Abigail Marshall

Reliance of constitutional principles on employment relationships in the public service

LLB(Hons) Research Paper

LAWS522 Public Law: Authority, Legitimacy and Accountability

Te Kauhanganui Tātai Ture—Faculty of Law

2021

Table of contents

I INTRODUCTION 4
II COMPARISON WITH PRIVATE SECTOR EMPLOYMENT 5
III PUBLIC SERVICE EMPLOYEES 6
IV PUBLIC SERVICE EMPLOYERS 8
V PUBLIC SERVICE PRINCIPLES 11
A Political neutrality and merit-based appointments 13
B Free and Frank advice 16
C Stewardship of the public service 17
D Open government 18
E Spirit of service to the community 19
F Supporting Māori-Crown relations 22
VI CONTRACTORS 23
A Focus on employees in the Act 24
B Loophole to adherence to the principles 26
C Incentives to hire contractors 28
VII BILL OF RIGHTS ACT 30
A Impact on the law 32
B Political neutrality and freedom of expression 33
C Guidance on justified limitations 36
D Case law: Daniels and Banerji 38
VIII CONCLUSION 40
IX BIBLIOGRAPHY 43

Abstract

The Public Service Act 2020 codified five principles that underpin the public service. These are: political neutrality, merit-based appointments, free and frank advice, stewardship and open government. These principles underpin the public service, protecting its role in New Zealand's constitutional democracy. The Public Service Act aligns these principles with the employment relationships within the public service and thus fundamental constitutional principles are protected and enforced through employment law. Employment law can be an effective enforcement mechanism, as employees do not wish to be disciplined or dismissed. However, there are also several weaknesses in this approach. First, the reliance on the *employment* relationship neglects the high number of contractors in the public service. The use of contractors poses a challenge to the protection of these principles that is not adequately dealt with in the Act. Third, although the Act acknowledges that public service employees have rights under the New Zealand Bill of Rights Act 1990, it does not provide any guidance on how these rights interact with the principles such as political neutrality. Ultimately this provision does not clarify anything but instead it muddies the waters, increasing the risk of employees inadvertently breaching their implied employment agreements, undermining important public service principles.

Keywords: Public Service Act 2020, public service principles, employment, employee, contractor, New Zealand Bill of Rights Act 1990.

I Introduction

The public service is the arm of the executive and is vital to the ability of the government to govern. In general, public servants are either subject matter experts informing the Government, or are practically implementing government policies. The nature of the public service is of constitutional importance: it is designed to be neutral and stable, able to serve successive governments and thereby promotes the democratic principle of Parliamentary Sovereignty.

Replacing the State Sector Act 1988, the Public Service Act 2020 was passed with the purpose of creating a more cohesive, cooperative public service.[1] This new Act centred existing public service principles by placing them for the first time in one dedicated section. These principles fundamentally underpin New Zealand's public service, informing its constitutional role. They are: politically neutral, merit-based appointments, free and frank advice, stewardship of the public service, and open government. In this paper I look at the enforceability of these principles. I find that two categories of employment relations are relied upon: those between the Public Service Commissioner and chief executives, and those between chief executives and public service employees.

The employment relationship is a key mechanism through which these principles can be enforced both by employers and employees in the public service. The rights and duties of employees are defined by legislation (in many cases specifically relating to the employment relationship), employment agreements and the Public Service Commissioner's minimum standards of integrity and conduct as well as the Commissioner's guidelines. It will be seen that obligations fall on public service leadership, not directly onto public service employees but that these are filtered down to public service employees through the employment relationship. Ultimately, these principles are to be implemented and enforced through express or implied terms of employment agreements within the public service.

[1] Public Service Legislation Bill 2019 (189-1) (explanatory note) at General Policy Statement.

In process is the same for the requirements in the Act that the public service has a spirit of service to the community and supports the Crown in its relationship with Māori. The public relies on these public service employment relationships functioning in order for these legislated principles to be upheld. The Public Service Act also legislates several public service values. While not discussed in this paper, my conclusions about the role of the employment relationships can be extrapolated to these.

Given the emphasis on *employment* relationships, the Act fails to adequately deal with the increasing use of *contractors* in the public service. Many of the principles' enforcement mechanisms do not apply to contractors. Further the contracting relationship provides additional challenges by decreasing the level of control and transparency. There are several benefits to hiring contractors rather than employees, and this is exacerbated by the Public Service Act such as by its "good employer" requirements. While these are admirable, they make the hiring of contractors more attractive. This is problematic because the principles are not as protected in this working relationship.

An additional employment issue in the Public Service Act is the relationship between the principles and individual employee rights. The Act makes clear that the New Zealand Bill of Rights Act 1990 applies to the public service. However, the principles of the public service require these rights to be limited, and justifiably so. For example in the right circumstances, expressing political opinions, joining political groups or participating in political protests may undermine the political neutrality of the public service, including the public and the Minister's trust in the particular public servant and even the wider public service to impartially serve the government of the day. The Act does not provide any explicit guidance on when and how much these rights may be limited, instead unhelpfully indicating that the Commissioner should fill this role.

II Comparison with private sector employment

While this paper focuses on employment issues that are unique to the public service, it is helpful to briefly set out the relationship between employment law in the public service and the private sector. Generally speaking, the public service has been governed by the

same law as the private sector since 1988.[2] Rather than establishing its own employment law scheme, the Public Service Act complements the law governing private sector employment relationships. It provides that, subject to any exceptions in the Act, employment in the public service is governed by the Employment Relations Act 2000, which also regulates the private sector.[3] Among other things, this means that public service employees have recourse for unjustified dismissal, constructive dismissal, and unjustified disadvantage. It also means that employees and employers have an obligation to deal with each other in good faith.[4]

The second source of general employment law is the common law, particularly the common law implied terms. These are terms of the agreement which do not need to be stated in the contract but are implied by the courts. Usually, they may be expressly limited by the employment agreement. These include requirements of employee obedience, employee fidelity, mutual trust and confidence, obligation to provide a safe workplace (now largely superseded by the Health and Safety at Work Act 2015) and managerial prerogative (the employer's residual broad discretionary power to issue orders within the confines of the employment contract). Unless limited by statute or expressly limited by the employment agreement, these implied terms apply to the employment relationships in the public service.[5]

III Public service employees

"Public service employees", are defined in the Act as employees of a department or interdepartmental venture.[6] The definition does not include chief executives.[7] In 2020,

---

[2] Gordon Anderson, John Hughes and Dawn Duncan *Employment Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2017) at 394. For a brief history of state employment before the enforcement of the Public Service Act, see Jane Bryson and Gordon Anderson, "Reconstructing State Employment in New Zealand" in Marilyn Pittard and Phillipa Weekes (eds) *Public Sector Employment in the Twenty-Frist Century* (ANU e-Press, Canberra, 2007) at 253.

[3] Public Service Act, s 76.

[4] Employment Relations Act 2000, s 4(1).

[5] For a discussion of implied terms, see Anderson, Hughes and Duncan, above n2, at 182-225.

[6] Public Service Act, s 65.

[7] Public Service Act, s 6.

there were 58,887 public service employees engaged across 247 different occupations.[8] The ten broad occupation groups, organised from largest to smallest, are: inspectors and regulatory officers; social, health and education workers; information professionals; managers; clerical and administrative workers; other professionals not elsewhere included; legal, human resources and finance professionals; contact centre workers; policy analysts; ICT professionals and technicians; and other occupations.[9]

Table 1: Occupational share of the Public Service Full-Time Equivalent workforce 2020

Source: Public Service Commission.[10]

Strictly speaking, public service employees are employees of the Crown whose employment rights and obligations are allocated to particular officials or agencies by the Public Service Act.[11] The Public Service Act allocates the powers, rights and duties of the

[8] Public Service Commission "The composition of the wider public sector" 9 December 2020 <www.publicservice.govt.nz>.
[9] Public Service Commission "Occupational profile of workforce" 9 December 2020 <www.publicservice.govt.nz>.
[10] Public Service Commission, above n 8.
[11] *Rankin v Attorney-General* [2001] ERNZ 476 (EmpC) at [18]; Anderson, Hughes and Duncan, above n 2, at 397.

employer between the Public Service Commissioner and chief executives, but nowhere does it state that they *are* the employers.[12] As far as individual public service employees are concerned, their employment relationship is principally with the chief executive or board of chief executives of the agency in which they work.[13]

Ministerial staff are not public service employees because they "work directly for a Minister in a Minister's office rather than in a public service agency".[14] A chief executive is responsible for their employment,[15] but given the political nature of their role, the Public Service Act lays out different rules for their employment which will not be traversed in this paper. Additionally, several sections of the Act apply to the New Zealand Police and the New Zealand Defence Force, but these are also not the focus of this paper.

