an aspect of the State's assumption and exercise of necessary governmental powers. At an ethical level, the fiduciary principle is engaged by this combination of the State's public administrative power and its subjects' private incapacity.

Courts have acknowledged the idea of a public or 'political' trust, although not generally as something which of itself can be given legal force. Sometimes, however, it has been argued that governments owe legally enforceable fiduciary duties to indigenous peoples. That argument has been considered in the United States, Canada and New Zealand and was considered by the High Court in *Mabo v State of Queensland (No 2)*.<sup>12</sup> Generally, where governments in the United States and Canada have been found to owe fiduciary duties to indigenous people, those duties have been based upon particular statutes.<sup>13</sup> There is a provision in the Constitution of Canada that affirms existing aboriginal treaty rights of the aboriginal peoples of that country.<sup>14</sup> In a case decided in the Supreme Court of Canada in

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<sup>10</sup> Evan Fox-Decent, *Sovereignty's Promise: the State as Fiduciary* (Oxford University Press, 2011).

<sup>11</sup> Ibid 111.

<sup>12</sup> (1992) 175 CLR 1.

<sup>13</sup> *United States v Mitchell* 436 US 206 (1983); *Guerin v R* [1984] 2 SCR 335.

<sup>14</sup> *Constitution Act 1982*, s 35(1).

1990, *R v Sparrow*<sup>15</sup>, the Court referred to a general guiding principle derived from that constitutional protection namely that:

the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.<sup>16</sup>

There is also a line of cases in New Zealand which establishes the existence of a fiduciary relationship between the Crown and the Maori people.<sup>17</sup>

In *Mabo (No 2)*, the people of Murray Island in the Torres Strait, argued that the State of Queensland, of which they were part, had a legally enforceable fiduciary duty to them in relation to their rights and interests in land on their Island. That fiduciary duty was said to arise from the particular historical relationship between the islanders and the colony of Queensland. They claimed that Queensland was bound as a trustee to recognise or protect their rights and interests. Queensland, of course, had passed an Act trying to extinguish their rights and interests while the *Mabo* case was still before the courts. The High Court found that Act to be unconstitutional in the decision known as *Mabo (No 1)*<sup>18</sup> in 1998 because it was inconsistent with the *Racial Discrimination Act 1975* (Cth), not because it involved a breach of a fiduciary duty. In the event, the general proposition of an enforceable fiduciary obligation to indigenous people did not find favour with the High Court except with Justice Toohey who founded it upon the power of the Crown to extinguish native title.<sup>19</sup>

I should mention that the Australian Constitution does use the term 'public trust', but only once. It appears in s 116 of the Constitution, which provides that:

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<sup>15</sup> [1990] 1 SCR 1075.

<sup>16</sup> Ibid 1108.

<sup>17</sup> *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641; *New Zealand Maori Council v Attorney General* [1989] 2 NZLR 142; *Te Runanga o Wharekauri Rekohu Inc v Attorney General* [1993] 2 NZLR 301.

<sup>18</sup> *Mabo v Queensland* (1998) 166 CLR 186.

<sup>19</sup> (1992) 175 CLR 1, 203.

no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

The term 'public trust' used there has not been explained by the Court. In a decision given by Justice Fullagar in 1950, he found that members of parliament hold an 'office or public trust under the Commonwealth for the purposes of s 116.'<sup>20</sup> However, he did not distinguish between the concept of office and the concept of public trust. In an article about s 116, which was published in the *Melbourne University Law Review* in 2011, it was suggested that a single public office may be characterised as both an office and a public trust for constitutional purposes.<sup>21</sup> An old example, was the commission issued in 1825 to Governor Darling as Governor of New South Wales, requiring him to take 'the usual oath for the due execution of the office and trust of our Captain General and Governor in Chief.'<sup>22</sup>

The notion of a fiduciary relationship between a State and its people as a legally effective constitutional principle is not a part of Australia's legal or constitutional tradition. The idea of the fiduciary relationship can, however, inform an ethical framework defining at a theoretical level the relationship between the State and its people generally, and feeding into the more particular relationship between the holders of public offices and those who may be affected by the exercise of their powers.

