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Vicarious individual responsibility in New Zealand

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VICARIOUS INDIVIDUAL RESPONSIBILITY IN NEW ZEALAND: THE
CONVENTION AND ITS PLACE IN NEW ZEALAND GOVERNMENT
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I INTRODUCTION

The constitutional convention of individual ministerial responsibility and its place in New Zealand Government has been questioned in recent years. In April 1996 it was asked "[w]hat on earth does ministerial responsibility mean if it does not demand the resignation of a minister when his department is directly implicated in the deaths of 14 people?"¹ This question was referring to the Cave Creek tragedy, where 14 young people died due to a negligently built Department of Conservation viewing platform. But it is also an illustration of the public cynicism surrounding the convention of individual ministerial responsibility.

Individual ministerial responsibility has traditionally been regarded as being at the heart of responsible government. Responsible government is a "system of government in which the executive branch is controlled by ministers who are members of the legislative branch, and hold office as long as the legislative branch permits".² The responsibility to Parliament of ministers, as members of the Executive, is crucial to the effective operation of responsible government.

Individual ministerial responsibility is traditionally divided into three distinct parts - vicarious responsibility, personal responsibility and primary responsibility. Vicarious responsibility is the responsibility of ministers for the acts or omissions of their departments. Sir Ivor Jennings was describing this when he stated that "[e]ach minister is responsible to Parliament for the

¹ C Brett "One Year On From Cave Creek: Isn't it time for some answers?" in *North and South* (April, 1996) 48.

² K J Scott *The New Zealand Constitution* (Oxford University Press, Oxford, 1962) 118.

conduct of his [or her] Department. The act of every civil servant is by convention regarded as the act of his [or her] minister".³ This is as opposed to personal responsibility, where a minister must take responsibility for personal actions that bring disrepute to the office, and primary responsibility, where a minister must take responsibility for unacceptable outcomes that stem from his or her own actions or decisions.

Closely related to ministerial responsibility is collective responsibility. Central to collective responsibility is the concept of unanimity - the requirement that Cabinet present a united front. This can be used to defeat the requirements of individual ministerial responsibility.⁴

This paper is concerned with vicarious individual ministerial responsibility, which has proved to be the most elusive of the three types of ministerial responsibility.⁵ It is 'elusive' because there is no generally accepted definition. Jennings' definition has proved difficult to pin down in empirical terms, and as a result the convention has been interpreted in differing ways. One school of thought holds that vicarious responsibility requires the ultimate sanction of a ministerial resignation to be applied after unacceptable conduct from that minister's department.⁶ Dicey viewed the sanction of resignation as

³ I Jennings *The Law and the Constitution* (5ed, University of London Press Ltd, London, 1959) 207-208.

⁴ See text at n 40.

⁵ Any reference to vicarious responsibility is referring to vicarious individual ministerial responsibility.

⁶ S E Finer "The Individual Responsibility of Ministers" in (1956) 34 *Pub Adm* 377 at 379. Finer identifies the main proponents of this view as being: A Todd *On Parliamentary Government in England* (Volume II, Longmans Green & Co, London, 1869) 385; W Bagehot *The English Constitution* (World's Classics edition, 1872) 285; S Low *The Governance of England* (1ed, Fisher Unwin, London, 1914) 148-149; A B Keith *Constitutional Law* (7ed, 1939) 207.

the essential part of the doctrine.⁷ An equally prevalent school of thought argues it is unrealistic for ministers to take responsibility for the actions of civil servants that "they do not know about and did not authorise".⁸

This debate strikes at the heart of vicarious responsibility. Michael Pearson stated in 1992 that "the doctrine of ministerial responsibility seems to have gone the way of the dinosaur".⁹ Confusion over what the convention requires has led to its inconsistent application by politicians and to public cynicism with regard to its relevance today.

This paper will establish that vicarious responsibility as a constitutional convention still has a very relevant role in New Zealand government today, although in a diluted form. In order to place the convention in its legal context, the first part of the paper will establish what is meant by a constitutional convention, how a convention is established, and will address the issue of a convention's enforceability. The second part of the paper will examine the convention of vicarious responsibility, discussing the development of the doctrine, its role in Britain and operation in New Zealand. New Zealand case studies will be examined and the views of ministers will be analysed. The third part will address whether public sector reform has fundamentally changed notions of accountability, and whether this has altered the nature of vicarious responsibility in New Zealand. The paper will analyse the place of vicarious responsibility in New Zealand government,

⁷ C Turpin "Ministerial Responsibility: Myth or Reality" in J Jowell and D Oliver (eds) *The Changing Constitution* (Clarendon Press, Oxford, 1985) 48, 49.

⁸ G Palmer *Unbridled Power: An Interpretation of New Zealand's Constitution and Government* (2ed, Oxford University Press, Auckland, 1987) 56.

⁹ M Pearson "The End of Accountability?" *Management* (April, 1992) 75.

concluding that although it still holds a very relevant place, the nature of modern politics means that this is a somewhat diluted form of responsibility.

II CONSTITUTIONAL CONVENTIONS

The doctrine of vicarious responsibility is founded in the conventions of the constitution. It is necessary to examine what constitutional conventions are, how they are established and enforced, and the ways in which they may be changed.

Constitutional conventions are rules that exist within the particular environment of Parliament, and are considered to be binding by those that work within the Parliamentary environment. O Hood Phillips states that conventions are rules of political practice or behaviour that are "regarded as binding by those to whom they apply, but which are not laws as they are not enforced by the courts or the Houses of Parliament".¹⁰ Although conventions are regarded as binding, as a result of the political environment in which they operate, they are not always observed.¹¹

In determining whether a convention exists, one identifying element emerges from the above quotation - a convention exists when it is regarded as

¹⁰ O Hood Phillips and P Jackson *O Hood Phillips' Constitutional and Administrative Law* (7ed, Sweet & Maxwell Ltd, London, 1987) 113. This point is also made in K C Wheare *Modern Constitutions* (2ed, Oxford University Press, London, 1966) 122.

