

PROTECTING STATUTORILY INDEPENDENT FUNCTIONS - A VISIBLE GAP IN OUR CONSTITUTIONAL ARRANGEMENTS



Len Cook

Len Cook, former New Zealand Government Statistician, UK National Statistician, Registrar-General of England and Wales, member of the New Zealand Remuneration Authority, and past president of IPANZ, explores the central importance of independence for public agencies. He sees some disturbing trends and possibilities that could undermine the public's trust in state institutions.

Across the world, democracy is under threat from both the left and the right. New Zealand, with its relatively “thin democracy”, is very reliant on state institutions acting independently of the executive or the legislature in carrying out key statutory functions. The recent seemingly arcane debate about the delegation of power under the Data and Statistics Act 2022 raises a more

fundamental question. Are we doing enough to protect public officials when they undertake their statutory functions independently of the government of the day?

The importance of statutorily independent functions

The Public Service Act 2020 enables the delegation of the full powers and authority of any chief executive, not only to within the public service but also to unspecified external bodies. Similar provisions exist in the Crown Entities Act. A slightly narrower delegation power was included in the State Sector Act 1988. This is the default setting in the Public Service Act and Crown Entities Act unless parliament explicitly legislates otherwise. ¹The Government Statistician; the Commissioner of Inland Revenue; the Surveyor-General; the National Archivist; the Registrar-General of Births, Deaths and Marriages; the Director of Public Health; the Comptroller of Customs; and the Secretary of the Treasury all have this in common. Some independently oversee the integrity of executive actions, yet unlike Crown entities, they are within the public service. These roles may also have independent law enforcement functions or are integral to our constitutional arrangements and can have international and inter-generational implications. It is vital that their decisions remain independent of outside pressures.

**IT IS VITAL
THAT THEIR
DECISIONS REMAIN
INDEPENDENT
OF OUTSIDE
PRESSURES.**

Impartiality, transparency, professional competence, scientific and technological capability, and international collaboration are at the core of institutional practices and behaviours in such roles. The trust of the public in these independent functions must not wax and wane in the same way that the political fortunes of Ministers and their policy agencies and service delivery departments often do. Recent events in the United States regarding the national archives and actions of electoral officials are in stark contrast to the high trust that

all New Zealanders have long had in these special roles. It is a reminder to us of the advantage we have of being able to know that trust is well protected.

Safeguarding independence in a digital age

Statutorily independent roles, particularly those explicitly referred to earlier, have long benefited from advances in information technologies. In common across the democratic world, the above roles are critical and enduring elements of our societal infrastructure. As New Zealand moves closer to the creation of a de facto national population register through the integration of administrative records across government, these roles will extend their reach in service provision, surveillance, and enforcement, as well as in statistics. They are inevitably at the forefront of such moves and usually determine the ever-expanding potential for the wider integration of public services. It is vital that the means to protect independence and trust evolve as well on a state-sector-wide basis. One-by-one change that haphazardly involves the powers and authority of any of the above statutorily independent roles avoids the deeper scrutiny essential for the protection of trust. Revised privacy legislation is just one of many necessary responses as advances in information technology are exploited in the face of existing constitutional weaknesses. The public debate about insertion now of the relevant Public Service Act clauses on delegation in the Data and Statistics Act 2022 has drawn attention to these wider issues.

International moves to safeguard the independence of official statistics

Without relevant safeguards for protecting independence, the political pressures occasionally experienced by official statisticians can result in extreme responses. As recently as 2021, the Fijian Statistician was removed from his job, while the former Chief Statistician of Greece is still being prosecuted for his earlier correction of erroneous statistics. The prevalence of such situations inspired the development and promotion in 1992 of the United Nations Principles for Official Statistics. These outline what is necessary for the independence and expertise needed for national, international, and inter-generational trust

in countries' official statistics. Countries have usually reflected these principles in their statistical legislation in ways that reflect their history, constitutional arrangements, and size. The principles validate their practices in demanding situations. Long-standing concerns of politicisation existed in the UK. In order to regain the confidence of the British public in official statistics, the UK government introduced in 2008 one of the most comprehensive and effective independent oversight regimes² seen anywhere. This development is an ideal model that has general international relevance for bringing independent oversight to the operation of statutorily independent roles that are also subject to forms of ministerial direction, as those listed above.