IV Public Service employers

As mentioned, the Crown is officially the employer of all public service employees. However, the rights, obligations and powers of the employer are delegated to the Public Service Commissioner and chief executives. The Commissioner is the head of the entire public service (as well as the broader state sector), while each agency in the public service is led by one chief executive or a board of chief executives.

The Public Service Commissioner "has the primary responsibility for the overall effective operation of the Public Service."[16] The Commissioner "acts as the Head of Service by providing leadership of the public service, including of its agencies and workforce and by oversight of the performance and integrity of the system."[17] The Commissioner is also the chief executive of the Public Service Commission, though they may delegate all or part of

[12] Anderson, Hughes and Duncan, above n 2, at 397. *Holmes v Dept of Survey and Land* [1991] 2 ERNZ 409 (LC) at 414 contains a judicial acknowledgement of this difference.
[13] Anderson, Hughes and Duncan, above n 2, at 397.
[14] Public Service Act, s 5.
[15] Public Service Act, s 70.
[16] Anderson, Hughes and Duncan, above n 2, at 396.
[17] Public Service Act, s 43(1).

that role to a Deputy Commissioner or other person.[18] Functions of the Commissioner that relate to employment include "promot[ing] integrity, accountability, and transparency throughout agencies in the State services, including by setting standards and issuing guidance"[19] and "work[ing] with public service leaders to develop a highly capable workforce that reflects the diversity of the society it serves and to ensure fair and equitable employment, including by promoting the good employer requirements in this Act."[20]
The Commissioner is appointed by the Governor-General on the recommendation of the Prime Minister, after the Prime Minister has consulted the leader of each political party represented in the House of Representatives.[21] In turn, the Commissioner acts as the employer of chief executives by appointing them and reviewing their performance, including how they carry out their responsibilities and functions, and reviewing the performance of their respective agencies to the extent relevant.[22] The Commissioner has the rights, powers, and duties of their employer.[23]

In turn, chief executives act as the employer of public service employees, although the Commissioner holds some residual employer roles. Chief executives lead the four types of public service agencies: departments, departmental agencies, interdepartmental executive boards, and interdepartmental ventures.[24] All existing agencies are listed in Schedule 2 of the Act. Departments and departmental agencies are each led by one chief executive, who is appointed by the Commissioner.[25] In contrast, interdepartmental executive boards and interdepartmental ventures are led by boards of chief executives.

Departments are the core public service agency. There are currently 32 departments, including 16 ministries and other organisations such as Inland Revenue, Land Information

---

[18] Public Service Act, s 49(1) and (2).
[19] Public Service Act, s 44(b).
[20] Public Service Act, s 44(c).
[21] Public Service Act, s 42.
[22] Public Service Act, s 44(d).
[23] Public Service Act, sch 7 cl 1.
[24] Public Service Act, s 10.
[25] Public Service Act, s 51(1).

New Zealand, and the Public Service Commission.[26] Departments host departmental agencies, whose functions, duties, and powers are determined by the appropriate ministers for the agency and host department.[27] Interdepartmental ventures are led by boards of chief executives of the "relevant departments".[28] At the time of writing, none have yet been created.[29]

As leaders of their respective agencies, chief executives and boards have similar obligations as employers of their agency's employees. Chief executives and boards of interdepartmental ventures appoint employees and have all the rights, duties, and powers of the employer of employees in their agencies, except as expressly altered by the Act.[30]

When employees of a host department move to work in a departmental agency, the chief executive of the departmental agency takes over as their employer from the chief executive of the host department.[31] Similarly, when employees of a department perform the functions or duties or exercise the powers of an interdepartmental executive board, the board takes over from the chief executive of the servicing department as their employer.[32] In both situations, by way of legislation, the employees have a change in employer.

Several provisions, listed in s 34, apply to a board of an interdepartmental venture as if it were a chief executive, "with any necessary modifications". Board members are jointly responsible to the appropriate Minister.[33] One of the members is the chairperson, chosen by the Commissioner, who also has the power to remove them and designate a replacement.[34] Before designating or removing a chief executive, the Commissioner *must*

---

[26] Public Service Act, sch 2 pt 1.
[27] Public Service Act, s 24(1).
[28] Public Service Act, s 36(1).
[29] See Public Service Act, sch 2 pt 4.
[30] Public Service Act, ss 66 and s 67(c).
[31] Public Service Act, s 68.
[32] Public Service Act, s 69.
[33] Public Service Act, s 35.
[34] Public Service Act, s 36(2) and (3).

invite the Minister who is responsible for the administration of the Public Service Act and the appropriate Minister to identify any matters that the Commissioner must take into account when doing so and *may* seek advice from other sources that the Commissioner thinks are relevant.[35]

Chief executives and boards of interdepartmental ventures are the employer in personal grievances[36] and "in relation to any other employment relationship problem (within the meaning of the Employment Relations Act), the employer is the chief executive of the department or the board of the interdepartmental venture."[37] However, in relation to disputes about collective agreements, the Commissioner may require the chief executive or board to act together with or in consultation with the Commissioner.[38]

V Public service principles

The Public Service is underpinned by several fundamental constitutional principles. These principles are codified in the Public Service Act, signaling Parliament's commitment to them. A spirit of service to the community is another important principle that is included elsewhere in the Act. The Act also places an obligation on the public service to support the Crown in its relationship with Māori. This is a new obligation. The Act sets out that the employment relationship is crucial to the observation and preservation of these principles and obligations.

Section 12 of the Public Service Act sets out five "public service principles". They are: politically neutral, free and frank advice, merit-based appointments, open government, and stewardship of the public service. Several of these were previously conventions before they were legislated. All the principles, except for open government (which was legislated in effect through the Official Information Act 1982) were recognised by the State Sector Act,

---

[35] Public Service Act, s 36(4).
[36] Public Service Act, s 77(a).
[37] Public Service Act, s 77(c).
[38] Public Service Act, s 77(b).

though not in a singular, codified section.[39] The principles were brought together in a dedicated section for the first time in the Public Service Act to address concern about a lack of clarity of and accessibility to these important conventions.[40] The principles are described as the constitutional pillars "which underpin the spirit of service to the community that motivates the Public Service to effectively serve New Zealand in a fast changing, globally connected world."[41]

Employees are not directly responsible for these principles under the Act. Rather, chief executives and interdepartmental ventures have the legislated responsibility for upholding the principles themselves and ensuring their respective agencies and ventures also do.[42] Interdepartmental executive boards are responsible for upholding the public service principles when carrying out their responsibilities and functions.[43] Chief executives and the boards are responsible only to the Commissioner for upholding the principles.[44] In this way, the Act centres the employment relationship between chief executives and the Commissioner to enforce these principles. It also implicitly centres the employment relationship between chief executives and public service employees as it is through the employment relationship that chief executives will fulfil their duty to ensure their respective agencies uphold the principles.

To help with ensuring equal application of the principles among employees, the Public Service Act provides that the Commissioner may issue standards and guidance. Section 17 provides that the Commissioner *may* produce minimum standards of integrity and conduct, while under s 19 the Commissioner may issue guidance for integrity and conduct. This guidance may relate to the minimum standards but is not limited to the subject matter in

[39] Public Service Act, ss 1A(d) (political neutrality), 4A(j) and 32(1)(c) (stewardship), 32(1)(f) (free and frank advice), and 60 (merit-based appointments).

[40] State Services Commission *Briefing to the Government and Administration Committee on the Public Service Legislation Bill 2020* (2020).

[41] State Services Commission *The Spirit of Service: Briefing to the Incoming Government* (2017) at 1.

[42] Public Service Act, s 12(2) and (4).

[43] Public Service Act, s 12(3).

[44] Public Service Act, s 12(5).

the standards. Ultimately, the code and the guidance are enforced directly through the employment agreement, and indirectly through the implied terms such as mutual trust and confidence. There currently are standards in effect, which were set under the previous Act but remain in force. Both the specific provisions and the more general code of conduct rely on the employment relationship for the protection of these constitutional principles. Any additional terms in employment agreements may also be used to uphold these principles.

The Act states that agencies, individuals, and groups must comply with the minimum standards that apply to them unless granted an exception by the Commissioner or the appropriate Minister.[45] These categories include board members, chief executives, employees, contractors and secondees; in relation to all of whom the Commissioner may respectfully vary the application of the standards.[46] They may also create for themselves additional or more detailed standards that are consistent with the Commissioner's standards.[47]

The Public Service Act also provides for the protection of these principles through specific provisions, which relate to the employment relationship. These will be discussed below. It is important to note that the use of judicial review is limited. In 2004, s 194A of the Employment Relations Act removed the right to judicially review the use of statutory powers that have given rise to employment relationship problems. Therefore, to challenge such decisions or exercises of power, public service employees only have recourse to the remedies in the Employment Relations Act. However, judicial review may be pursued by members of the public where applicable.