¹¹ G Marshall *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press, Oxford, 1984) 6.

binding.¹² This view is supported by Jennings, who asserts that three questions must be satisfied to determine whether a convention exists - "first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule?".¹³ For a convention to arise there must be precedents established to support it, and good reasons for the convention to exist. Wheare also identifies these principles, but divides them into two different categories. He argues that either a convention arises over a period of time, being first persuasive and later becoming obligatory, or it arises when an agreement is made "among the people concerned to work in a particular way and to adopt a particular conduct".¹⁴

Conventions are not statute or common law, therefore they cannot be enforced by the courts. This was set out by the Privy Council with respect to Rhodesia,¹⁵ and also by the Supreme Court of Canada.¹⁶ Despite this, the courts will use the existence of conventions as evidence, and to provide guidance. This can be seen in *Liversidge v Anderson* where the responsibility of the Home Secretary to Parliament was recognised,¹⁷ or in *Carltona Ltd v Commissioners of Works and Others* where the convention of ministerial

¹² See text above n 10. Note that a convention does not have to be treated as binding, as conventions are not always obeyed.

¹³ Above n 3, 136.

¹⁴ Wheare, above n 10, 122.

¹⁵ *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 723 - the Privy Council would not recognise conventional relationships as creating binding obligations.

¹⁶ *Reference re Amendment of the Constitution of Canada (Nos. 1, 2 and 3)* (1982) 125 DLR (3d) 1, 22 - the Supreme Court of Canada would not recognise that convention could ever "crystallise into law".

¹⁷ *Liversidge v Anderson* [1942] AC 206, 222.

responsibility was acknowledged.¹⁸ In New Zealand ministerial responsibility to Parliament has also been affirmed in the cases *Shand v Minister of Railways*¹⁹ and *Parsons v Burke*.²⁰ But ultimately, despite judicial recognition, conventions are not legally enforceable. Rather a reliance is placed upon those bound by conventions to uphold them. Marshall states this point succinctly. "In so far as a convention defines duties or obligations they remain morally and politically, but not legally, binding".²¹ However it would be wrong to suggest that conventions are unenforceable because they are non-justiciable, or that a breach of a convention would have no consequences. Watson notes that the public, if they are unhappy with a minister for breaching a convention, can express this at election time.²² Retaliatory measures by the Opposition can also be used to enforce conventions. If the Government ignores a convention, the Opposition could retaliate by ignoring a different convention. Watson cites the convention of pairing as an example, as the Government relies upon the Opposition obeying that convention, so that all members of Parliament do not have to be in the House of Representatives all the time.²³

It has already been stated that conventions, although regarded as binding, are not always obeyed. Marshall states that "widespread breach of political

¹⁸ *Carltona Ltd v Commissioners of Works and Others* [1943] 2 All ER 560, 563.

¹⁹ *Shand v Minister of Railways* [1970] NZLR 615, 634.

²⁰ *Parsons v Burke* [1971] NZLR 244, 248.

²¹ Above n 11, 17.

²² G Watson "Ministerial Responsibility and the Maniototo Irrigation Scheme" 6 OLR 161, 162.

²³ Above n 22. Pairing occurs when the Opposition removes one member from Parliament in a vote for every member of the Government that must be absent. This is vital so that the governing majority is not altered.

(as of linguistic) convention may itself sometimes lead to a change of convention".²⁴ This paper asserts that this is not a definitive statement. Constitutional conventions are often vague in terms of their content and application. Constant breach may bring about the change of one convention, but not another. Joseph stated that all conventions "are binding but some are 'more binding' than others".²⁵ Breach of a convention may, but will not automatically lead to its change.

III VICARIOUS INDIVIDUAL RESPONSIBILITY

The crux of vicarious responsibility is seen by the public and portrayed in the media in terms of sacrificial resignation. This paper will establish that resignation is not part of the convention in New Zealand. Resignation is not a suitable response to matters of vicarious responsibility, but rather a response to serious matters of primary responsibility.

Vicarious responsibility was established as a convention in Britain. When New Zealand was settled by Britain, the settlers brought with them such British statute and law that applied to the new colony.²⁶ As such, vicarious responsibility became one of New Zealand's constitutional conventions. This section will set out vicarious responsibility in its historical context and will

²⁴ Above n 11.

²⁵ Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (The Law Book Company Ltd, Sydney, 1993) 242.

²⁶ The English Laws Act 1858, s1.

illustrate the way that it has applied in Britain, to establish a setting for its application in New Zealand. Case studies of its application in New Zealand will also be discussed.

A *The Historical Context*

Vicarious responsibility is regarded as a key part of responsible government. It is therefore important to identify the specific need that the convention developed to address. This section of the paper will identify its place as a constitutional convention and trace its development as a convention in Britain.

It is undisputed that ministerial responsibility is regarded as a constitutional convention. Dicey identified it as such, as did Marshall, Hood Phillips and Joseph, among many others.²⁷ The concept of ministerial responsibility arises from the fact that ministers derive their authority from, and act on behalf of, Parliament. The convention demands that they also be responsible to Parliament.

In the 17th century unsuccessful attempts were made to reduce the power of the monarchy by making the King's Ministers responsible to Parliament. The purpose of such attempts was to halt financial maladministration on the part of the ministers.²⁸ Gradually Parliament was able to exert more control over

²⁷ A V Dicey *Introduction to the Study of the Law of the Constitution* (10ed, Macmillan and Company Ltd, London, 1960) 325; Marshall, above n 11, 54; O Hood Phillips, above n 10, 311; Joseph, above n 25, 251.

²⁸ C B Anderson "Ministerial Responsibility in the 1620s" [1962] 34 *Journal of Modern History* 381.

ministers, and from the reign of George I "[m]inisters accepted individual responsibility to both the King and Parliament for the conduct of their departments".²⁹ The doctrine developed further in the 19th century. Todd noted in 1892 that the "individual responsibility of ministers was considered to extend to all official acts and to relieve subordinates of public blame for their errors".³⁰ The House of Commons facilitated the development of the doctrine in order to provide a check upon the powers of the monarchy, and to recognise the ministers' responsibility to the House of Commons from whom they derived their support.³¹

Historically associated with the convention is the principle of public servant anonymity and non-accountability. This means that ministers obtain credit for the success of the work of public servants, and take the responsibility when errors are made. The minister, not the public servant, is the public face of the government department.