IT IS VITAL THAT THE MEANS TO PROTECT INDEPENDENCE AND TRUST EVOLVE AS WELL ON A STATE-SECTOR-WIDE BASIS.

The UN Fundamental Principles of Official Statistics is an exemplar of international protocols, codes, and conventions. These are the same principles that underpin the rules, conventions, and policies that national statistical offices need in order to give proper effect to their enabling legislation. They are also relevant to other statutorily independent roles. They include these ten principles:

1. *High quality international statistics ... are a fundamental element of global information systems.*
2. *[Statistics] production is to be impartial and strictly based on the highest professional standards.*
3. *The public has a right to be informed about the mandates for the statistical work of the organisations.*
4. *[Statistical methods must] meet professional scientific standards and ... made transparent for the users.*

5. *Sources and methods for data collection are appropriately chosen ... to be cost-efficient and to minimise the reporting burden for data providers.*
6. *Individual data ... are to be kept strictly confidential and are to be used exclusively for statistical purposes.*
7. *Erroneous interpretation and misuse of statistics are to be immediately ... addressed.*
8. *Standards for ... statistics are to [be based on] sound professional criteria.*
9. *Coordination of international statistical programmes is essential.*
10. *Bilateral and multilateral cooperation in statistics contribute to the improvement of statistics.*

The Government Statistician is not the only statutorily independent role where proper practice is set out explicitly in an international convention, standard, or code. Unrelenting adherence by those with expertise, experience, and resources shapes public expectations, compliance, and engagement at every level when giving practical effect to enabling legislation. Official statistics are just one example of where legislation is necessary but not sufficient for trust in key statutorily independent roles.

The need for the delegation clauses inserted in the Data and Statistics Act

I am not aware of any known application since 1988 of the powers in the Public Service Act to delegate chief executive roles outside the public service. After thirty-four years of obscurity, these powers were placed in the Data and Statistics Act 2022. Parliament decided that this obscure general authority in the Public Service Act obviated the need for further parliamentary consideration of the intent to affirm the unrestricted delegation of the full powers and authority of the role of Government Statistician. Despite the untested nature of the relevant clauses and their long-standing obscurity, the burden of proof for this change in delegation was presumed to have already been met. In such a recourse to the Public Service Act, the burden of proof should be on justifying why such a seemingly obsolete power to delegate justifies any current relevance.³

OFFICIAL STATISTICS ARE JUST ONE EXAMPLE OF WHERE LEGISLATION IS NECESSARY BUT NOT SUFFICIENT FOR TRUST IN KEY STATUTORILY INDEPENDENT ROLES.

Common characteristics of independent roles

The long-established statutory roles in the New Zealand state sector exist for the protection of the public interest. This includes the impartial preservation of public rights and their protection and the pre-emption of the influence of vested interests and corruption in sensitive governance decisions. They ensure the proper specification or transfer of resources, identity, and obligations that are of great importance to citizens. The authority to ensure compliance with statutory obligations placed on citizens may come with the legal authority to independently regulate how obligations are to be applied. Within the state sector, the expectations that Ministers place on policy and service agencies can put them in conflict with the impartiality and transparency required of statutorily independent roles. In the case of Crown entities, there are some roles that function independently of the board as well.

In the case of the Surveyor-General, through the maintenance of strict impartiality and adherence to statutory criteria, the drawing of the initial electoral boundaries for the Electoral Representation Commission occurs after the population figures from the Census are prepared by the Government Statistician. The Surveyor-General is also responsible for ensuring the complete integrity of the survey system and the LandonLine digital data base. The Registrar-General has statutory authority for the integrity of the ownership and legal rights of its content. The Valuer-General has the statutory responsibility to maintain the integrity of the national

valuation database free from the pressures of vested interests and corrupt valuation practice.