A Political neutrality and merit-based appointments

The political neutrality of the public service is a longstanding constitutional convention that is fundamental to the New Zealand public service. It is "designed to ensure the

---

[45] Public Service Act, s 18(1) and (2).

[46] Public Service Act, s 17(3).

[47] Public Service Act, s 18(4).

continuing process of government by successive administrations,"[48] supporting the convention that it is the government who rules, not the public service. It is codified in the Cabinet Manual 2017 which states:[49]

> New Zealand's state sector is founded on the principle of political neutrality. Officials must perform their jobs professionally, without bias towards one political party or another. Officials are expected to act in such a way that their agency maintains the confidence of its current Minister and of future Ministers. This principle is a key element of impartial conduct. It provides the basis on which officials support the continuing process of government by successive administrations.

The process of appointing public service employees is crucial to ensuring that employees are not politically swayed but will carry out their roles in a politically neutral manner. Perhaps the key mechanism through which the Act preserves this principle is through the office of the Public Service Commissioner (and complementing independence provisions) which acts as a buffer between the government of the day and public service employees in matters of employment.[50] The Commissioner appoints chief executives,[51] who in turn appoint and manage public service employees in their respective agencies. In this way, "[t]he Commissioner is directly or indirectly responsible for the appointment and management of all state servants".[52] When making decisions about chief executives, the Commissioner is not responsible to, and must act independently from the Minister.[53] However, this independence does not apply to cls 3, 4, 6, 7, and 8 of Schedule 7 which relate to appointment, reappointment, transfer, conditions of employment, and removal from office of chief executives.[54] Appointment of chief executives involves consulting with the Minister but the Minister does not choose the chief executive.[55]

---

[48] State Services Commission, above n 40, at [14].
[49] Cabinet Office *Cabinet Manual 2017* at [3.58].
[50] Anderson, Hughes and Duncan, above n 2, at 395.
[51] Public Service Act, sch 7 cl 3.
[52] Anderson, Hughes and Duncan, above n 2, at 395.
[53] Public Service Act, s 45(1).
[54] Public Service Act, s 45(2).
[55] Public Service Act, sch 7 cl 3.

Similarly, chief executives are not responsible to the appropriate minister and must act independently when making decisions about individual employees, including decisions relating to their appointment, promotion, demotion, transfer, disciplining, or the cessation of their employment.[56] The requirement for the Commissioner and chief executives to act independently in these matters is so important that it is an offence to "directly or indirectly solicit or attempt to improperly influence" them in these matters.[57]

These provisions also uphold the principle of merit-based appointments, which requires that public servants are appointed and promoted strictly on merit.[58] They protect against nepotism and the politicisation of the public service by preventing members of the government from "interven[ing] in matters affecting individual employees."[59] Government influence in individual appointments would increase the risk of nepotistic or political appointments rather than politically neutral, merit-based appointments. Moreover, merit-based appointments are explicitly protected in s 72, which provides that when appointing public service employees, "a chief executive or board must give preference to the person who is best suited to the position."[60] The obligation of appointing a chief executive based on merit is also legislated in sch 7 cl 3 which sets out the appointment process for chief executives.

The principle of merit-based appointments was first legislated in the Public Service Act 1912 to combat the widespread concern that public officials were being appointed due to their connections rather than their skills or expertise and was foundational to building an impartial public service able to serve successive Governments.[61]

---

[56] Public Service Act, ss 27, 34(b) and 54.
[57] Public Service Act, s 103.
[58] State Services Commission, above n 41, at 3.
[59] Anderson, Hughes and Duncan, above n 2, at 395.
[60] Public Service Act, s 72.
[61] State Services Commission, above n 41, at 3.

Not only does this principle protect the political neutrality and promote the expertise of the public service, but it also creates rights for workers. All of the enforcement mechanisms for these provisions are employment related. First, if chief executives did not abide by this, they could be disciplined by the Commissioner. Second, anyone looking for work who suspects the person appointed for the job they missed out on was not appointed based purely on merit may have recourse to discrimination provisions in the Employment Relations Act and the Human Rights Act. This provision establishes and protects the rights of individuals seeking employment within the public service. Of course, it relies upon workers who miss out on a job both having the understanding that the person appointed was not appointed based purely on merit, and also on having the will and capacity to pursue legal action. It would of course be possible for another person or group with more knowledge and will to use this person as the claimant in pursuing a claim. This limits the effectiveness of enforcement. Given the size of New Zealand, there is a limited number of people qualified for specialist areas in the public service. In the small community, it is likely that some of the people applying for a job know the people involved in the appointment. An aggrieved person is unlikely to pursue legal action as not only would it be difficult to prove that an appointment was biased, even if the applicant was known to the employer, but it would risk harming the complainant's future job opportunities.

B Free and Frank advice

Examples of free and frank advice are legislated in the Act. For example, s 8 of Schedule 6 states that chief executives of departments "must give a long-term insights briefing to the appropriate Minister at least once every 3 years and must do so independently of Ministers." It is fundamental that members of the public service give free and frank advice to Ministers. This convention acts to ensure that Ministers are highly informed, enabling them to make the best possible decisions. It is important to employment relationships as it offers job protection to public servants, emboldening them to give advice even when the advice is not what the Minister would like to hear. The Covid-19 pandemic highlighted the importance of this principle. Cabinet relied upon the knowledge of experts, including the Director-General of Health Dr Ashley Bloomfield. If Dr Bloomfield and other experts were unable to give free and frank advice, this would have limited the ability of the Government

to adopt an expert-informed approach to the pandemic which ultimately could have caused widespread loss of life and health. Arguably, the United Kingdom's lack of reliance on experts is what resulted in their drastically higher case numbers and deaths. Heavy reliance on Dr Bloomfield's advice, and at times the rejection of his advice (such as to shut the border to New Zealand citizens) showed that this convention was working as designed. This convention has propelled the view that public servants are subject matter experts that can be relied upon, while Cabinet has the job of weighing all advice and making political decisions.

C Stewardship of the public service

This principle means:[62]

> (e) to proactively promote stewardship of the public service, including of—
>
> (i) its long-term capability and its people; and
>
> (ii) its institutional knowledge and information; and
>
> (iii) its systems and processes; and
>
> (iv) its assets; and
>
> (v) the legislation administered by agencies.

An example of a public servant not stewarding public service assets was discussed in the *Rankin* case where a chief executive unjustifiably spent an enormous amount of money on a retreat for staff.[63] In this way, upholding the principle hinges on the employment agreement and related employment mechanisms such as performance reviews, discipline, declining to give a bonus or pay rise and ultimately dismissal.

Stewardship also has a broader element, being about a long term view of promoting the constitutional role of the public service. In this way, this principle is related to the principle of political neutrality and other principles that uphold the constitutional nature of the public service. This is in contrast to the system in the United States whereby an administrative change results in a major changes to the bureaucratic personnel, who are more politicised

[62] Public Service Act, s 12(1)(e).

[63] *Rankin v Attorney-General*, above n 10.

than New Zealand's public service. New Zealand's principles of political neutrality and stewardship are aimed to promote a stable public service that can serve successive governments.

D Open government

The Public Service Act places an expectation on the public service to make information available to the public through the principle of "open government"[64] as well as the value of trustworthiness, meaning "to act with integrity and be open and transparent."[65] Open government is a relatively recent principle in the public service. Previously, the state sector was bound by the Official Secrets Act 1951. The passing of the Ombudsmen Act 1975 and the Official Information Act 1982 (which repealed the Official Secrets Act) marked a significant change in Parliament's attitude toward information as the assumption changed from secrecy to transparency. According to the State Services Commission, "the principle of open government reflects the development over time of public and government expectations and their codification in the Official Information Act 1982."[66] Openness is important, perhaps even constitutional, because it allows the public to hold government to account. The public service is integral in government openness and transparency because they hold much of the relevant information.

Public servants have an obligation to follow the law in making information available and not to unjustifiably withhold it. The principle of open government is also relevant to the employment relationship because the public may be interested information relating to public service employees and their employment agreements and relationships. One issue, discussed in the following section, is the reduced transparency around the hiring of contractors rather than employees.

[64] Public Service Act, s 12.

[65] Public Service Act, s 16(1)(a).

[66] State Services Commission, above n 40, at [14].