When vicarious responsibility was in its early stages a distinguishing feature of politics was the lack of domination by political parties. If a situation arose where a departmental error occurred Parliament could effectively force the hand of the minister. Woodhouse observed that between 1855 and 1867 five resignations occurred - a number disproportionate to later periods, and links

²⁹ Above n 25, 630.

³⁰ A Todd *Parliamentary Government in England* (Vol 2, New ed, 1892) 116-119, cited in Turpin, above n 7, 49.

³¹ P W Wood *Ministerial Responsibility: A reassessment including a consideration of the Labour Government's reforms* (LLBHons Research Paper, University of Canterbury, Christchurch, 1988) 3; D Woodhouse *Ministers and Parliament: Accountability in Theory and Practice* (Oxford University Press, Oxford, 1994) 7-8.

this to the uncertain majorities in the House of Commons.³² If Parliament no longer had confidence in the minister, the minister had no choice but to resign.

B The Status of the Convention in Britain Today

The application of the convention has by no means been consistent. Much of the confusion that exists over the status of vicarious responsibility in New Zealand also exists in Britain. This question has been addressed in Britain by a number of scholars, and the general conclusion is that British ministers do not tend to resign for vicarious responsibility unless there are weighty political reasons for doing so.³³

The development of the political party is chiefly responsible for the lack of ministerial resignations in cases of vicarious responsibility. The Government will normally hold the majority of seats in Parliament. A key feature of the political party is that members are 'encouraged' by the party whips to 'toe the party line'. If the party decides that it is not expedient to invoke the punitive element of the convention, then it is not possible for Parliament to force the resignation of the Minister. Although 'responsibility' to Parliament is expected and generally observed, the punitive aspect of the doctrine has become less important.

³² Woodhouse, above n 31, p 9.

³³ See *Finer* above n 6; *D Butler "Ministerial Responsibility in Australia and Britain"* (1973) 26 *Parl Aff* 403, 404; *Turpin* above n 7, 68; *Woodhouse* above n 31, 35.

The latter half of the nineteenth century has been portrayed as the 'high point' of vicarious responsibility, due the number of resignations.³⁴ This claim is unfounded, as only the resignation of Robert Lowe, the Vice-President of the Committee of the Council on Education, can truly be attributed to vicarious responsibility.

In 1864 Lowe resigned after unfounded allegations were made against him with respect to illegally altering school inspection reports. It was later found that his department was responsible for the censoring against specific instructions from Lowe to the contrary. Lowe resigned "alleging that his honour had been impugned", although the House of Commons was later told that Lowe's resignation was unnecessary.³⁵ Finer documents a further eight ministerial resignations for vicarious reasons between 1905 and 1954, but in only three examples was it clear that the minister resigned for an error that was no fault of his own.³⁶

The resignation of Sir Thomas Dugdale, the Minister of Agriculture in 1954, was claimed to be an exercise of vicarious responsibility.³⁷ Yet although there were errors on the part of the department, it was the personal fault of Dugdale in exercising misjudgment and failing to efficiently organise his department that led to his resignation.³⁸

³⁴ Wood, above n 31, 3; Scott, above n 2, 129.

³⁵ Above n 6, 381.

³⁶ Above n 6, 385. The ministers were Austen Chamberlain and Neville Chamberlain in 1917, and Viscount Swinton in 1938.

³⁷ Above n 6, 377, quoting *The Economist* 24 July 1954 263 (UK); D N Chester "The Crichel Down Case" in G Marshall *Ministerial Responsibility* (Oxford University Press, Oxford, 1989) 106, 111.

³⁸ Marshall, above n 11, 65; Scott, above n 2, 130.

These cases raise doubt as to whether resignation is part of the convention. Rather than a requirement of vicarious responsibility, most resignations occurred due to personal fault. Finer states that even these instances of resignation are only a "tiny number compared with the known instances of mismanagement and blunderings", where ministers accepted no punitive sanctions.³⁹ Instead, erring ministers have been protected by the cloak of collective responsibility and appeals to party solidarity, symbolic cabinet reshuffles, or the minister has clung to office through sheer personal tenacity.⁴⁰ In many cases an explanation is given to Parliament and amendatory action is taken. Resignations cannot establish a precedent when they constitute the exception rather than the rule.

An alternative approach to the convention has been identified in Britain. Rather than invoking only one sanction, the convention has developed so that it operates on a number of levels, depending upon the degree of responsibility required. Woodhouse has identified these as redirectory responsibility, reporting or informatory responsibility, explanatory responsibility, amendatory responsibility and finally sacrificial responsibility.⁴¹ In a situation where a minister has only indirect responsibility, for example a nationalised industry, it is sufficient for the minister to redirect questions appropriately. If required, this can be extended to informatory responsibility where the minister must report to Parliament. When a minister's own

³⁹ Above n 6, 386.

⁴⁰ Above n 6, 386-390.

⁴¹ Above n 31, 28-33.

department is involved, that minister is required to fulfil explanatory responsibility - to explain the department's actions to Parliament. Amendatory responsibility then requires the minister apologise to Parliament for the actions of the department, and if necessary to announce that corrective action is being taken. Woodhouse argues that sacrificial responsibility no longer applies in cases of vicarious responsibility, and the only case in which a minister should resign would involve 'personal fault' or 'private indiscretion', or departmental fault which the minister "was involved or of which he [or she] knew, or should have known".⁴² However, despite the existence of different levels of responsibility, where the political fallout of collectively defending a minister is too great it may be expedient for the minister to resign.

