Statement by the Commissioner for Standards in Public Life following the publication of the Principal Permanent Secretary's analysis of his report on the engagement of backbench MPs in government service

Introduction

On 5 July 2019 I issued a report[1] on the engagement by the government of backbench members of Parliament, that is to say those members who are not ministers or parliamentary secretaries. In this report I expressed the view that the engagement by the government of backbench MPs is fundamentally wrong because, among other reasons, it makes MPs financially dependent on the government; it undermines the autonomy of Parliament; and it aggravates the questionable practice of appointments on trust.

On 11 November 2019 the Principal Permanent Secretary published an analysis of my report (the Analysis).[2] He concluded that the engagement of MPs as persons of trust, consultants or members of official boards is not in breach of the Constitution or other laws; it is not contrary to the principles of the Constitution; and it does not create a conflict of interest for MPs so engaged. The Analysis is reported to have received the approval of Cabinet and the Labour Party parliamentary group.

I have carefully considered the arguments put forward by the Principal Permanent Secretary and his legal advisors, but I am unable to agree with them. In this statement I will say why with reference to three key pillars of the Principal Permanent Secretary's argument. Moreover, as I aim to show in this statement, the issues at stake are not obscure legal matters of concern only to lawyers. They are fundamental issues that concern every citizen of this country. The Principal Permanent Secretary and I seem to be departing from different standpoints. My goal is to promote the raising of standards by improving upon the principles that underly our Constitution, whereas the government, as shown in the Analysis, is attempting to justify the status quo.

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1 Report on case K/002. Available from https://standardscommissioner.com/case-reports/.

2 The analysis and the legal opinions on which it is based can be downloaded from https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2019/November/11/pr192421.aspx.

1. Parliament and the separation of powers

The Principal Permanent Secretary argues that the concept of separation of powers does not really apply to Malta because it is not part of the British model on which Malta's Constitution is based. Hence, there is no reason why backbench MPs should not carry out their function as members of parliament and serve government simultaneously.[3]

I consider this argument to be incorrect because:

- The independence of Parliament from the government is a very important principle in the UK – so much so that the UK has a limit on the number of MPs who can be appointed ministers and the number of ministers who can vote in Parliament at the same time.[4]
- In Malta, as in the UK, the government of the day is accountable to Parliament, which should keep the government under scrutiny. Backbench MPs play a very important scrutinising role, particularly as members of the various parliamentary committees such as the Public Accounts Committee or the Standing Committee on Public Appointments.
- How can backbench MPs function effectively as members of such committees if they are dependent on the government's pleasure for their livelihood? This is an obvious conflict of interest.
- The Principal Permanent Secretary's analysis, based on legal advice, seems to suggest that somehow I advocated absolute separation of powers. I certainly did not suggest that the powers of the different organs should be held and exercised in watertight compartments. On the contrary, there should be checks and balances. It is precisely the elimination of one of these checks through the engagement of backbenchers with the executive that I criticised in my report.

2. Appointments on trust and the Constitution

The Principal Permanent Secretary insists that the Constitution allows the government to employ persons on trust, that is to say without a selection process that is based on merit. Hence, he argues, there is nothing in the law to prevent MPs from being given such appointments.[5]

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3 Principal Permanent Secretary and Cabinet Secretary, "An Analysis of the Commissioner for Standards in Public Life's Report K/002", paragraphs 10–19.

4 "Limitations on the Number of Ministers", House of Commons Library Briefing Paper no. 03378, 10 August 2017. Available from https://researchbriefings.files.parliament.uk/documents/SN03378/SN03378.pdf.

5 Principal Permanent Secretary, "An Analysis", paragraph 38.

This argument is flawed because:

- Article 124 of the Constitution defines non-military posts in government employment, with specific exceptions, as posts in the public service of Malta. Article 110 requires such posts – again with specific exceptions – to be filled on merit under the scrutiny of the Public Service Commission. None of the exceptions in either article caters for appointments on trust.
- While it is correct to state that persons of trust are being appointed on one-year contracts, articles 110 and 124 make no distinction between permanent and one-year appointments. The Constitution still regards the latter as appointments in the public service.

The Principal Permanent Secretary also argues that persons of trust are not public officers (public service employees) because their appointments do not go through the Public Service Commission. This is the opposite of what is stated in the Constitution. According to the Constitution, appointments are to be made through the Public Service Commission because they are appointments in the public service, not vice versa.