Moving away from the large abstraction of the State — the idea of the individual holder of public office as a trustee has a long history. In the 18<sup>th</sup> century case of *R v Bembridge*, public officials were described as holding offices of 'trust concerning the public'.<sup>23</sup> That description reflected what Justice Paul Finn, who has written extensively in this field, called the 'circuitous route' by which English judges brought public officials 'into a fiduciary relationship with the public'.<sup>24</sup>

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<sup>20</sup> *Crittenden v Anderson* (Unreported, High Court of Australia, Fullagar J, 23 August 1950).

<sup>21</sup> Luke Beck, 'The Constitutional Prohibition on Religious Tests' (2011) 35 *Melbourne University Law Review* 323, 347.

<sup>22</sup> *Ibid.*

<sup>23</sup> (1783) 99 ER 679, 681.

<sup>24</sup> PD Finn, 'The Forgotten "Trust": The People and the State' in M Cope (ed), *Equity: Issues and Trends* (Federation Press, 1995) 131, 133.

The idea of a trust-like or fiduciary obligation was applied, in a legal setting, to individual Members of Parliament in the 1920s by the High Court of Australia in two cases, *Horne v Barber*<sup>25</sup> and *R v Boston*.<sup>26</sup> Mr Horne was a land agent engaged by Mr Barber to sell a property to the Victorian Government. The agent engaged Mr Deany, a member of the Victorian Parliament, to act as a lobbyist for the sale, promising him a share of the commission if it went through. Mr Deany made representations to the relevant Minister about the virtues of the property, but 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 land 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 emphasised the obligation of Members of Parliament as an aspect of responsible government and upheld the decision of the Supreme Court that the commission agreement was void. Sir Isaac Isaacs, who was to be appointed as the first Australian-born Governor-General, said in his judgment that:

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>27</sup>

The law would not sanction the circumstance when the personal interest of a Member of Parliament could lead him to act 'prejudicially to the public interest by weakening ... his sense of obligation of watchfulness, criticism, and censure of the Administration.'<sup>28</sup> There is, of course, a tension between that obligation and the party system in which members of the party in power tend to support the executive of the day as demonstrated by the Dorothy Dix questions that come from the government side of the House at question time whichever party is in power.

Justice Rich in the *Horne* case reasoned explicitly in terms of a trust relationship:

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<sup>25</sup> (1920) 27 CLR 494.  
<sup>26</sup> (1923) 33 CLR 386.  
<sup>27</sup> (1920) 27 CLR 494, 500.  
<sup>28</sup> Ibid.

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.<sup>29</sup>

Similar statements were made in the *Boston* case decided in 1923, in which a Member of Parliament 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. Isaacs and Rich JJ described Members of Parliament as 'public officers'.<sup>30</sup> They cited the definition of 'office' in the Oxford Dictionary of the day which included 'a position of trust, authority, or service under constituted authority'.<sup>31</sup> Higgins J made a comparison with private trusteeship and said:

He is a member of Parliament, holding a fiduciary relation towards the public, and that is enough.<sup>32</sup>

The practical importance of the public trust metaphor waned for a time as specific mechanisms were created for the oversight and accountability of public officials. However, as Justice Finn has pointed out a loss of faith in those mechanisms in the late 20<sup>th</sup> century led to 'renewed interest in the "public trust" and its implications for officials and for our system of government itself'.<sup>33</sup> In codes of conduct for public officials at many levels, the trust or fiduciary concept is invoked. Provisions of the *Independent Commission Against Corruption Act 1988* (NSW)<sup>34</sup> refer to 'breaches of public trust'.