There are alternatives to this view. Martin argues that ministers have resigned when there have been systemic failures within their departments, and cites the resignation of Lord Carrington as an example. Carrington resigned due to flaws in the intelligence service at the start of the Falklands War.⁴³ However this can still be interpreted as an acceptance of *personal* fault in recognition of negligence in organising his department, and does not indicate the acceptance of resignation as part of the convention.⁴⁴

The prevalent view in Britain is that many examinations of the convention focus upon 'resignation' as the issue at stake, rather than 'responsibility'. As

⁴² Above n 31, 38.

⁴³ See J Martin "A Question of Responsibility" *The Dominion*, Wellington, New Zealand, 28 November, 1995, page reference unknown.

⁴⁴ G Marshall "Individual Responsibility: Some Post-War Examples" in G Marshall *Ministerial Responsibility* (Oxford University Press, Oxford, 1989) 130.

Woodhouse has demonstrated, resignations will rarely be appropriate in cases of vicarious responsibility, and there are different levels of responsibility that can be invoked.⁴⁵ G W Jones identifies resignation as a totally different issue to that of accountability.⁴⁶ It has been established that the convention provides a tier of methods to demonstrate responsibility, and does not require sacrificial resignations - they alone do not constitute 'responsibility'.

C The Operation of the Convention in New Zealand

When New Zealand became a colony of Britain, the common law and constitutional conventions of Britain became those of New Zealand.⁴⁷ This part of the paper will first outline the various ways that the convention has historically operated in New Zealand, by examining various cases. It will then look to the ways that government itself has attempted to define ministerial responsibility and ask whether the practice of ministers fits with such definitions.

The first approach taken to vicarious responsibility in New Zealand was that of the Minister of Works, Robert Semple, during the debate over the Fordell and Turakina tunnels in 1944. After a Commission of Inquiry found that general laxity in the organisation of the department led to insufficient

⁴⁵ Above n 31, 38.

⁴⁶ G W Jones "Symposium on Ministerial Responsibility: An Answer: Stand up for ministerial responsibility" (1987) 65 Pub Adm 87.

⁴⁷ Above n 26.

preparation, faulty designing and inadequate supervision, Semple stated that:⁴⁸

I am not running away from...responsibility; but there is a great difference between responsibility and blame. How can one blame a man for the conduct of thousands of workers under his control?

A second approach to the doctrine was taken in 1954 when a prisoner serving a life sentence for murder and rape escaped from Mount Eden prison whilst on an excursion to play bowls. The Minister of Justice acknowledged the lack of adequate directions for the inclusion of such prisoners in these excursions and discharged his responsibility by giving an account of the situation to Parliament and taking precautionary actions to make sure that such an incident would never happen again.⁴⁹

A third approach to the convention has been for the minister to completely deny any form of responsibility. In 1980 when there were massive cost overruns to the Maniototo Irrigation Scheme, the Minister of Works and Development, Anthony Friedlander, refused to accept responsibility and declined to resign. Friedlander's refusal to accept responsibility does not strengthen the convention, but nor does it undermine the convention. As noted earlier, breach of a convention does not necessarily lead to its change.⁵⁰ What Friedlander's refusal to accept responsibility does highlight are the definitional problems surrounding the convention. These will be discussed later in the paper.

⁴⁸ (1944) 267 NZPD 43.

⁴⁹ See Scott, above n 2, 126 and E McLeay *The Cabinet and Political Power in New Zealand* (Oxford University Press, Auckland, 1995) 195 for accounts of this event.

⁵⁰ See text at n 25.

These three approaches to the doctrine laid the bases for the current approach to the convention. The following is a brief and incomplete summary of incidences involving vicarious responsibility, and the approach taken by the minister involved.

In 1969 following an accusation of using the Tourist and Publicity Department for party political propaganda, the minister in charge, L A Adams, laid the blame on to a 'private citizen' working for the department and accepted no responsibility.

In 1986 copies of the budget were distributed before being formally announced. The Minister of Finance Roger Douglas immediately offered his resignation, accepting responsibility, but the Prime Minister David Lange refused to accept it, stating that the "breach was not...your act. You did not know of it in advance. You could not reasonably have been expected to know of it".⁵¹ Douglas had taken all steps to find out what had happened, and was prepared to ensure that such a mistake would not recur. The Prime Minister believed that Douglas was not personally to blame and therefore a resignation was unnecessary.

In 1987 the Department of Maori Affairs made unauthorised arrangements to borrow a large sum of money without going through the appropriate channels. The minister, Koro Wetere, tendered his resignation but this was not accepted as he was protected by the shroud of collective responsibility, and departmental officials were blamed.

⁵¹ Letter, Hon D Lange to Hon R Prebble (12 August 1986) cited in Palmer, above n 8, 52.

The 'responsible but not to blame' approach to the convention was taken one step further in 1992 by the Minister of Health Simon Upton when it was revealed that bad advice from his department led to haemophiliacs being supplied with contaminated blood after screening procedures had been put in place. Upton claimed that he was *neither responsible nor* to blame.

The most recent example of the approach taken to vicarious responsibility is the Cave Creek tragedy, the facts of which were outlined at the beginning of this paper. The Commission of Inquiry found that a secondary cause of the collapse of the viewing platform was that management structures within the West Coast conservancy were lacking, and that this led to the primary cause of the collapse - that the platform was not constructed in accordance with sound building practice. When the Commission of Inquiry's report was released, the Minister of Conservation Dennis Marshall addressed Parliament. Marshall acknowledged his responsibility for the Department of Conservation, but stated that blame can only be attached to a minister when they could have prevented an error made by the department or should have known of the possibility that an error may occur. Marshall accepted responsibility, but not blame. In that context he claimed that to resign from his position as Minister of Conservation would be to take the easy path and that it would not solve any of the problems that caused the error to occur.⁵²

My resignation would....not remedy the systemic problems that contributed to this accident. It would be a way of emphasising the fact that I am profoundly sorry. But for all the symbolic power of a resignation, I do not intend to proceed from sorrow to abdication.

⁵² (1995) 551 NZPD 10028.

