

ARNIKKA MACINTYRE DALY

**THE POLITICAL NEUTRALITY OF THE
NEW ZEALAND PUBLIC SERVICE**

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ABSTRACT

This paper explores the operation of the convention of political neutrality in the New Zealand Public Service. Political neutrality encourages effective government by ensuring that the public service is responsive to its political masters, and by facilitating public and government confidence in the public service.

The past two decades have seen some significant changes in the role and management of the public service, particularly in relation to chief executives. These changes have increased the contact that public servants are likely to have with non-government politicians in the conduct of their official duties. These changes have also increased public awareness of, and interest in, the operation of the public service. The increased attention to individual public servants generated by these changes means that behaviour by public servants is more likely to be identified by politicians and the public as evidence of political partiality than traditionally. The impact of these changes on political neutrality has been further accentuated by the overall reduced ability of the public service to protect the convention.

This paper considers the impact of these developments on the operation of the convention, and sets out ways in which this impact can be minimised. The public service culture can, and must, be revived to provide effective protection for this convention. More strict statutory provisions are necessary for public servants wishing to stand for Parliament. Finally, limited categorisation is required within the public service to provide clearer guidance for all public servants. If these steps are not taken, this paper asserts that the convention of political neutrality in the public service will be eroded, to the detriment of the efficacy and legitimacy of the New Zealand system of government.

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 12,920 words.

THE POLITICAL NEUTRALITY OF THE NEW ZEALAND PUBLIC SERVICE

I INTRODUCTION

The constitutional convention of the political neutrality of the public service plays a significant role in the continued efficacy and accountability of the New Zealand Public Service. As such, it has been a central feature of the public service since major reforms in 1912.¹ The convention of political neutrality encourages effective government in two ways.

Political neutrality provides a mechanism to ensure that the public service is responsive to its political masters, and does not develop an independent political agenda. This is vital for individual ministerial responsibility to effectively control the public power exercised by the public service. This mechanism for accountability to Parliament, and through Parliament to the public, prevents this powerful limb of government from becoming divorced from the needs of the public.

Political neutrality further promotes effective government by ensuring that the public service is able to adequately meet the needs of current and future governments. Political neutrality protects the relationship between current Ministers and the public service in a way that does not threaten future relationships if the government changes hands. This prevents the re-shuffling of the public service with every change of government.²

The perception of political neutrality is as important for these purposes as the actual neutral implementation of policy by the public service. This public perception

¹ The Public Service Commission (the predecessor of the current State Services Commission) was established in 1912 to employ all public servants, thus protecting the public service from political interference and enabling political neutrality. See: State Services Commission *Briefing for the Minister of State Services* (Wellington, 2002.) 30.

² This re-shuffling is necessary in politicised bureaucracies such as in the United States: Matthew Palmer "Towards an Economics of Comparative Political Organization: Examining Ministerial Responsibility" [1995] *Journal of Law, Economics and Organisation* 164, 181.

is necessary to maintain public confidence in the public service. Without this confidence, the democratic legitimacy of the New Zealand system of government may be compromised.

In this paper I explore the operation of the convention of political neutrality in the New Zealand Public Service. Initially I will describe the constitutional justifications for the convention, and the relationship between this convention and other conventions governing the public service. I will then briefly outline the limited ways in which the convention has been codified in statute and constitutional documents. In the central part of this paper I will describe some of the significant developments of the past two decades, and the impact that these have had on the public service. I finally evaluate the effect of these developments, and set out some recommendations for the effective protection of political neutrality in New Zealand.

For the purposes of this paper, I will use the definition of 'public service' set out in the State Sector Act 1988.³ 'Public servant' will be used to denote all public service employees, including chief executives.⁴ Although some of this discussion touches upon the behaviour expected of other government employees, such as crown entity employees, this paper will not specifically consider the application of political neutrality to these employees.

II CONSTITUTIONAL BACKGROUND

A Public Power Exercised by the Public Service and the Need for Control

The New Zealand Public Service consists of 36 government departments, who employ a total of 30,000 employees.⁵ The public service supports Ministers in

³ The State Services Act 1988, s 27 defines 'public service' as all government departments listed in the First Schedule of that Act. I have chosen this definition as the Public Service Code of Conduct only applies to these public servants.

⁴ The term 'official' will also be used to identify higher-level public servants.