E Spirit of service to the community

There are two further provisions in the Public Service Act which might be described as principles, though they are not described as such in the Act. The first is the spirit of service to the community, and the second is the role of the public service in promoting Māori-Crown relations.

The idea that the public service should have a spirit of service to the community was included in a 2013 amendment to the State Sector Act's purpose section.[67] It is given greater emphasis in the Public Service Act, being the subject matter of s 13 as well as being included in the purpose section of the Act.[68] In both sections it is described as a "fundamental characteristic of the public service".

Section 13(2) states that "[p]ublic service leaders, interdepartmental executive boards, boards of interdepartmental ventures, and boards of Crown agents *must preserve, protect, and nurture* the spirit of service to the community *that public service employees bring* to their work"[69] (emphasis added). This is stated as a duty without stating to whom it is owed. In contrast, subs (3) states that the same responsibility of a board of a Crown agent is owed only to the responsible Minister. This subsection was inserted following a select committee submission by the Accident Compensation Corporation (ACC) who expressed concern that an open-ended duty could result in judicial reviews of ACC's decisions about investments, cover, or injury prevention initiatives on the ground that ACC had not properly applied the spirit of community service principle.[70]

Consequently, Crown agents are protected from being judicially reviewed for not upholding the spirit of service to the community, but public service leaders, interdepartmental executive boards and boards of interdepartmental ventures are not. To protect themselves from being judicially reviewed they must ensure the employment relationship, including the terms of the employment agreement, between themselves and

---

[67] Public Service Act, s 1A(a).

[68] Public Service Act, s 3(e).

[69] Public Service Act, s 13(2).

[70] State Services Commission *Departmental Report for the Governance and Administration Committee: Public Service Legislation Bill 2020* (2020) at [122] – [124].

public service employees adequately preserves, nurtures and protects the spirit of service to the community. In this way, public service employees will have an enforceable obligation to abide by the spirit of service to the community.

There is another, and possibly unintended, impact this section may have in the context of employment relations: through the impact on employer obligations. It may be possible for an employee to raise a disadvantage grievance under the Employment Relations Act when, for example, the employer has not provided adequate working conditions to promote the employee's ability to work well, contrary to the promotion of a spirit of service.[71] This is a possible way for this section to be upheld through the employment relationship.

Though described as "fundamental", it is unclear from the Act what the spirit of service to the community entails. Presumably, this involves both one-on-one interactions with the public and policy formations. The second raises questions about "which community" as New Zealand is a very diverse country. The inability to define the obligation makes it difficult to enforce and may result in uneven enforcement throughout the public service agencies. The Commissioner's guidance is therefore important.

It is fundamental to a democratic constitution that those who govern do so with the consent of the public. It is the public interest that is to be sought, not the interests of ministers or public servants.[72] One might think, then, that public servants owe their loyalty to the public. However, this immediately poses a problem. It would significantly undermine Parliamentary sovereignty for public servants to ignore, or act contrary to government policies and directives, even if the public servants believe they are acting in the public interest. The government's power is justified by being elected by the people. Public servants are not elected and are to do the government's bidding. This function of

---

[71] Thomson Reuters "Public Service Act 2020 s 13 Spirit of Service to the Community" Westlaw <www.westlaw.co.nz>.

[72] Richard Ekins "The value of representative democracy" in Claire Charters and Dean R Knight (eds) *We, the people(s): participation in governance* (Victoria University Press, Wellington, 2011) 29 at 30.

democracy is said to be in the long-term public interest.[73] A well-meaning public servant would be undermining democracy, and therefore the public's long-term interest, if they pursued their idea of the public interest over clear government policy. That is why it is often considered that while public servants are to serve the public, their direct loyalty is to the government.[74]

Yet this is not always a comfortable solution. Ministers supposedly have an incentive to act in the public interest, but in reality, they merely have an incentive for their *visible* actions to be in the *perceived* public interest. A public servant's unwavering duty to the government without independent regard to the public is not always in the public's interest. It is an unfortunate reality that those in power do not always act selflessly. As Oliver has stated:[75]

> The sad fact of the matter is that MPs and ministers in any country cannot always be relied upon to resist temptations to act in their own interests (such as to avoid embarrassment or to drum up electoral support) and those of their party, or on weak evidence, contrary to the duties of stewardship of public resources.

In extreme cases of a government acting harmfully towards sections of society the dilemma is circumvented by the illegitimacy of the government. A public servant does not owe that government their allegiance over loyalty to the public interest. Yet even a legitimate government may pursue objectively harmful policy. Difficulties especially arise when harmful policy is carried out in a way that is too covert or technical for most of the public to notice or understand, or it is only a small, marginalised section of society that is affected. There is no clear answer about whether the public servant's loyalty should lie with the government or with the people. There are problems with both approaches. Perhaps it is appropriate and even desirable that "[a] perennial tension is between a duty of service to

---

[73] Chris Eichbaum "A constitutional personality: does the New Zealand public service possess one, and is it in good order?" (2016) 12 *Policy Quarterly* 50.

[74] See Eichbaum, above n 74.

[75] Dawn Oliver "Constitutional Stewardship: A role for state or public sector bodies?" (2017) The Constitution Society at 20.

the government of the day and a duty of care to the public interest."[76] Therefore it is difficult to know what the spirit of service entails and what needs to be enforced through the employment relationship to avoid judicial review.

F Supporting Māori-Crown relations

Section 14(1) provides that "[t]he role of the public service includes supporting the Crown in its relationships with Māori under the Treaty of Waitangi (te Tiriti o Waitangi)." Subsection (2) sets out how that is applied:

> (2) The public service does so by the Commissioner, public service chief executives, interdepartmental executive boards, and boards of interdepartmental ventures having responsibility for—
> (a) developing and maintaining the capability of the public service to engage with Māori and to understand Māori perspectives:
> (b) in the employment area,—
> (i) in the case of the Commissioner, recognising the matters listed in section 73(3)(d) in the development and implementation of the leadership strategy under section 61:
> (ii) in the cases of chief executives and boards, operating an employment policy that meets the requirements of section 73(3)(d) [good employer requirements].

The explicit legislating of the public service's role in upholding Treaty obligations is new to this Act. The State Sector Act was silent on the Treaty but included requirements on chief executives to have employment policies that recognised the aims, aspirations, and employment requirements of Māori and the need for their greater involvement in the public service.[77] These requirements were carried over to the new Act.[78]

The inclusion of s 14(1) is a much wider Treaty obligation that involves every aspect of how departments and interdepartmental ventures operate, creating obligations on public service leaders as employers and on public service employees in their relations with the public, including in the creation of strategies and policies. The public service may at times

---

[76] Eichbaum, above n 74, at 15.
[77] Public Service Act, s 56(2)(d).
[78] Public Service Act, s 73(3)(d).

be even more proactive about Treaty obligations than the government would otherwise require them to be – unless, of course, it is against government policy. This is reflective of a greater constitutional norm of respecting the Treaty as a living document, with Mr Hipkins calling this "another clear signal that we are serious about our commitment to our treaty partners".[79]

The Commissioner is only responsible for this principle in relation to their own functions and responsibilities, and is responsible to the Minister.[80] Chief executives, interdepartmental executive boards, and boards of interdepartmental ventures must report to the Commissioner on their progress in upholding s 14.[81] However, chief executives, boards of interdepartmental executives and boards of interdepartmental ventures are responsible only to the appropriate Minister in relation to the operation of their respective agencies. This responsibility is enforced through their employment agreement that is primarily with the Commissioner. To uphold their obligation, chief executives will ensure that public service employees are upholding this principle, as it will be part of their express or implied terms of their employment agreement. This provision may also be justiciable by the public through judicial review.

VI Contractors

The use of contractors is popular in the public service, where fluctuating demand for work and short-term projects are common. Recently, there has been a surge in contractors due to "unprecedented demand" for essential services during the Covid-19 pandemic.[82] The Ministry of Health spent the highest amount on Covid-19 contractors in the 2020-2021 financial year, totalling $12.8 million, with contractors making up half or three-quarters of the Ministry's pandemic workforce. [83] Despite the prevalent use of contracting, the Public

---

[79] New Zealand Government "Public Service undergoes biggest shake-up in 30 years" 26 June 2019 <www.beehive.govt.nz>.

[80] Public Service Act, ss 15(1)(a) and 15(2)(a).

[81] Public Service Act, s 15(3).

[82] Phil Pennington "Covid-19 recovery driving contracting surge in public sector" *RNZ* (online ed, Wellington, 10 August 2021).

[83] Pennington, above n 83.