Over the next twelve months all similar structures in the Department of Conservation were examined and those that were sub-standard were repaired or closed. Marshall also worked towards gaining a substantial increase in funding for the Department. On 30 May 1996 he resigned from the portfolio of Conservation stating that since the Commission of Inquiry's report he had done "everything possible to deliver on the changes needed to make outdoor recreation in New Zealand as safe as possible".⁵³ Marshall's resignation was not a direct response to the requirements of vicarious responsibility, but due to his personal sorrow about the tragedy. This is illustrated in the statement that he made to the House of Representatives upon announcing his resignation.⁵⁴

Today I am taking a further step to express my sorrow for what happened that fateful day at Cave Creek. This is a personal decision, which I feel is the correct course of action for me now.

Marshall approached the convention in a similar way to that of Semple. He accepted full responsibility but denied that blame could be attributed to a minister for acts he could not be expected to know about. He also believed that the convention demanded that responsibility be accepted and that steps should be taken to make sure such errors did not occur again.

This summary illustrates the way in which the convention has operated recent years. Vicarious responsibility has not always been adhered to - the Friedlander and Upton cases illustrate this. But this does not mean that the

⁵³ (1996) 555 NZPD 12921.

⁵⁴ (1996) 555 NZPD 12922.

doctrine no longer exists, nor that it is no longer relevant. There have also been cases in which ministers have accepted and satisfied the explanatory and amendatory components of the convention. Because the convention is still followed, it should not be considered irrelevant. The correct interpretation of the convention was exemplified by the approach that Marshall took to his responsibility for the errors that caused the accident at Cave Creek. What Semple began when he stated "I am responsible but not to blame", has transformed into a convention which requires the minister to accept 'responsibility', and then work to remove the factors that allowed the error to occur. Such an approach is consistent with the way in which the convention has developed in Britain.

Documents produced by the Government imply that this is the approach that should be taken by ministers when they are faced with vicarious responsibility. The State Services Commission's draft guidance paper for senior public servants stated with regard to ministerial responsibility that:⁵⁵

On occasion this may require a minister to account for actions of a department in which errors have been made even though s/he may have had no knowledge of or involvement in those actions. So although not directly responsible for the actions of their departments, Ministers must answer for them and attempt to give reassurance that specific departmental acts of commission or omission will not be repeated.

It is significant that these guidance principles state only that the minister has to account for the actions of a department, *answer* for the department and

⁵⁵ State Services Commission "The Public Service and Government: Extracts from the SSCs project: *Guidance on Principles, Conventions and Administrative Practice* (Public Service Senior Management Conference, 9-10 September 1993) 2.

give *reassurance* that the error will not be repeated. This endorses the current status of the convention.

The *Cabinet Office Manual* also couches vicarious responsibility in terms of 'accounting' to Parliament. It notes that ministers do not have operational responsibility for their departments, but rather responsibility for the overall policy.⁵⁶ This alludes to the divisibility of responsibility between the minister and the chief executive of the department. Neither the State Services Commission's guidance principles nor the *Cabinet Office Manual* have any reference to resignation as a part of the convention. This confirms the approach that has been followed in New Zealand.

D A Political Interpretation

The interpretation of the convention of vicarious responsibility will at times differ according to whether the person interpreting the doctrine is a member of the government or the opposition. This part of the paper will address varying interpretations of the doctrine and will establish that in some cases interpretations are politically motivated.

In 1984 with reference to the cost overruns of the Maniototo irrigation scheme, Geoffrey Palmer (then the deputy leader of the Opposition) stated clearly that ministerial responsibility meant that ministers were ultimately responsible to the public for the actions and errors of public servants. He was

⁵⁶ *Cabinet Office Manual* (Cabinet Office, Department of the Prime Minister and Cabinet, Parliament Buildings, Wellington, 1996) 24.

reported in the *Otago Daily Times* as saying that "[w]here gross negligence occurs the rules of the system are that the Minister is responsible, and he must resign".⁵⁷ This makes no distinction between a situation when the minister knows of the negligence and when he or she does not. Yet three years later (when a minister in the Labour Government), Palmer stated that it was patently unrealistic for a minister to accept responsibility when a public servant had acted contrary to policy and instructions without the knowledge of the minister.⁵⁸ The interpretation placed upon what the convention requires will often be influenced by the political status of the interpreter. It is to the advantage of the Opposition to place pressure upon the Government, and exaggerating the requirements of the convention in order to show the Government in a bad light is one such tool - political players will manipulate the convention to achieve political ends.

In the heat of the parliamentary debate over the Commission of Inquiry into the Cave Creek tragedy there were many calls for the resignation of Dennis Marshall. These calls came from members of Opposition parties only, and members of the governing party defended Marshall's stance.⁵⁹ This again illustrates the use of the convention by Opposition parties as a political tool to discredit the Government. The calls for a resignation supported the 'classic' interpretation of the convention as asserted by Dicey. Winston Peters provided a strong critique of the current status of the doctrine, arguing that the doctrine has been trampled on in the past, and that Marshall should

⁵⁷ *Otago Daily Times*, Dunedin, New Zealand, 15 January 1984, page reference unknown, cited in Watson, above n 22, 161.

⁵⁸ Above n 8, 47.

⁵⁹ (1995) 551 NZPD 10089.

resign. But he too, in the past as a minister, had agreed a ministerial resignation in such circumstances was unnecessary.⁶⁰ His stance had changed considerably from when he was a minister himself, demonstrating a lack of respect for, and the political nature of, the convention.

Political parties are a dominant force in New Zealand politics, which explains the political operation of the convention. It is in the interests of opposition party members to discredit the government by asserting the classical view of the convention and calling for the resignation of the minister. Palmer acknowledges that calls for ministers to resign are usually "obscured by political invocations of ministerial responsibility".⁶¹

Much of the misunderstanding in the media and amongst the public can be attributed to political calls for resignation designed to discredit the government rather than to enforce convention. Such cynical manipulation of the convention highlights a lack of respect shown to it by some members of Parliament. But this does not detract from the role that the convention has to play. The next part of the paper will show that despite manipulation on the part of some, the convention still commands respect from many ministers. Ministerial responsibility is still crucial to maintaining the responsibility of ministers to Parliament.