⁵ State Services Commission *Briefing for the Minister of State Services* (Wellington, 2002) 33.

carrying out their ministerial responsibilities.⁶ This role effectively means that the public service carries out the administration of the country, earning the public service the description: “the fourth branch of government”.⁷ The public service is the chief source of information and advice for the government when developing policy. The public service then implements the government policies that result. This role encourages political stability, by providing continuity in the provision of public services:⁸

The public service is the machinery of government. If Cabinet and individual ministers direct something to be done, or the law so requires, it is usually the public service that does it. The public service also advises Cabinet ministers as to what they should want done. Because of this, and because they generally have more information, expertise and time to think than ministers, public servants have power.

Much of the power exercised by the public service comes from the discretion apparent in the policy advice role of senior officials. In their capacity as policy advisors these public servants identify material issues and facts for consideration by their Minister. This control over the flow of information to Ministers can give the public service a significant ability to shape the direction that policy will take:⁹

Quite simply, decisions are made on the basis of the information available, and this means that the content of decisions is invariably structured by the advice offered. Moreover, as the principal source of the advice available to politicians, bureaucrats effectively control the flow of information: politicians know what civil servants tell them. Information can thus be concealed or ‘shaped’ to reflect the preferences of the civil service.

⁶ Cabinet Office *Cabinet Manual 2001* (Wellington, 2001), para 2.143.

⁷ Andrew Heywood *Politics* (Macmillan Press Ltd, London, 1997) 350.

⁸ Sir Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand Government under MMP* (3ed, Oxford University Press, Auckland, 1997) 78.

⁹ Heywood, above, 346.

The public service is also potentially powerful in its policy implementation role. Politicians can seek alternative sources of policy advice, yet they are compelled to leave policy implementation in the hands of the public service. This is a significant source of power.¹⁰

Control of implementation gives civil servants the opportunity to reinterpret the content of policy, as well as to delay or even thwart its introduction.

Although Ministers provide departments with policy direction, their lack of time, information and experience often limit the extent to which Ministers can provide detailed instructions to their department.¹¹ Departments regularly exercise discretion when implementing policy, as Ministers delegate decision-making about administrative details to their department. Responsiveness to the government of the day is therefore essential for the constitutional legitimacy of the public service. Without this, non-elected officials would impose an interpretative force upon government policy that is not consistent with democratic control.

B Relationship between Political Neutrality and Other Conventions Governing the Public Service

1 What are constitutional conventions?

Constitutional conventions are accepted norms of political behaviour that are generally acknowledged to have attained a significance and status worthy of general acknowledgement.¹² They constantly evolve to reflect changing political practice and political science.¹³ Conventions “co-ordinate the practices of government and provide means for co-operation between the organs”.¹⁴ In this way, conventions

¹⁰ Heywood, above, 351.

¹¹ Heywood, above, 352.

¹² Phillip Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers Ltd, Wellington, 2001) 273.

¹³ Joseph, above, 271.

¹⁴ Joseph, above, 271.

provide some control over the exercise of legal power, and promote responsible government in accordance with democratic will.¹⁵ Although conventions are very influential, they are not laws and for this reason they cannot be enforced in the courts. The convention of political neutrality can only be enforced in court to the extent that it has been reiterated in statute. It can also only be used to base disciplinary action to the extent that political neutrality forms part of the conditions of a public servant's employment contract.

2 *The convention of political neutrality of the public service*

The constitutional convention of political neutrality requires all members of the public service to act neutrally towards political parties in the exercise of their functions. Political neutrality enables the public service to maintain a positive working relationship with the current government, while retaining the ability to foster the same relationship with an incoming government, thus maintaining public confidence.

A relationship of trust and confidence between department and Minister is particularly important when Ministers have multiple portfolios. Ministers are very reliant on their departments to inform and advise correctly and comprehensively, to undertake the day-to-day activities of the department, and to implement government policy.¹⁶ If the Minister has any concern that this reliance is misplaced, the Minister will be unlikely to trust the department with important matters:¹⁷

[I]f the relationship between [Ministers and the public service] breaks down then the democratically-elected component of government loses its ability to govern, and the

¹⁵ Joseph, above, 271.

¹⁶ Juliet Philpott *Public Servants and Public Accountability: the Convention of Anonymity* (LLB (Hons) Research Paper, Victoria University of Wellington, 2001) 6.