Service Act is geared towards employees, rather than other workers such as contractors. The model of contracting provides a challenge to enforcing the public service principles and this has not been adequately dealt with in the Public Service Act. Furthermore, this was a missed opportunity for the public service to be a leader in employment law by including all types of workers in the scheme. While the ability to be classed as a contractor can be beneficial for both workers and employers, it is well traversed in the literature that it can also unnecessarily and unfairly result in contractors missing out on the rights and protections enjoyed by employees.

A Focus on employees in the Act

The Public Service Act specifically refers to contractors twice. Section 17 provides that the Commissioner "may vary the application of minimum standards, as the Commissioner thinks fit, in light of the legal, commercial, or operational context" to specific agencies, groups of individuals, which explicitly includes contractors.[84] There is no reference to contractors in the current standards, but they may be included in contracting agreements. Schedule 6 cl 2 provides that chief executives may delegate functions or powers to, among others, contractors. This means that contractors may be delegated significant functions or powers. Given the lack of safeguards around contracting and the public service principles, this may not be appropriate.

The Public Service Act repeatedly refers to employees and employers. It is essential to clarify the working relationship(s) to which these terms do and do not apply. The Public Service Act provides that the Employment Relations Act applies to the public service, subject to any exceptions in the Act.[85] Therefore, subject to any exceptions or inconsistencies, these terms are assumed to have the definition given in the Employment Relations Act. The Public Service Act does not define "employee" as relevant definitions are circular. For example, "public service employee" means "an employee of a department or an employee of an interdepartmental venture", "employee of a department" means "a

[84] Section 17(3)(b)(vii).

[85] Public Service Act, s 76.

person appointed to a position as an employee in a department" and "employee of an interdepartmental venture" means "a person appointed to a position as an employee in an interdepartmental venture".[86] However, the definition of an "employment agreement" which is "a contract of service", gives some guidance.[87] A *contract of service* is a legal term used to refer to an employer/employee relationship, as opposed to a *contract for service* which refers to contractors.[88] "Contract of service" also the definition of "employment agreement" in the Employment Relations Act[89] and is used in its definition of employee.[90] That is all to say that the term "employee" in the Public Service Act has the same definition as in the Employment Relations Act.

"Employee" is defined in the Employment Relations Act as meaning "any person of any age employed by an employer to do any work for hire or reward under a contract of service"[91] and explicitly excludes volunteers.[92] The key to this definition is the phrase "contract of service", distinguishable from the term "contract for service", which refers to the agreement between a principal and an independent contractor.[93] The label given to the relationship by the parties is not determinative as the Employment Court and the Employment Relations Authority are directed to determine the "real nature" of the relationship.[94] Furthermore, the Employment Relations Act defines "employer" as "a person employing any employee or employees; and includes a person engaging or employing a homeworker."[95]

[86] Public Service Act, s 65.
[87] Public Service Act, s 6.
[88] John Hughes *Mazengarb's Employment Law (NZ)* (online loose-leaf ed, LexisNexis) at [ERA6.3.1].
[89] Employment Relations Act, s 5.
[90] Employment Relations Act, s 6(1)(a).
[91] Employment Relations Act, s 6(1)(a).
[92] Employment Relations Act, s 6(1)(c).
[93] Hughes, above n 88, at [ERA6.3.1].
[94] Employment Relations Act, s 6(2) and (3).
[95] Section 5.

B Loophole to adherence to the principles

The use of contractors in the public service provides a challenge to upholding the principles that was not adequately dealt with in the Public Service Act, especially given the prevalence of contracting arrangements. First, many of the provisions that specifically uphold the principles are specific to employees. For example, s 54 requires independence in relation to employees. Furthermore, principals also have less control over contractors than employers do over employees, reducing the ability of principals to ensure their compliance with public service principles and the public's ability to get a remedy.

Another concern is that there is much less transparency around contracting roles in government than there is about employee roles. They have previously not included in the Public Service Commissioner's statistics about its own workforce. Furthermore, according to one political journalist, information about contracting roles "can often be hard to obtain even via the Official Information Act" meaning the Government "can effectively avoid a lot of scrutiny by employing people as contractors rather than employees."[96] In a welcome move, the Public Service Commission recently committed to more transparency of contracting relationships, including through keeping relevant statistics.[97] However, to ensure this happens, this should have been provided for in the Public Service Act.

Furthermore, contractors are appointed through request for proposal processes but the Act does not give any guidance on this. In reality, this process is somewhat public but it is hard to know whether the public service principles are adhered to and to what extent contracts explicitly require contractors to adhere to the principles, which is the primary way in which these principles can be enforced in the contracting relationship. Conceivable issues include contractors not giving free and frank advice in order to retain their contract, and open government being undermined by the lack of information regarding contractors

---

[96] Dileepa Fonseka "Why is a Labour government encouraging its employees to become contractors?" *Stuff* (Wellington, online ed, 8 May 2021).

[97] Public Service Commission "Contractors and Consultants Guidance" 9 December 2020 <publicservice.govt.nz>.

While empirical research in this area is lacking (and is outside the scope of this paper), research in New Zealand and Australia has shown that contractors in the public service are generally "accountable for delivering results and less so for the processes by which results are achieved."[98] In Australia,[99]

> …the major emphasis is on the desired outcome, on whether the contractor has delivered the service in question to the required standard and within the negotiated price. How the contractor goes about achieving this outcome is to be left to the contractors' discretion and excluded from public scrutiny, subject to the normal legal requirements to which all company actions are subject…

Research in Australia has found that while some government agencies require contractors to comply with public service principles, available evidence suggests they are "not being extended to all activities undertaken by contractors but that certain areas are being exempted".[100] Furthermore, it was found that principles such as merit-based appointments "are not generally being applied to private contractors."[101] As Mulgan questions,[102]

> Once responsibility passes to a private provider of a public service, why should the concerns for transparency, frugality and merit appointment become so attenuated? The habit of excluding private contractors from the high standards of ethical conduct applied to public servants may be a residue of an era when the lines between the sectors were less blurred and private contractors were less engaged in performing public functions.

Given the prevalent use of contractors in the public service, and that even chief executives may delegate their functions and powers to contractors, the lack of statutory safeguards to ensure the principles are upheld within the working relationship and by the contractors is a gap in the Public Service Act. The strongest provision in the Act relating to this matter is

[98] Richard Mulgan "Public sector reform in New Zealand: issues of public accountability" (2008) *PAQ* 32(1) 1 at 27.
[99] Richard Mulgan "Outsourcing and public service values: the Australian experience" (2005) 71(1) *Intl Rev Admin Sci* 71(1) 55 at 68.
[100] Mulgan, above n 99, at 67.
[101] At 68.
[102] At 68.

that the Commissioner may comment on the applicability of the minimum standards to contractors. It is unclear whether the current standards have been expressly extended to contractors.

It should be noted that an additional but less common enforceability mechanism is through ministerial responsibility. According to Mulgan, "governments may be held accountable for how much contractors spend on themselves even when such questions are outside the specified terms of the contract."[103]

C Incentives to hire contractors

The Public Service Act incentivises contracting due to the additional obligations placed on dealing with employees that do not apply to contractors. It can provide for the fluctuating demand for work, for example during the Covid-19 response, and can allow a more flexible lifestyle that may suit some workers.[104]

Employers do not have to observe the same minimum rights for contractors as they do for employees. Only employees have access to personal grievance remedies and the right to collectively bargain under the Employment Relations Act, as well as the statutory protections in the Minimum Wage Act 1989 and the Holidays Act 2003.[105] As John Hughes writes, the definition of employee "effectively sets the boundary for application of the [Employment Relations] Act and associated legislation. Contracts for services are essentially regarded as autonomous commercial contracts, not requiring the protection of employment law."[106] While the Ministry of Business, Innovation and Employment (MBIE) has reported on the legal issues of the employee/contractor distinction but no legislative

---

[103] Mulgan, above n 98, at 27.
[104] Ministry of Business, Innovation and Employment *Better protections for contractors: Consultation summary* (November 2019) at 2.
[105] Minimum Wage Act 1989, s 2.
[106] Hughes, above n 88, at [ERA6.3.1]

change has been made.[107] Parliament has declined to deal with these issues in the Public Service Act, despite its longstanding and strengthened commitment to the public service being an exemplary employer through the "good employer" requirements.