⁶⁰ (1995) 551 NZPD 10035.

⁶¹ G Palmer and M Palmer *Bridled Power: New Zealand Government under MMP* (Oxford University Press, Auckland, 1997) 72, 75.

E *The Prevailing View of the Players*

The way in which the convention operates in reality is determined by those to whom it applies - ministers. It is therefore relevant to investigate the views held by those involved in the system, outside the heat of political debate. On 23 April 1997, I sent a letter to all ministers and to the leaders of the opposition parties, requesting their views on the existence and relevance of the convention, and whether the state sector reforms have altered, or should alter the nature of the convention. I received 13 responses, by letter and interview.⁶² Seven out of the 10 responses from ministers indicated that vicarious responsibility requires the minister to account for errors made by his or her department, and to take action to ensure that such an error will not recur.⁶³ It is only in situations where policy promoted by the minister caused the error to occur, or the minister knew or should have known of the potential for the error to occur, that the minister should have to take a higher degree of responsibility by resigning. Such categories fit into the concept of primary rather than vicarious responsibility.

This dominant viewpoint is represented by the Minister of State Services, Jenny Shipley. Shipley states that vicarious responsibility requires the

⁶² Hons P McCardle, S Upton, M Williamson and D McKinnon did not comment due to busy timetables. No response was received from Hons T Henare, L Smith, B English, J Luxton, J Delamere, M Bradford, B Donnelly, C Fletcher, N Smith, D Morris, N Kirton, R MacDonald and H Clark.

⁶³ Two out of the other three did not indicate their personal views. Hon P East included a photocopy of the relevant passage from the *Cabinet Office Manual*, above n 56, and Hon D Graham included a photocopy of an article by John Martin on the subject, rather than indicate their own personal views as requested.

minister to account to Parliament and the public through the formal mechanisms of Parliament such as parliamentary debates and questions, and the informal mechanisms provided by the media. Such accountability is in the form of answering to Parliament for any errors that have occurred through policy or the actions of their departments. Resignation should only be an issue in the rare case in which the minister is personally culpable.⁶⁴ Shipley's perspective is supported by the Minister of Education, Wyatt Creech, who states that "people should only be personally accountable for what they are personally capable of doing".⁶⁵

Such views are not the only ones that exist with regard to how the convention should operate. The Minister of Housing, Murray McCully, is of the belief that simply answering in Parliament and 'putting things right' is not what the essence of the doctrine entails, and that current practice has demeaned it. He believes that the public and the House of Representatives require symbolic responsibility to be exercised.⁶⁶ In contrast, the Minister of Police Jack Elder believes that responsibility only extends as far as "events and actions which the minister might reasonably have known about and had power to deal with".⁶⁷ This perspective is supported by Richard Prebble, the leader of ACT New Zealand, who holds that ministers should not be responsible for "actions that they neither knew about or were in any way

⁶⁴ Letter, Hon J Shipley to M Faull, 26 May 1997. These views are affirmed by the Prime Minister, Rt Hon J Bolger; the Deputy Prime Minister, Hon W Peters; the Minister of Finance, Rt Hon W Birch and the Minister of Social Welfare, Hon R Sowry.

⁶⁵ Letter, Hon W Creech to M Faull, 7 May 1997.

⁶⁶ Interview with Hon M McCully, 13 May 1997.

⁶⁷ Letter, Hon J Elder to M Faull, 2 May 1997.

negligent".⁶⁸ These views represent the extremes of political opinion with regard to how the convention should be approached.

The relationship between the public service and ministers is integral to the In 1987 a similar survey was conducted of ministers in the fourth Labour Government. Seven out of the 11 comprehensive replies argued that a minister has to answer to Parliament for departmental errors, and must make sure that such errors are addressed and do not recur.⁶⁹ Again, resignation would only be expected if the error was the personal fault of the minister. The then Prime Minister David Lange made this point very clearly, stating that:⁷⁰

Where an action had been taken by an official of which the minister had no prior knowledge and the conduct of the official was reprehensible, there is no obligation to endorse what he believed was wrong or to defend what was clearly an error of his [or her] department. However, the minister must remain constantly responsible to Parliament for the fact that something had gone wrong.

The prevailing view of the players involved in interpreting the convention of vicarious responsibility supports the approach adopted by Marshall following the Cave Creek tragedy. The expression of ministers past and present is that the minister should only be held to 'blame' for his or her own acts or policy. In respect to the acts of public servants the minister should provide an account to Parliament and the public and work to ensure such errors do not recur. Such an interpretation still fulfils the requirement of responsibility to Parliament, without placing unrealistic expectations on ministers.

⁶⁸ Letter, Hon R Prebble to M Faull, 6 May 1997.

⁶⁹ Wood, above n 31, 58-76. Only one minister disagreed with this interpretation of the convention, and the other three did not specifically address this issue.

⁷⁰ Letter, Hon D Lange to P Wood, 29 April 1987, cited in Wood, above n 31, 68.

IV THE PUBLIC SECTOR AND VICARIOUS RESPONSIBILITY

The relationship between the public service and ministers is integral to the notion of vicarious responsibility. The traditional corollary to vicarious responsibility was the principle of public servant anonymity, meaning that ministers could take credit, but also the responsibility for the actions of public servants. The principle of public service anonymity has changed in recent years, and this raises the issue of whether vicarious responsibility should change alongside. This will be first addressed in relation to the changing accountability mechanisms for officials and secondly in relation to public sector reforms and the respective accountabilities of chief executives and ministers.

A *The Accountability of Officials*

Public servants are frequently called to provide information and to give advice to select committees. They are directed to answer questions on issues of concern and to explain departmental actions. Such accountability mechanisms would prima facie suggest that public servants, rather than ministers, are being made accountable to select committees for departmental actions and the delivery of advice. But public service guidelines are clear that when a public servant appears before a select committee it is on behalf of the minister. If the questions are with regard to policy or politics the official may refer the question to the minister. The minister may direct an official not to

answer certain questions or address certain issues, or to answer questions in a specific way.⁷¹ Ultimately the appearance of individual public servants before select committees is under the control of the minister and does not have any direct implications upon vicarious responsibility.