¹⁷ Matthew Palmer *The Relationship between Ministers and Public Servants: Forum Session 1: Constitutional Overview* (Paper presented to the New Zealand Centre for Public Law and the Institute of Policy Studies forum "The Relationship between Ministers and Public Servants", Wellington, 25 October 2001) 1.

component of government chosen for its competence in advising on and implementing decisions loses its legitimacy.

This is likely to occur if Ministers feel that the public service is following an internal political agenda, hence the importance of political neutrality.

When the government changes, an incoming government must also feel confident that the public service will act loyally, and conduct their duties in a politically neutral manner for the next term of government. This is the 'litmus test' of a politically neutral public service.¹⁸

In addition, it is essential that the New Zealand public feel that the public service are responsive to their needs, through their elected representatives. By fostering neutrality in the provision of advice and the implementation of policy, the convention of political neutrality helps to ensure that the public service remains responsive to government direction. This helps maintain the democratic legitimacy of government.

In order to meet the needs set out above, public servants must not only act in a politically neutral manner, but must also appear to be acting in this way at all times. Although the public is unlikely to be able to identify whether public servants are in fact acting neutrally, the media provides extensive publicity for any semblance of political behaviour. This publicity can have a corresponding impact on public confidence in the service. As a result, the perception of neutrality can at times be even more important than actual neutral behaviour.

For higher-level public servants, this can mean that their obligation of political neutrality extends beyond their professional work to include behaviour in their personal capacity. This is identified in the Public Service Code of Conduct,

¹⁸ Graham Scott *Public Management in New Zealand: Lessons and Challenges* (Business Roundtable, Wellington, 2001) 78.

which emphasises that public servants must not permit their personal activities to interfere with, or appear to interfere with, their obligations to government.¹⁹

3 *Political neutrality and individual ministerial responsibility*

Public accountability of the public service is maintained through the political doctrine of individual ministerial responsibility. Under this doctrine, Responsible Ministers are required to account to Parliament for the conduct of their relevant department. When departmental error occurs, the Minister must account for this error, even if they were not involved in, or had no knowledge of the circumstances leading up to the error. At its most extreme, individual ministerial responsibility can lead to the dismissal of the Responsible Minister.²⁰

The doctrine of individual ministerial responsibility is predicated upon the assumption that government departments are in fact controlled by, and are responsive to the government of the day through the Responsible Minister. The convention of political neutrality helps to ensure this responsiveness by reducing the potential for political interference in the operation of the public service. In this way the risk of the public service being used as a powerful political machine is reduced.²¹

Individual ministerial responsibility only provides effective control if electoral competition is capable of having a real impact upon the operation and direction of the public service.²² If the public service were no longer responsive to their political masters, Ministers would be reluctant to take political responsibility for departmental error.

¹⁹ Consider for instance: State Services Commission *Public Service Code of Conduct 2001* (Wellington, 2001) 9.

²⁰ Sir Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand Government under MMP* (3ed, Oxford University Press, Auckland, 1997) 72.

²¹ Andrew Heywood *Politics* (Macmillan Press Ltd, London, 1997) 351.

²² Matthew Palmer "Towards an Economics of Comparative Political Organization: Examining Ministerial Responsibility" [1995] *Journal of Law, Economics and Organisation* 164, 181.

Concern that the New Zealand public service will develop an internal political agenda is not entirely unfounded. At certain stages of New Zealand's history the public service has been accused of this, due to its lack of responsiveness to government. In the 1970s and 1980s, some critics identified the long-term and broad orientation of the public service as meaning that the public sector balance had shifted too far from political control.²³

It was argued by critics of the third Labour government (1972-5) that the combination of an entrenched conservative public service culture and the policy inclinations of senior officials had frustrated and even subverted their policy objectives.

This risk has been reduced by the shorter appointment periods for chief executives under the State Sector Act 1988.²⁴ There is always a risk, however, that a department will develop an internal culture that is not consistent with the government's objectives. This is a particular risk when an incoming government wishes to take a very different policy approach from previous governments.²⁵ As a current Minister noted:²⁶

When you are a Minister of an area that you know very little about, your department tends to continue in the same direction that they had been going under the previous government. In this situation, they lead the Minister, not the Minister leading them. This is when you become wary of public servants following an internal culture.

A department culture can become so embedded that a public servant is unaware that they are following it. This can then generate a lack of responsiveness

²³ Jonathan Boston, John Martin, June Pallot and Pat Walsh *Public Management: the New Zealand Model* (Oxford University Press, 1996, Auckland) 56.