3. The appointment of MPs as board members

The Principal Permanent Secretary draws a comparison between members of the governing boards of public entities and public officers who lecture at the University. The Constitution itself permits the latter to engage in politics. On this basis he sees no reason why the boards of entities that are "altogether operational in nature" should not include MPs.[6]

In my view this argument is incorrect because:

- There is no comparison between board members and University lecturers. Board members can be better compared, if at all, to senior officials in the public service, because both have management responsibilities. Even the Principal Permanent Secretary agrees that senior officials in the public service should not be members of parliament.[7]
- The laws governing various public entities specify that the responsible minister can issue instructions to the entity on matters of policy only.[8] This

[6] Principal Permanent Secretary, "An Analysis", paragraphs 66–72.

[7] Principal Permanent Secretary, "An Analysis", paragraphs 77–78.

[8] Examples include the Gozo Regional Development Authority Act (chapter 600 of the laws of Malta), article 10(1); the Employment and Training Services Act (chapter 594), article 9(4); the Lands Authority Act (chapter 563), article 17(1); the Authority for Transport in Malta Act (chapter 499), article 11(1); the Maltese Language Act (chapter 470), article 13(1); the Malta

is intended to keep politics out of entity operations. Putting MPs on the boards of entities, with the power to decide on operational matters, is in blatant conflict with this principle.

The Principal Permanent Secretary himself appears to accept that MPs should not be appointed to the boards of entities that are not "operational in nature", although it is not clear what he means by this.

Further considerations

As I stated in my report of 5 July 2019, the practice of giving backbench MPs government jobs did not start under the present administration. But I have been appointed with the unanimous backing of Parliament to contribute to the raising of standards in public life. Raising standards means doing away with undesirable practices regardless of whether or not they may be long-established. Raising standards also means improving upon current practices.

It remains my firm belief that the engagement of backbenchers by the government is one of the practices that should be done away with. The Venice Commission expressed the same view when it said that "the possibilities of backbenchers controlling Government are seriously reduced if MPs have a financial incentive to seek offices at the disposal of the administration they are supposed to control."[9] The Principal Permanent Secretary is undoubtedly familiar with this report, since he quoted a different passage from it.[10]

In my report I suggested that the underlying reason for the practice of appointing all backbench MPs to executive roles is to appease them for their non-appointment as ministers or parliamentary secretaries or compensate them for their low salary. I could see no other reason, except possibly a desire by the government to tighten its control over the backbench and hence over Parliament itself, but this would at best be speculation on my part. On the other hand no-one has made the argument that the appointment of MPs to such positions is indeed necessary or desirable for the better governance of the country or the strengthening of our democratic structures. In fact, in my view it is neither necessary nor desirable. Quite the contrary.

Enterprise Act (chapter 463), article 21(1); and the Co-operative Societies Act (chapter 442), article 8(1).

9 European Commission for Democracy Through Law (Venice Commission), *Malta: Opinion on Constitutional Arrangements and Separation of Powers and the Independence of the Judiciary and Law Enforcement*, 17 December 2019, paragraph 86. Available from https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)028-e.

10 Principal Permanent Secretary, "An Analysis", paragraph 46.

I reiterate that whereas I agree of course that the rule of law is a basic tenet of our constitution, one cannot discard the equally important need to achieve a balance between the three organs upon which our democracy is built in order to maintain the rule of law.

Parliament should be jealous of its constitutional role and resist all practices that undermine its independence. It should, in my view, consider the conclusions of my report as an opportunity to strengthen democracy and the institutions of government of our country and take action to end the practice of giving backbench MPs government jobs.

One way of doing so would be to amend the Constitution so as to tighten the rules on conflicts of interests by MPs, as recommended by the Venice Commission.[11] I have submitted a report to the President of Malta, in his capacity as Chairman of the Constitutional Reform Committee, that includes proposals to this end among others.[12]

George Marius Hyzler
Commissioner for Standards in Public Life

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11 Venice Commission, *Malta: Opinion on Constitutional Arrangements*, paragraph 94.

12 *Towards Higher Standards in Public Life: Proposals to Modernise the Provisions of the Constitution on Parliament, the Judiciary and Public Administration*, Office of the Commissioner for Standards in Public Life, 30 October 2019. Available from https://standardscommissioner.com/wp-content/uploads/constitutional-reform-proposals.pdf.