It should not be thought that the concept of membership of the parliament as an office of trust with legal as well as ethical strictures, has gone by the board. Sir Gerard Brennan, a former Chief Justice of the High Court in a speech made in 2013, said:

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<sup>29</sup> Ibid 501.

<sup>30</sup> (1923) 33 CLR 386, 402.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid 412.

<sup>33</sup> Finn, above n 24, 134.

<sup>34</sup> *Independent Commission Against Corruption Act 1988* (NSW), ss 8(1)(c), 12.

It has long been established legal principle that a member of Parliament holds 'a fiduciary relation towards the public' and "undertakes and has imposed upon him a public duty and a public trust". The duties of a public trustee are not identical with the duties of a private trustee but there is an analogous limitation imposed on the conduct of the trustee in both categories. The limitation demands that all decisions and exercises of power be taken in the interests of the beneficiaries and that duty cannot be subordinated to, or qualified by the interests of the trustee.<sup>35</sup>

The cases his Honour cited were *Boston* and *Horne*. To say that the exercise of power must be in the interests of its beneficiaries is to say no more than that the powers of public officers are to be exercised for the purposes for which they were created, reflected generally in the statutes enacted by the Parliament which created them.

A breach of the duties of elected office so outrageous that it was almost comical, came before the House of Lords in England in 2002 in a case called *Porter v Magill*<sup>36</sup>. The Conservative Party had control of a city council. The leader and deputy leader of the council believed that people who owned their own houses were more likely than council tenants to vote Conservative. They established a policy under which the council would sell 250 council properties a year in eight marginal wards. After receiving legal advice that targeted sales would be unlawful, the policy was revised to increase the number of sales to 500 across the entire city, but still including the 250 sales in marginal wards. The council's auditor, to whom the matter had been referred under the *Local Government Finance Act 1982*, found that the council had adopted the policy with a view to achieving electoral advantage for the majority party. He found that the leader and deputy leader were party to its adoption and implementation in the knowledge that it was unlawful. He certified that those responsible for the policy, including the leader and deputy leader, had caused the council to lose approximately £31 million. That finding was ultimately upheld in the House of Lords.

Lord Bingham, whose little book entitled *The Rule of Law* has become a classic, set out the legal principles. He referred to a leading text on administrative law and what he called 'a general principle of public law':

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<sup>35</sup> Sir Gerard Brennan, 'Presentation of Accountability Round Table Integrity Awards, Dec 2013' (Speech delivered at Parliament House, Canberra, 11 December 2013) (footnotes omitted).

<sup>36</sup> [2002] 2 AC 357.

Statutory power conferred for public purposes is conferred as if it 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>37</sup>

An 'old and very important principle' followed from the proposition that public powers are conferred as if upon trust, namely:

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.<sup>38</sup>

There is a clear link in his judgment between the ethical idea of discharging responsibilities in exercising powers for the purpose for which they were created and viewing the office as a trust.

Administrative law is the field of law which is concerned with the exercise of public power, its limits and the basis upon which it can be called into question in courts of law. It embodies the basic ethical framework to which I have referred earlier. There has been considerable writing to the effect that the courts' treat challenges to particular exercises of public power as they treat challenges to the exercise of discretion by a trustee or a fiduciary. Sir Anthony Mason, a former Chief Justice of the High Court, has written that administrative law 'from its earliest days has mirrored the way in which equity has regulated the exercise of fiduciary powers.'<sup>39</sup> In 2000, Lord Woolf, the Master of the Rolls, made the same point:

The recipients of the powers, whether national or local, are in very much the same position as they would be if they had fiduciary powers conferred upon them.<sup>40</sup>

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<sup>37</sup> Ibid 463, citing Neill LJ in *Credit Suisse v Allerdale Borough Council* [1997] QB 306, 333, referring to Wade and Forsyth, *Administrative Law* (Oxford University Press, 8<sup>th</sup> ed, 2006) 356–57.

<sup>38</sup> [2002] 2 AC 357, 463.