²⁴ Chief executives are now appointed for renewable periods of up to five years: State Sector Act 1988, s 38(1).

²⁵ This was the case for the Labour-Alliance Government (1999-2002), coming into power with very different policies from those that had been followed by the public service under the previous (predominantly National-led) governments in the 15 years prior. (Interview with A, anonymous current Minister (the author, Wellington, 10 September 2002).)

²⁶ Interview with A, anonymous current Minister (the author, Wellington, 10 September 2002).

within the department that has the effect of compromising ministerial responsibility as effectively as if this were deliberate.

This risk is been highlighted by the Mixed Member Proportional electoral system (MMP). MMP increases the likelihood that a department will have to deal with a Minister who is inexperienced not only in executive management but also in government, and even Parliament. Margaret Wilson's appointment as a Minister in 1999 shows that a party can bring a non-MP on to its list and straight into Cabinet. In addition, a small party may reach the 5% threshold for seats in Parliament, and gain a pivotal position (even membership of a governing coalition) all in one election.²⁷

4 *Political neutrality and public service loyalty*

In addition to the conventions of political neutrality and individual ministerial responsibility, the New Zealand public service is governed by the convention of loyalty to the government of the day. This convention demands that public servants comply with the requests of their Responsible Minister, while simultaneously meeting the needs of the government of the day.²⁸

The convention of political neutrality limits this loyalty. It requires that public servants be loyal to the government of the day, without displaying partiality to the political parties that make up government.²⁹

Public servants serve the Government in the formulation and implementation of its policies, but they do not serve the interests of the political parties that comprise the Government.

²⁷ Consider Labour's adoption of the Progressive Coalition party as coalition partner following the 2002 elections. This party remarkably did not even break the 5% threshold for party seats, relying solely on its two electorate seats.

²⁸ State Services Commission *Public Service Code of Conduct 2001* (Wellington, 2001) 10.

²⁹ State Services Commission *Responsibility and Accountability: Standards Expected of Public Service Chief Executives - Key Documents* (Wellington, June 1997).

At times this distinction may be difficult for public servants to draw. When a public servant is faced with a Minister's request, political neutrality demands that that public servant ensure that this request is on behalf of the government, rather than the Minister's political party. This distinction may even be impossible to make, as the two will sometimes comfortably overlap. During an election period, however, political tension runs high, and public servants must ensure that their conduct cannot be said to be politically partial.³⁰

One way in which a balance between political neutrality and loyalty to the government is maintained relates specifically to officials who provide policy advice to the Minister. The Cabinet Manual states:³¹

Although regard must be had to the policies and priorities of the government of the day, the advice given by officials must be 'free and frank', so that Ministers can take decisions based on all the facts and an appreciation of all the options.

The Public Service Code of Conduct reinforces this. It imposes a duty on officials to alert Ministers to all possible consequences of following particular policies, "whether or not such advice accords with Ministers' views."³²

It is vital that the public service manages this balance between loyalty and political neutrality effectively. If the public service appears to be too responsive to the government of the day, this can lead to suspicion by an incoming government that the public service is not politically neutral.

³⁰ The State Services Commissioner has sought to make this distinction easier for public servants by publishing *Guidance for Public Servants During Election Year* (Wellington, 2002).

³¹ Cabinet Office *Cabinet Manual 2001* (Wellington, 2001), para 2.147.

³² State Services Commission *Public Service Code of Conduct 2001* (Wellington, 2001) 10.

The constitutional convention of the anonymity of the public service is based on the principle that, in law, public servants are purely an extension of the Minister:³³

The employees of the department are the minister's agents; everything they do, they do in his or her name. In the eyes of the law, the permanent official is an anonymous instrument of the minister.

The conventions of political neutrality and anonymity complement each other. Anonymity demands that public servants remain faceless, fostering the illusion that executive government consists of no more than its democratic element, the Minister. If public servants develop a public presence through activities such as criticising the government, or responding to criticism by a Minister, they undermine the fiction of seamless government.³⁴ This complements political neutrality, which requires public servants to be entirely responsive to government, with no political persona or priorities of their own.