Protecting the authority of independent roles

The Public Service Act does not prevent the possibility that the full delegation of any chief executive role, including of any statutorily independent powers, might result in a de facto relationship where authority might be shared by every partner that holds statutorily independent delegations. It might have been expected that legislation would define the parameters for determining the practical feasibility of such an arrangement and provide tests for evaluating the certainty that potential partners exist who could meet the ongoing intensity of public and professional scrutiny. This would have to include the integrity and impartiality of their past and present practices.

The ranking of a role within the state sector is critical when tensions between the priorities of Ministers and their agencies challenge obligations of transparency and integrity of decisions about processes and practice. (Cullen, ⁴ page 53) notes “... *the fundamental purpose of the National Archives is to preserve the record of government. That fundamental purpose is a constitutional, not an academic one. It is about the accountability of governments to the people, now and in the future. The archives are not subordinate to the needs of present-day historians, nor are they simply part of our ‘heritage.’*”

Conclusion

The Public Service Act 2020 took the important steps of codifying in one place existing long-standing conventions such as political neutrality, free and frank advice, open government, and stewardship as legislative principles. This Act should help New Zealand avoid the experience of similar jurisdictions, which have seen the accidental or gradual erosion of these principles. Although the

statutorily independent roles above have long exemplified these goals, we may have missed the opportunity to buttress in statute the crucial role they play. This will apply to all statutorily independent functions as they face these same pressures.

In summary:

a. Statutorily independent roles exist to deliver and protect key functions of government when public trust in the very nature of government can become of national concern. Absolute certainty of impartiality, transparency, and proper expertise is needed to meet the basic requirements for public trust in the key statutorily independent roles.

THE PUBLIC SERVICE ACT 2020 TOOK THE IMPORTANT STEPS OF CODIFYING IN ONE PLACE EXISTING LONG-STANDING CONVENTIONS.

b. Information technology increases the opportunity for integrated processes across government and widens the reach of the roles above. Given the end result of such integration is in effect a population register that will be used across government, the haphazard management of the consequences for integrated approaches to such statutorily independent roles results in piecemeal responses.

c. We risk becoming more vulnerable to a loss of public trust in government if the unfettered delegation of long-standing key statutorily independent roles were to become the norm. The burden of proof should be on justifying why the delegation

power should apply in each case. The full delegation of a statutorily independent role should require explicit legislative approval, such as applies for statutory deputy chief executive roles. All advice on such change must be transparent. Parliament must remove the existing default setting general approval now in place in the Public Service Act and the Crown Entities Act.

d. Regulatory impact statements about statutorily independent roles could then evaluate the justification of this specific delegation in any particular domain. This could include the constitutional, international, and inter-generational consequences and impacts on conformity with international conventions, standards, and codes.

e. In the case of the Government Statistician, the core elements of the UN Fundamental Principles of Official Statistics outlined above provide a clear-cut test of whether the full delegation of the powers and authority of the Government Statistician could be met in any specific case. The tests are sufficiently specific such that those few potentially eligible could have been stated in the Data and Statistics Act 2022. International protocols will be similarly of relevance in other domains.

Acknowledgments

I am grateful to Bill Robertson, Dianne Macaskill, Sir Geoffrey Palmer, and Robert Hughes for their thoughts as this paper was prepared. Particular thanks to Derek Gill from IPANZ for his contributions to the finalisation of this paper.

I am responsible for any inadequacies in its final form.

¹ The Public Service Act explicitly precludes delegating certain powers of the Public Service Commissioner and the Solicitor-General. ² Since 2008, the UK Statistical Authority seeks to serve the public good by overseeing the production, publication and use by government of official statistics, most of which are prepared independently by the National Statistician. ³ The responsible Minister has an oversight role on the exercise of delegations. ⁴ See: www.aranz.org.nz/assets/publication-pdfs/Archifacts/1d549e554b/Archifacts-1999-April.pdf