The Public Service Act places further requirements on employers through the "good employer" requirements that do not apply to contractors. They are a further and potentially significant incentive to hire contractors rather than employees. These requirements apply to employment rather than contracting relationships. A good employer is defined as "an *employer* who operates an employment policy containing provisions generally accepted as necessary for the fair and proper treatment of *employees* in all aspects of their employment" (emphasis added).[108] This duty applies to the Commissioner, chief executives and boards the Commissioner.[109]

A "good employer" is defined in s 73(3) as "an employer who operates an employment policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment." This includes provisions relating to the impartial selection of suitably qualified people for appointment (except in the case of ministerial staff); good and safe working conditions; an equal employment opportunities programme; recognition of the aims and aspirations and employment requirements of Māori and the need for greater involvement of Māori in the public service; opportunities for the enhancement of the abilities of individual employees; recognition of the aims and aspirations, employment requirements, and the cultural differences of ethnic and minority groups; recognition of the employment requirements of women and people with disabilities; recognition of the importance of achieving pay equity between female and male employees; and recognition of the importance of decisions about remuneration being free from bias including, but not limited to, gender bias. The last two provisions are new to this Act. "Equal employment opportunities programme" means a programme that

---

[107] Ministry of Business, Innovation and Employment, above n 104. See also Gordon Anderson, "Rethinking the Legislative Architecture" (CLEW 50th Anniversary Seminar, 14 April 2021).

[108] Public Service Act, s 73(3).

[109] Public Service Act, ss 73(4)(b), 74(1) and 73(1).

is aimed at identifying and eliminating all aspects of policies, procedures, and other institutional barriers that cause or perpetuate, or tend to cause or perpetuate, inequality with respect to the employment of a person or group of persons.[110] None of these relate to contractors.

Although contractors receive fewer protections, there are also incentives for workers to become contractors. The 2020 pay freeze for public service employees did not apply to contractors, incentivising workers to become contractors.[111] As the Public Service Association warned, "when the pay rates of employees in hard-to-staff roles like IT are kept down then employers are incentivised to engage people as contractors (so avoiding pay restraint expectations for employees) so that they can recruit or retain them by paying them more".[112] Furthermore, public service contractors "generally made 20-30 percent more than employees" during this period.[113] They also may have been more protected from the public service pay freeze[114] which applied to all employees, but this may have pushed them into contracting to the government's advantage.

It is an unfortunate gap in the Public Service Act that there are incentives provided for public service employees to hire workers as contractors, and yet the Act does not adequately deal with challenges to upholding these principles through the contract.

VII Bill of Rights Act

Unlike its predecessor, the Public Service Act explicitly recognises that public service employees have rights under the New Zealand Bill of Rights Act 1990. This seems to have been in response to advice from the State Services Commissioner that a lack of clarity about what employees can say or do has led to a chilling effect on employees' behaviour, especially in regard to political expression. However, the Act does not give any guidance

---

[110] Public Service Act, s 74(2).

[111] Fonseka, above n 96.

[112] Fonseka, above n 96

[113] Pennington, above n 83.

[114] Phil Pennington "Pay freeze hits public servants but not contractors" *RNZ* (online ed, Wellington, 7 May 2021).

on how these rights may be balanced or limited by important public service principles outlined in the Act, instead leaving it to the Commissioner and the Courts.

In its impact statement on the State Sector Act reforms, the State Services Commission concluded that the existing Code of Conduct was not clear enough on what political expression was permitted from public service employees, stating that:[115]

> [s]ome submissions suggested that the Code of Conduct has had a chilling effect on public servant behaviours. This was particularly noted in cases where public servants felt unable to engage in political expression in their private lives… The Code of Conduct specifies minimum standards of conduct, and indicates what a public servant must or must not do. There has not previously been a corresponding statement of what public servants can do. This may have led to some agencies and public servants adopting a more cautious approach to standards of conduct than intended, especially with rights of political expression.

In response to these concerns, s 22 of the Act, titled "rights and freedoms of public service employees", explicitly states that the New Zealand Bill of Rights Act applies to public service employees:

> (1) This section acknowledges that public service employees have all the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 in accordance with the provisions of that Act.
>
> (2) Accordingly, that Act (along with any other enactment that provides for the exercise or enforcement of those rights and freedoms, including the Human Rights Act 1993) applies to a public service employee exercising or seeking to enforce those rights and freedoms.

This section specifically applies to employees and therefore does not directly apply to contractors.

---

[115] Hannah Cameron *Impact Statement: State Sector Act Reform* (State Services Commission, May 2019) at 21 and 30.

A Impact on the law

The express acknowledgement that the Bill of Rights Act applies to public service employees likely did not change the law. Section 3 defines the application of the Bill of Rights Act, stating that it applies (only) to acts done—

(a) by the legislative, executive, or judicial branches of the Government of New Zealand; or

(b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

The public service agencies are part of the executive government and therefore fall within category 3(a). Commentary on the Bill of Rights Act has suggested that the Act would apply to all public service employment relationships[116] and given the fundamentally public nature of the public service, it is likely that a court would agree. There is a lack of case law concerning the relationship between rights of public service employees and the political neutrality of the public service. This is not because the law is clear. The Commission itself noted the difficulty in this area. Instead, the lack of case law is likely due to a combination of the chilling effect of the code of conduct (perhaps suppressing political expression more than necessary) alongside the resolution of cases before being litigated, in the form of payouts to aggrieved public servants.

However, the courts have dealt with tensions between political neutrality and political expression in relation to s 3(b) bodies. Though these bodies are subjected to the Act, the courts have differentiated between public and private acts of these bodies, because, in accordance with the wording of s 3(b), the Bill of Rights Act applies "only acts done in performance of the public function, rather than to all acts done by a body that happens to perform a public function."[117] In several cases the courts have found that the employment relationship was a private function, thereby excluding the applicability of the Bill of Rights Act. In *Bracewell v Richmond Services Ltd*, the Employment Court held that "employment relationships are effectively a non-public function of public bodies and therefore an area in

[116] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 662.

[117] *Electrical Union 2001 Inc v Mighty River Power Ltd* [2013] NZEmpC 197, (2013) 11 NZELR 252 at [54].

which the [Bill of Rights Act] has no application."[118] In *Electrical Union 2001 Inc v Mighty River Power Ltd* the Court found that "the [Bill of Rights Act] does not apply to public bodies in respect of their non-public activities, including employment relationships."[119] Adopting a statement of the High Court, the Employment Court concluded that "the [Bill of Rights Act] has no general application to this case except to the extent that one of its provisions (s 11) has been adopted expressly in the parties' collective agreement."[120]

In *Daniels v Māori Television Service,* the Employment Relations Authority agreed that employment relationships are usually a private function but held that "in relation to the complained-of act [Māori Television Service] was acting in the performance of its public function of television broadcasting."[121]

Ultimately, the inclusion of s 22 did not change the legal position but that public service employees have rights under the Bill of Rights Act. Furthermore, it remains unclear how these rights will be balanced with the important principle of the political neutrality of the public service. However, s 22 may function as putting greater emphasis on these rights, thus indicating that there is no s 4 justification to completely limit them.

B Political neutrality and freedom of expression

It is important that the rights of public servants are limited to ensure the preservation of constitutional public service principles. Perhaps the most common area of difficulty is the conflict between the principle of political neutrality and the right to freedom of expression. According to s 14 of the Bill of Rights Act, freedom of expression includes the right to "impart information and opinions of any kind in any form". However, the public expression of political views by a public servants could undermine the political neutrality of the public service. The issue has heightened in recent years due to the rise of social media platforms,

---

[118] *Bracewell v Richmond Services Ltd* [2014] NZEmpC 111 at 113.

[119] *Electrical Union,* above n 117 at [52] citing *Poole v Horticulture and Food Institute of New Zealand Ltd* [2002] 2 ERNZ 869 at [208].

[120] At [56]; *Butler v McCutcheon* HC Auckland CIV-2011-404-923, 18 August 2011 at [58].

[121] *Daniels v Māori Television Service* (2005) 7 NZELC 98,019 (ERA) at [60].

allowing individuals to widely distribute information and opinions, sometimes being distributed more widely than even intended. This principle of political neutrality may also at directly conflict with the rights to freedom of association and of peaceful assembly, and possibly also to freedom of thought, conscience, and religion and of manifestation of religion and belief.[122]

The Bill of Rights Act contains three sections which are fundamental to the operation of the Act and the rights within it. Section 4 stipulates that the provisions within any other enactment (including the Public Service Act) are not ineffective or invalid for the reason of being inconsistent with the rights affirmed in Bill of Rights Act. In other words, the Bill of Rights Act is not supreme law. However, according to s 6, wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights Act, that meaning is preferred to any other meaning. Lastly, s 5 provides that the rights within the Act are not absolute, being "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[123]

Like any other person, public servants' rights may be limited to the extent that is reasonable, justified, and found in law. Because the principles and values of the public service, including political neutrality, are explicitly legislated, they cannot be made invalid because they restrict public servants' rights. Due to the constitutional nature of public service employees' roles and the importance of certain conventions to our free and democratic society, their rights are likely to be justifiably limited to a greater extent than employees in the private sector. Upholding the public service principles legislated by Parliament requires public service employees' rights to be limited.