The past decade has shown a significant reduction in public service anonymity. No longer the anonymous instrument, the public has witnessed a chief executive challenging the State Services Commissioner in the Employment Court, alleging political interference in her non-reappointment.³⁵ Recent history has also shown a chief executive resigning from his position following the Cave Creek disaster, taking public responsibility for departmental error.³⁶ The Official

³³ Sir Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand Government under MMP* (3ed, Oxford University Press, Auckland, 1997) 71. (Referring to the *Report of the Royal Commission of Inquiry on the State Services in New Zealand*, Wellington, 1962, 31.)

³⁴ James, Colin *The Tie that Binds: The Relationship between Ministers and Chief Executives* (Institute of Policy Studies/New Zealand Centre for Public Law, Wellington, 2002) 72.

³⁵ *Christine Kathryn Rankin v A-G in respect of the State Services Commissioner* (2 August 2001, Employment Court Wellington, WRC 8/01, Goddard CJ.)

³⁶ Matthew Palmer "Ministerial Responsibility versus Chief Executive Accountability: Conflict or Complement?" (Paper presented at the Institute for International Research conference on "Analysing and Understanding Crucial Developments in Public Law", Wellington, 4 April 2001) 14.

Information Act has also reduced the anonymity of public servants, increasing public awareness of government decision-making processes and the role of officials in this process.

This loss of anonymity increases the level of media attention on public servants. This threatens public perception of political neutrality, by highlighting any examples of political behaviour by public servants.³⁷ This increased media attention means that low-level political activity by public servants has a more detrimental impact on perceptions of political neutrality than in the past.

Reduced anonymity also increases the risk that other actors will attempt to single out members of the public service for political advantage. The greater the public presence of public servants, the greater the risk that they will be targeted by political players, or by interest groups attempting to influence policy development or implementation. Each of these possibilities threatens the continued political neutrality of the public service.

III POLITICAL NEUTRALITY TODAY: LIMITED CODIFICATION

The convention of political neutrality has been codified to a certain extent by the Electoral Act 1993, the Public Service Code of Conduct 2001, and the Cabinet Manual 2001. These set out a combination of statutory obligations and behavioural guidelines for public servants.

A Electoral Act 1993

The Electoral Act 1993 promotes political neutrality by preventing public servants from qualifying for candidacy while they are actively employed by the

³⁷ This can be seen in the media attention that was devoted to the speech by then Governor of the Reserve Bank, Don Brash, at a 2001 Catching The Knowledge Wave conference. Although the Governor is not a public servant, this incident demonstrated how willing the media is to highlight any potentially political behaviour by government employees.

public service. The Act requires public servants who wish to become a candidate for election as a Member of Parliament (MP), to take leave for this purpose.³⁸

When a public servant is on leave for candidacy purposes, they are not permitted to carry out any official duties and are not entitled to receive a salary, although they may receive holiday pay.³⁹ If elected, their office as a public servant is deemed to have been vacated.⁴⁰ If they are not elected, they are eligible to return to their position as if they had been on leave for any other reason.⁴¹

B Public Service Code of Conduct 2001

The Public Service Code of Conduct 2001 (the Code) is issued by the State Services Commissioner under the State Sector Act 1988.⁴² The Code provides “minimum standards of integrity and conduct” for the public service.⁴³ The obligations owed by public servants to the government and to their Responsible Minister are set out in the Code as broad statements of principle. These obligations are then implied into the conditions of employment of all public servants.⁴⁴

The Code specifically recognises the convention of political neutrality.⁴⁵ It promotes the convention by restricting political activity, and any other activity that could compromise the convention:⁴⁶

Public servants need to ensure that their participation in political matters does not bring them into conflict, or the appearance of conflict, with their duty as public servants to act in a politically neutral manner.

³⁸ Electoral Act 1993, s 52(2).

³⁹ Electoral Act 1993, s 52(5).

⁴⁰ Electoral Act 1993, s 53(2).

⁴¹ Electoral Act 1993, s 53(2).

⁴² State Sector Act 1988, s 57.

⁴³ State Sector Act 1988, s 57.

⁴⁴ Interview with C, anonymous public servant (the author, Wellington, 4 September 2002.)

⁴⁵ State Services Commission *Public Service Code of Conduct 2001* (Wellington, 2001) 9.

⁴⁶ State Services Commission *Public Service Code of Conduct 2001* (Wellington, 2001) 13.