<sup>39</sup> Sir Anthony Mason, 'The Place of Equity and Equitable Doctrines in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238, 247.

<sup>40</sup> *Equitable Life Assurance Society v Hyman* [2000] EWCA 4 [18].

Examples of that kind of observation in the context of administrative law, can be multiplied as well as cautionary observations against stretching the analogies too far in a way that might be dependent upon contestable assumptions about sovereignty and the sources of constitutional authority.

Given the examples which I have mentioned of bad behaviour by parliamentarians in the 1920s and local government officials in England more recently, it is perhaps important to emphasise that the fiduciary obligation is not just about what fiduciaries should not do. They have positive obligations and must have the freedom to discharge them without being second guessed on the merits by the courts. Professor Charles Sampford made that point in arguing that trust law can make a positive contribution to constitutional law:

Trust law is primarily positive — a trustee is given powers in order to advance the interests of the beneficiaries.<sup>41</sup>

In so doing, he pointed to the cautionary parable from the New Testament, likening the trustee, who does not use his powers for the purposes given, to the servant who buried the talent with which he had been entrusted in order to 'keep it safe'.

The trust or fiduciary metaphor has been said to provide a bridge between ethics and the law. Professor Fox-Decent in *Sovereignty's Promise* argues for a connection between law and morality in light of fiduciary principles.<sup>42</sup> It is nevertheless important to recognise that while the duties imposed on public officers resemble fiduciary obligations, the courts do not generally speaking impose fiduciary obligations directly upon public officers. To do so could result in too interventionist an approach.

The basic ethical framework formulated at the beginning of this paper, does little more than set out the requirements of administrative law today. Take the simple case of a single official exercising a power under an Act of the Parliament. It might be a power to grant or revoke a licence or a visa, to deport someone or to let them stay. There is a vast array of such powers in our society under Commonwealth, State and Territory laws. In such

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<sup>41</sup> Charles Sampford, 'Trust, Governance and the Good Life' in Ken Coghill, Charles Sampford and Tim Smith (eds), *Fiduciary Duty and the Atmospheric Trust* (Ashgate, 2012) 43, 46.

<sup>42</sup> Fox-Decent, above n 10.

cases, the decision-maker will comply with the ethical framework and with the requirements of administrative law if he or she acts according to what I call the logic of the law under which the power is conferred. That requires that the exercise of the power:

- is according to a reasoning process, albeit it may involve the exercise of a value judgment;
- is consistent with the statutory purpose;
- is not directed to a purpose in conflict with the statutory purpose;
- is based on a correct interpretation of the statute;
- has regard to matters which the statute requires to be considered;
- disregards matters which the statute does not permit the decision-maker to take into account;
- involves the finding of the required facts or states of mind necessary to the exercise of the relevant power;
- does not depend upon inferences which are not open or findings of fact which are not capable of being supported by the evidence or materials before the decision-maker;
- results from the application of processes which are required by the statute or by implication including requirements of procedural fairness.

All of the above require diligent attention by the decision-maker to what is necessary to discharge the statutory task. They are utterly inconsistent with bias or dishonesty in the discharge of that task. Ethics and the law coincide in this area. The ethical obligation can be generalised to a kind of promise keeping. For neither the law nor ethics requires the public officer to do more than what he or she has impliedly promised to do by accepting the office to which he or she has been appointed. In some cases, of course, that promise is made explicit by an oath of office.

## Conclusion

What this oration offers is a bare bones statement of the ethical requirements of a public officer. Of course, any public officer may exceed those ethical requirements. There is a phenomenon which we sometimes call 'acting above and beyond the call of duty'. There are many extraordinary individuals who do just that. Zelman Cowen was one such. His life demonstrates to us all that the basic ethics of public office impose no limit upon the levels of selfless commitment, which may be given to public service. Sir Zelman Cowen was an extraordinary individual and, with that, an exemplar of the ethical public officer.