Limitations must be found *in law*. This means enactments or the common law.[124] This does not include the Commissioner's standards and guidance which are not legislative

[122] New Zealand Bill of Rights Act, ss 17 (freedom of association), 16 (freedom of peaceful assembly), 13 (freedom of thought, conscience and religion) and 15 (freedom of manifestation of religion and belief).
[123] New Zealand Bill of Rights Act, s 5.
[124] Butler and Butler, above n 116, at 215.

instruments nor disallowable instruments for the purposes of the Legislation Act 2012.[125] On the other hand, the standards are enforced in the Public Service Act, as s 18 states that agencies and individuals must comply with them. However, they do not have to be presented to the House of Representatives for scrutiny and approval and therefore including this as law would give significant power to the Commissioner. There is another way that the standards may limit employee's rights. The Employment Court has indicated that, if done voluntarily, employees can contract out of their Bill of Rights Act protections. This is contrary to the United States' approach which finds that public employment cannot be made conditional on surrendering constitutional rights.[126]

For chief executives in particular, the employment agreement may also include the so-called "face doesn't fit" clause, which can be used to terminate the employment of a public servant when their relationship with their responsible minister has irretrievably broken down. In the case of *Rankin,* the former chief executive's employment agreement included the following clause:[127]

> The parties acknowledge that the relationship between the Minister and the Chief Executive is fundamental to the continued employment of the Chief Executive in this position. Where for any reason whatsoever arising through no fault of the Chief Executive the Commissioner is satisfied on reasonable grounds that the relationship between the Minister and the Chief Executive has broken down irrevocably the parties agree to the matter being addressed in accordance with sub-clause 10.2.

Sub-clause 10.2 lays out the procedure for removing the chief executive which involves first seeking to appoint the person in another position within the public service, and, failing that, to terminate their employment with a pay-out. Furthermore, the implied terms of employee fidelity and of mutual trust and confidence could be relied upon.

---

[125] Public Service Act, s 21.

[126] *Perry v Sinermann* 408 US 593 (1972) at 597; *Rutan v Republican Party of Illinois* 497 US 62 (1990).

[127] *Rankin v Attorney-General*, above n 10, at [17].

Of interest is how these issues interact with the principle of open government. It is possible that this principle may increase the scope of rights. The Official Information Act, Open Government Partnership, and whistleblower protections, alongside the principle of open government being included in the Public Service Act indicate that the intention for the scope of the right to expression may well be broad as there has been a move away from secrecy to openness – though there is much room for improvement. In saying that, these provisions relate to specific and careful procedures. They are not the same as a public service employee voicing their politically swayed view on the internet.

C Guidance on justified limitations

Parliament has not given guidance in the Act about the interplay between public servants' rights and the principles of the public service. Instead, the Commissioner may give guidance on this when setting the minimum standards of integrity and conduct under s 17 or when issuing guidance on integrity and conduct under s 19. Section 20 provides that any s 19 guidance on political neutrality must address the right to freedom of expression (as well as the responsibilities of individuals who have obligations as a member of a profession). Effectively, the Commissioner has discretion in determining to what extent public servants' rights are limited. While this is ultimately subject to a court's judgment on the matter, disputes of this nature in the public service do not tend to be litigated.

According to one commentator, the instruction for the Commissioner to issue guidance on political neutrality under s 20:[128]

> appears intended to ensure that the guidance strikes the right balance. That balance is between upholding the principle of political neutrality, and ensuring that public servants' freedom of speech, or their expression of professional advice or opinions, will not be unnecessarily constrained due either to employers overstepping the principle, or employees feeling they need to be excessively cautious in what they say publicly or in social settings.

[128] Rebecca Atkins (ed) *Employment* Law (online loose-leaf ed, Thomson Reuters) at [PS20.01].

The standards previously issued by the Commissioner under s 57 of the State Services Act 1988 remains in force;[129] at the time of writing, these standards have not been updated in light of the new legislation. It is yet to be seen what, if any, additional guidance the Commissioner will release. The Commission did release guidance on political neutrality in 2010 for the state services (which includes the public service).[130] The Commission stated that "an established constitutional convention in New Zealand" is that "State servants must be apolitical when carrying out their duties, functions and powers".[131] The explanation given was that "[t]his means, essentially, that State servants must keep their jobs out of their politics and their politics out of their jobs."[132] The Commission wrote that public servants' rights must be balanced with "the public interest in having a politically neutral and effective State Services," [133] indicating their rights may be more infringed than other members of the public. Like any other employee, public servants must maintain their employment responsibilities such as not bringing their employer into disrepute. This limits what they can say politically, much more than for a worker in the private sector. There is unlikely however to be any justified limit on the freedom of association rights such as union membership and collective bargaining.

Ultimately, does this provision address the Commission's concern about ambiguity about what public servants can and cannot say and do? I argue that it does not; it kicks the can back to the Commissioner to provide more guidance and yet this has not been done. Despite the application of the Bill of Rights Act, public service employees' rights will justifiably limited significantly to ensure the public service principles are upheld and the public service is adequately serving the elected government and the public. It seems the Commission was looking to Parliament to provide more guidance, but Parliament has declined to do this. Without new and clear guidance, s 22 may embolden employees to say

[129] See Public Service Act, sch 1 cl 8(2).
[130] State Services Commission "Political Neutrality Guidance" April 2010 <publicservice.govt.nz>.
[131] State Services Commission, above n 130.
[132] State Services Commission, above n 130.
[133] State Services Commission, above n 130.

or do things that they should not be doing, undermining the political neutrality of the public service and potentially resulting in unfair discipline at work.

D Case law: *Daniels* and *Banerji*

The Employment Relations Authority has provided some guidance on how the right to freedom of expression and political neutrality may intersect. *Daniels v Māori Television Service* concerned a s3(b) body but the employment relationship was unusually found to be a public function of the employer and therefore the Bill of Rights Act applied.[134] The Authority held that the employer acted in an unfairly discriminatory manner by imposing a blanket ban on Ms Daniels from attending political protests in her free time. As the instruction to not take part in political protests was vague and discriminatory, it constituted an unlawful infringement on her rights. Further, the principle of political neutrality did not permit the employer to prevent Ms Daniels from expressing her political views in her non-working hours. This indicates that rights limitations must not be unnecessarily broad and that public service employees are entitled to attend political protests in their free time.

Like New Zealand, Australia has conflicting interests in an “apolitical” public service and the individual right to freedom of expression. The facts of a 2019 decision of the High Court of Australia are a useful case study of the kind of problems that might arise in a 21st century public service. Between 2006 and 2012, Michaela Banerji worked at the Commonwealth Department of Immigration and Citizenship. During those years, she published 9000 tweets on her personal anonymous Twitter account. At least one of these tweets was published during her working hours. Many of the tweets were critical of her employer, her colleagues, departmental policies and administration, Government and Opposition immigration policies, and Government and Opposition members of Parliament.[135] In 2012, one of Banerji’s colleagues filed two complaints with the department’s Workplace Relations and Conduct team, alleging that she was inappropriately using social media in breach of the Australian Public Service Code of Conduct.[136] After an

[134] *Daniels v Māori Television Service* (2005) 7 NZELC 98,019 (ERA).
[135] *Comcare v Banerji* [2019] HCA 23, (2019) 267 CLR 373 at [2].
[136] *Comcare v Banerji*, above n 135, at [3].

investigation and a consultation period, the department concluded that Banerji's tweets were in breach of the Code of Conduct and sought to terminate her employment.

The full bench of seven Justices unanimously found that the dismissal was lawful. Central to the three judgments was the importance of the maintenance and protection of an apolitical, professional public service of integrity and good reputation, in order to support a representative and responsible government. The Court also found that there could not be an exception for anonymous political communications, stating[137]

> anonymity can and often eventually will be lost. And when it is lost, the damage done is that it is then seen that the member of the [Australian Public Service] was *not* apolitical. That causes harm to the internal functioning of the [Australian Public Service] and the public's perception of the [Australian Public Service] as an apolitical, impartial and professional part of the executive government and, thus, to a defining characteristic of the constitutionally prescribed system of government.