B The Public Sector Reforms and Vicarious Responsibility

In 1988 significant reform was carried out upon the public service in an attempt to reduce bureaucracy, promote efficiency and to clarify lines of accountability. The very nature of the public service was altered. As the relationship between ministers and their officials is central to the convention it is necessary to address whether this reform has altered the operation of vicarious responsibility in New Zealand.

The actual reforms will be examined, and then the impact of these reforms upon vicarious responsibility will be analysed. The conclusion will be drawn that the reforms have merely reinforced an existing distinction that operated within the convention.

1 The reforms

The fourth Labour Government introduced two major reforms that were designed to alter the nature of the public service. These were the State Sector Act 1988 and the Public Finance Act 1989. The State Sector Act

⁷¹ State Services Commission "The Public Service and Parliament" in *Public Service Principles, Conventions and Practice* (State Services Commission, Wellington, 1995) 5.

defined relationships vertically from the minister to the chief executive and downwards, and identifies the role of each part of the public service. The Public Finance Act 1989 specifies that the minister of a department is to identify the outcomes that he or she requires the department to produce through their outputs. Outputs are the products or services that a department provides whereas outcomes are the impacts that those products and services have on the general community. Outcomes are identified as the overall policy that the minister wishes to implement. A performance agreement is drawn up between the minister and the chief executive and the chief executive is responsible for the delivery of outputs to achieve the required outcomes.

2 *The impact on vicarious responsibility*

The principle of public service anonymity was being eroded in New Zealand long before public sector reform occurred. Staff at the scene of the Maniototo Affair were blamed for overspending and an inadequate performance.⁷² The same approach was taken by Simon Upton in 1992, after public sector reform, when he focused attention on the conduct of his department and advisory committees.⁷³

The State Sector Act further supports such divisibility of responsibility, although it leaves ultimate political responsibility with the minister. This can

⁷² Above n 22, 159.

⁷³ J Martin "The Role of the State in Administration" in A Sharp (ed) *Leap Into The Dark: The Changing Role of the State in New Zealand since 1984* (Auckland University Press, Auckland, 1994) 41, 50.

be seen in s 32 of the Act, which states that the "chief executive of a department *shall be responsible to the appropriate Minister*".⁷⁴ This infers that the chief executive has responsibility for the operational activities of the department. This interpretation is supported by the references to ministerial responsibility in the *Cabinet Office Manual*. It was noted above that the *Cabinet Office Manual* advocates the divisibility of responsibility.⁷⁵

In practice this division is difficult to apply. This can be seen in an analysis of vicarious responsibility after the Cave Creek tragedy. There were calls for the resignations of both the minister and the chief executive. Whether the failure was one of policy, for which the minister would be responsible, or a direct failure to deliver an output, for which the chief executive would be responsible under the State Sector Act is unclear, and public opinion on the issue was diverse. This lack of clarity is highlighted by Wyatt Creech, who argues that it is up to the individual minister to determine whether a departmental error was brought about due to a failure of policy.⁷⁶ This is problematic as it calls for a subjective assessment of the situation by the minister whose career may be at stake. As was seen in the aftermath of the Cave Creek tragedy, perceptions will differ as to whether the failure was one of policy or not, and unless clearly at fault, the minister is unlikely to find that an error is due to policy.

⁷⁴ Emphasis added.

⁷⁵ Above n 56.

⁷⁶ Above n 65.

By advocating the divisibility of responsibility between the relevant minister and chief executive, the public sector reforms create another issue which impacts upon vicarious responsibility. It allows for a scenario where the chief executive, being responsible for operational activities, is considered to hold full responsibility and is therefore encouraged to resign. This scenario was almost realised in the aftermath of the Cave Creek tragedy. Richard Prebble stated with regard to the Cave Creek tragedy that Bill Mansfield, the Chief Executive, should have resigned as he had failed to provide safe systems within the Department of Conservation.⁷⁷ Mansfield chose not to resign after a series of inquiries purportedly cleared him of responsibility, but it is arguable whether the Commission of Inquiry actually cleared him. It found 'systemic failure' within the Department of Conservation, but the State Services Commission found the system 'inadequate', thus removing blame from Mansfield. As noted above with respect to ministers, there are difficulties and diversities of opinion when attempting to locate responsibility.

In an attempt to clarify when a chief executive would be expected to resign, the State Services Commission produced a report on the standards expected of chief executives in terms of accountability and responsibility.⁷⁸ It outlines the circumstances in which a chief executive would be required to resign, and of particular note states that in some circumstances even though a chief executive may not be at fault, "the events that have taken place and the public perception of them, will preclude or seriously impede the chief

⁷⁷ Above n 68.

⁷⁸ State Services Commission *Responsibility & Accountability: Standards Expected of Public Service Chief Executives - Key Documents* (State Services Commission, June 1997).

executive from continuing in office".⁷⁹ It is stressed that such a conclusion would be reached by the chief executive independently. By making such a statement, the divisions in responsibility requirements between the minister and chief executive are clear. The principle of public service anonymity is no longer fundamental to the concept of vicarious responsibility, and the chief executive is fully accountable to the public. This supports the argument that the convention no longer requires the minister to accept blame for the errors of public servants. Chief executives have now been identified as having a clear role in the accountability and responsibility process.

Ultimately the reforms have divided direct responsibility for the errors of government departments. The minister is still responsible to Parliament in the explanatory and amendatory sense for any departmental errors, but is not expected to be sanctioned for errors that he or she knew nothing about. Although this is undoubtedly an improvement as it clarifies the location of responsibility and blame, there are still definitional problems. In borderline cases it will be the minister who personally decides whether the error was one of policy which would demand sanctions, or an operational error for which political responsibility only would be required.

⁷⁹ Above n 78, 10.

V ANALYSIS

This part of the paper will draw together all the main issues that have been addressed. It will then assess the changes that have occurred to vicarious responsibility and identify the degree to which the convention has been changed.

A *The Changes: A Summary*

Vicarious responsibility was a product of an unusual era in British politics, and the political behaviour in that era is unlikely to recur. The lack of political parties meant that ministers could be held directly responsible to Parliament for the conduct of their departments, and forced to resign if the circumstances warranted.

The development of political parties placed constraints upon the exercise of such direct responsibility to Parliament. Owing to the firm control exercised over parties it is no longer possible for a minister to be forced to resign unless members of the governing party also lose confidence. As noted above when examining the nature of constitutional conventions, it is possible for a convention to be altered through a widespread change of practice. Owing to such changing parliamentary circumstances the concept of vicarious responsibility has been fundamentally altered. Ministers are no longer responsible for the errors of their department in the 'resigning' sense. What the convention does mean is that ministers are required to account to

Parliament for what has gone wrong and to show that efforts are being made to put the error right and to make sure it is not repeated. Ministers should only be subject to such 'direct' responsibility if the error was a personal one, or the minister should have known that the error could take place. A minister should only resign in cases of primary, not vicarious, responsibility. Public sector reform in New Zealand has confirmed these changes, by allocating direct responsibility to the minister for policy outcomes, and making the chief executive responsible to the minister for the delivery of outputs.

This is not a 'new' convention of vicarious ministerial responsibility, but an evolution. The convention has evolved as a result of the practices of parliamentarians, and through the changes in the political environment, to meet the requirements of contemporary society.

B Assessment of the Change

Pragmatically, the domination of the political system by political parties means that it is unlikely that the sacrificial component of vicarious responsibility will ever be exercised. Theoretically it may be possible in an MMP coalition government where no party is dominant, but the likelihood of coalition members jeopardising their hold on government is slim, unless the negative implications of protecting a minister are judged too great. The changes that have taken place in the doctrine will be assessed in terms of the what the convention should be addressing, and whether the amended nature of vicarious responsibility still achieves this.

The original reason ministers were made responsible to Parliament was to provide a check upon the exercise of unfettered power. Parliament is the elected representative of the people and Parliament's role is to ensure that the Executive is achieving the right results. If the Executive is not achieving the results required, Parliament must demand accountability. When the convention was established an effective (but not necessarily commonly practised) way of forcing ministers to be accountable was to force a resignation. Today, the power of Parliament and the media to demand an explanation from a minister, and to demand that action be taken, means that explanatory and amendatory responsibility is the most effective manifestation of vicarious responsibility. The sanction of resignation only has symbolic value - Marshall believes that the Conservation Department would not have received increased funding had he not stayed and fought for it.⁸⁰ The division of accountability between the minister and the chief executive means that those who are directly responsible are held accountable, and the minister should accept explanatory and amendatory responsibility to Parliament. The purpose of vicarious responsibility is exercised far more effectively in this manner.

Distinguishing between instances of vicarious and primary responsibility is a problem in this amended version of ministerial responsibility. As set out above, Creech has stated that it is up to the minister to decide whether a

⁸⁰ Interview with Hon D Marshall, 10 June, 1997.

departmental error was brought about due to a failure in policy or a failure that the minister could not have been aware of, and only if it is a failure in policy should the minister consider tendering his or her resignation. The only case of a minister ever having resigned due to ministerial responsibility in New Zealand was Apirana Ngata in the 1930s, due to a conflict between his personal and ministerial interests. There is no case of any minister resigning because of departmental errors which he or she knew nothing about. There is also no case of any minister resigning due to personal fault. The definitional problems noted above were illustrated in the Marginal Lands Board Affair of 1980. The Minister of Lands had made a representation on behalf of the daughter of the Minister of Agriculture to the Marginal Lands Board. A Commission of Inquiry found that there was no impropriety in the acts of either the Minister of Lands or the Minister of Agriculture, although they had acted unwisely. Therefore they were not required to resign.⁸¹ The Marginal Lands Board Affair illustrates the difficulty in defining the degree to which a minister must be personally at fault before a resignation will be required. It is a question of interpretation (often subjective) as to the conclusion that will be reached. The fact that no minister since Ngata has resigned due to ministerial responsibility shows that it will be a very rare circumstance for a minister to accept sanctions. If ministers are merely repositioning blame when they are the ones that should be accepting blame, then the purpose of the convention is being defeated in New Zealand.

⁸¹ Above n 8, 48.

Despite these definitional problems and the potential for political manipulation, the current form of vicarious responsibility still has a vital role to play in compelling ministers to remain responsible to Parliament for the activities of their departments. Although in a somewhat diluted form compared to the original version, it remains one of the few mechanisms that can be invoked to hold ministers to account.

VI CONCLUSION

It has been established that individual ministerial responsibility still holds a very relevant place in New Zealand government, but it is in a diluted form to that which was exercised when the convention was established. The convention has been altered through the widespread practices and beliefs of ministers. Ministers are no longer required to resign for vicarious responsibility, if indeed they ever were. Rather they are held politically responsible to Parliament by being made to account for any errors made by their departments, and to explain and carry out procedures to ensure such errors do not recur. This manifestation of vicarious responsibility is the most effective mechanism to ensure responsibility to Parliament.

It remains problematic as to when a minister should resign for reasons of primary responsibility. An ongoing problem that needs to be resolved is the relative ease with which a minister can reject personal blame in favour of the less severe responsibilities that vicarious responsibility entails.

Ultimately it is for the minister to make the decision whether to accept personal blame or only political responsibility. If the circumstances only demand the exercise of political responsibility then the requirements of the convention are still being met. However if the circumstances demand that the minister accept blame as well as responsibility, and the minister ignores this, then the requirements are being ignored. In New Zealand the convention still has a significant role, but it has become easy for a minister to take only political responsibility and not accept personal blame. When this occurs the original purpose of the convention is denied.

Despite the potential for manipulation, this essay has established that the current form of the convention still has a place in New Zealand Government as an effective tool with which to hold ministers responsible for the actions of their departments.

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