Notably, the Court held that the Act "does not purport to proscribe all forms of "anonymous" communications: only those which fail to "uphold" the [Australian Public Service] Values and the integrity and good reputation of the [Australian Public Service]".[138]

The Justices frequently referred to the need for trust between public service employees and their employer. This translates to the common law implied term of mutual trust and confidence. While stating that "all circumstances are relevant", Justice Edelman provided "six factors of particular significance to any assessment of whether the relevant trust is sufficiently imperilled", which are as follows:[139]

1. The seniority of the public servant;

---

[137] *Comcare v Banerji*, above n 137, at [160].
[138] *Comcare v Banerji*, above n 137, at [25].
[139] *Comcare v Banerji*, above n 137, at [183].

2. Whether the comment concerns matters for which the person has direct duties or responsibilities, and how the comment might impact upon those duties or responsibilities;
3. The location of the content of the communication upon a spectrum that ranges from vitriolic criticism to objective and informative policy discussion;
4. Whether the person intended, or could reasonably have foreseen, that the communication would be disseminated broadly;
5. Whether the person intended, or could reasonably have foreseen, that the communication would be associated with the public service; and
6. if so, what the public servant expected, or could reasonably have expected, an ordinary member of the public to conclude about the effect of the comment upon the public servant's duties or responsibilities.

This decision is likely to be highly persuasive to a New Zealand court. This is a unanimous High Court of Australia decision involving the very same tensions faced in New Zealand between a politically neutral public service, the right to freedom of expression, and the prevalence and ease of disseminating opinions and information on social media. This is a very helpful framework for evaluating the conflict of rights and political neutrality. In fact, the Commissioner could adopt this.

VIII Conclusion

The Public Service Act 2020 rightly prioritises the codification of constitutional public service principles. Ultimately, by placing duties on the Commissioner and chief executives, and the emphasis on the Commissioner's minimum standards of integrity and conduct and the Commissioner's guidance, these principles are implemented and enforced through the individual employment relationship, usually by employers imposing duties on employees. The threat of disciplinary action or even job loss is a significant motivator for public servants to uphold these principles, as laid out in the standards, guidance, code of conduct (for public service employees) and statute (for chief executives). However, given the importance of these principles to the public, it is interesting that in many cases, members

of the public would not be able to bring a claim against a public servant who breached a principle.

The principle of merit-based appointments is unique in that employers have obligations to employees or prospective employees. To make this enforceable, it is the workers who must hold employers accountable. However, this is not practicable due to the difficulty in job-seekers knowing if this principle has been breached, and the unlikelihood that an individual would pursue litigation about this matter given the risk of hurting their future employment opportunities in the relatively small New Zealand public service. This is especially so in relation to highly ranked officials such as chief executives and yet the merit principle is most important when it comes to keeping highly ranked positions, to ensure they are not politicised.

Another significant gap is the omission of duties placed on contractors. This is surprising, given that contracting is common in the public service. In fact, the Public Service Act (perhaps inadvertently) creates incentives for this type of working relationship by placing good employer obligations on employers that do not apply in relation to contractors. Due to research limitations, this paper was not able to undertake an empirical study into current contracting relationships. However, previous research has shown that contracting relationships are less transparent and outputs are prioritised over the protection of public service principles. This indicates that in this working relationship the public service principles are not being adequately enforced, and therefore that this is a gap in the Public Service Act.

Lastly, in a move relevant to employment relationships and the public service principles, Parliament explicitly provided that the Bill of Rights Act applies to public service employees. This was in response to findings by the Commission that public servants were unsure about what they could or could not express politically. This provision did not change the law, as the Bill of Rights Act already applied to these employment relationships. Parliament declined to do what would be most helpful thing for the public service: provide guidance on the relationship between the conflicting rights and principles. At most, the

acknowledgment of the applicability of the Bill of Rights Act is an indication that public service employees' rights cannot justifiably be completely limited. But this was already evident in the case law. Therefore, while not a bad thing, this provision does little to aid the Commissioner in this difficult balancing task, instead handing the power over to the Commissioner to decide through their standards and guidance. While it could be said that Parliament was also leaving this issue to the courts, there is a lack of case law in this area indicating that most cases are settled confidentially. However, the Commissioner may look to the Employment Relations Authority decision of *Daniels* or the High Court of Australia decision of *Banerji* for guidance.

This paper has uncovered that constitutional principles hinge on employment relationships in the public service. While sometimes this provides a helpful enforceability mechanism, there are also some gaps that need to be filled. How to fill those gaps is a question for further research.

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 11,351 words.

IX Bibliography

A Cases

1 New Zealand

Bracewell v Richmond Services Ltd [2014] NZEmpC 111

Butler v McCutcheon HC Auckland CIV-2011-404-923, 18 August 2011

Daniels v Māori Television Service (2005) 7 NZELC 98,019 (ERA)

Electrical Union 2001 Inc v Mighty River Power Ltd [2013] NZEmpC 197, (2013) 11 NZELR 252

Holmes v Dept of Survey and Land [1991] 2 ERNZ 409 (LC)

Poole v Horticulture and Food Institute of New Zealand Ltd

Rankin v Attorney-General [2001] ERNZ 476 (EmpC)

2 Australia

Comcare v Banerji [2019] HCA 23, (2019) 267 CLR 373

3 United States

Perry v Sinermann 408 US 593 (1972) at 597

Rutan v Republican Party of Illinois 497 US 62 (1990)

B Legislation

Employment Relations Act 2000

Holidays Act 2003

Human Rights Act 1993

Minimum Wage Act 1989

New Zealand Bill of Rights Act 1990

Public Service Act 1912

Public Service Act 2020

State Sector Act 1988

C Books and book chapters

Gordon Anderson, John Hughes and Dawn Duncan *Employment Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2017)

Jane Bryson and Gordon Anderson, "Reconstructing State Employment in New Zealand" in Marilyn Pittard and Phillipa Weekes (eds) *Public Sector Employment in the Twenty-Frist Century* (ANU e-Press, Canberra, 2007) at 253

Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015)

Richard Ekins "The value of representative democracy" in Claire Charters and Dean R Knight (eds) *We, the people(s): participation in governance* (Victoria University Press, Wellington, 2011) 29 at 30.

D Online commentary and looseleaf texts

Rebecca Atkins (ed) *Employment* Law (online loose-leaf ed, Thomson Reuters)

John Hughes *Mazengarb's Employment Law (NZ)* (online loose-leaf ed, LexisNexis)

E Journal articles

Chris Eichbaum "A constitutional personality: does the New Zealand public service possess one, and is it in good order?" (2016) 12 Policy Quarterly 50

Richard Mulgan "Outsourcing and public service values: the Australian experience" (2005) 71(1) *Intl Rev Admin Sci* 71(1) 55

Richard Mulgan "Public sector reform in New Zealand: issues of public accountability" (2008) *PAQ* 32(1) 1

F Parliamentary and government materials

Cabinet Office *Cabinet Manual 2017*

Hannah Cameron *Impact Statement: State Sector Act Reform* (State Services Commission, May 2019)

Ministry of Business, Innovation and Employment *Better protections for contractors: Consultation summary* (November 2019)

New Zealand Government "Public Service undergoes biggest shake-up in 30 years" 26 June 2019 <www.beehive.govt.nz>

Public Service Legislation Bill 2019 (189-1) (explanatory note) at General Policy Statement.

State Services Commission *Briefing to the Government and Administration Committee on the Public Service Legislation Bill 2020* (2020)

State Services Commission *Departmental Report for the Governance and Administration Committee: Public Service Legislation Bill 2020* (2020).

State Services Commission *The Spirit of Service: Briefing to the Incoming Government* (2017)

G Reports

Dawn Oliver "Constitutional Stewardship: A role for state or public sector bodies?" (2017) The Constitution Society at 20.

H Newspaper articles

Dileepa Fonseka "Why is a Labour government encouraging its employees to become contractors?" *Stuff* (Wellington, online ed, 8 May 2021)

Phil Pennington "Covid-19 recovery driving contracting surge in public sector" *RNZ* (online ed, Wellington, 10 August 2021)

Phil Pennington "Pay freeze hits public servants but not contractors" *RNZ* (online ed, Wellington, 7 May 2021)

I Internet resources

Public Service Commission "Contractors and Consultants Guidance" 9 December 2020 <publicservice.govt.nz>

Public Service Commission “Occupational profile of workforce” 9 December 2020 <www.publicservice.govt.nz>

State Services Commission “Political Neutrality Guidance” April 2010 <publicservice.govt.nz>

Public Service Commission “The composition of the wider public sector” 9 December 2020 <www.publicservice.govt.nz>

Thomson Reuters “Public Service Act 2020 s 13 Spirit of Service to the Community” Westlaw <www.westlaw.co.nz>

J Other resources

Gordon Anderson, “Rethinking the Legislative Architecture” (CLEW 50th Anniversary Seminar, 14 April 2021).