The Code reinforces the prohibition against public servants standing for Parliament unless they have taken leave, and describes activities that could pose a threat to political neutrality.⁴⁷ These activities include public comment on Government policy:⁴⁸

Public Servants should ensure that their contribution to any public debate or discussion on such matters is appropriate to the position that they hold, and is compatible with the need to maintain a politically neutral Public Service.

The Code emphasises that no matter how a public servant feels personally about a particular policy, they have an obligation to advise upon and implement this in a strictly politically neutral manner:⁴⁹

[P]ublic servants may not withhold relevant information from Ministers, nor seek to obstruct or delay a decision, nor attempt to undermine nor improperly influence Government policy (for example, by the unauthorised release of official information).

The obligations set out in the Code are reiterated in two further ways. Each government department produces a departmental code of conduct, based on the Public Service Code of Conduct. Departmental codes are tailored to the circumstances of individual departments to provide more specific guidance for public servants.⁵⁰ The State Services Commission also publishes further guidance material for public servants.⁵¹ Each of these publications emphasise political

⁴⁷ State Services Commission *Public Service Code of Conduct 2001* (Wellington, 2001) 14.

⁴⁸ State Services Commission *Public Service Code of Conduct 2001* (Wellington, 2001) 11.

⁴⁹ State Services Commission *Public Service Code of Conduct 2001* (Wellington, 2001) 10.

⁵⁰ State Services Commission *Briefing for the Minister of State Services* (Wellington, 2002.) Available on: <<http://www.ssc.govt.nz/display/document.asp?navid=115>> (last accessed 25 August 2002).

⁵¹ See for example: State Services Commission *Public Servants, Political Parties and Elections* (Wellington, 2002.)

neutrality, although neither departmental codes, nor Commission guidance material, form part of a public servant's conditions of employment.⁵²

C Cabinet Manual 2001

The Cabinet Manual sets out the key principles and procedures that a government expects to follow while in power. It does not create legal obligations, but provides a "sound, transparent and proven basis on which to operate."⁵³ The Cabinet Manual 2001 declares that:⁵⁴

The New Zealand public service is founded on the concept of political neutrality, enabling officials to advise Ministers of successive governments as part of the continuing process of government. Public servants implement the decisions of the government of the day and provide free and frank advice to Ministers.

The Cabinet Manual notes that when public servants undertake their professional duties they must comply with certain constitutional principles and values. These include the principles of neutrality, independence and the 'values of a career service.'⁵⁵

Political neutrality requires public servants to "ensure that their personal interests or activities do not interfere with, or appear to interfere with" their obligations to their Minister.⁵⁶ The Cabinet Manual anticipates that there may be situations where the demands of a public servant's position will prevent them from undertaking an activity in their personal capacity. The Cabinet Manual also requires that:⁵⁷

⁵² Interview with C, anonymous public servant (the author, Wellington, 4 September 2002).

⁵³ Cabinet Office *Cabinet Manual 2001* (Wellington, 2001.) Foreword by Hon. Helen Clark, Prime Minister.

⁵⁴ Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) para 2.143.

⁵⁵ Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) 5.

⁵⁶ Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) para 2.146.

Any contact between public servants and representatives of political parties within or outside the government should take place only with prior ministerial approval.

Such precautions are intended to ensure that a Minister retains their trust in their public servants. The Cabinet Manual further imposes an obligation on Ministers not to compromise the political neutrality of the public service. Although Ministers may require officials to provide factual or statistical material, officials “should not be required to offer comment or opinion on clearly political topics, such as policies mooted by other parties in Parliament.”⁵⁸

IV RECENT DEVELOPMENTS CHALLENGING THE CONVENTION

To say that public servants are technocrats is absolute rubbish. Everything that many public servants deal with is political because it is about resource allocation and it has values embedded in it. You can't make a tidy distinction between management and politics.⁵⁹

A The State Sector Act 1988 and the Public Finance Act 1989

The State Sector Act 1988 (SSA) and the Public Finance Act 1989 (PFA) represented a move from ‘command and control’, towards performance-driven management of the public service.⁶⁰ This move has impacted on the convention of political neutrality due to its emphasis on the accountability of chief executives for specific outcomes. The SSA has also increased the potential for the politicisation of the public service. This is reflected in mechanisms such as Cabinet approval of candidates in the chief executives appointment process. Simultaneously, the SSA

⁵⁷ Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) para 2.163.

⁵⁸ Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) para 2.148.

⁵⁹ Comment by participant under the Chatham House Rules at the series of forums on “The Relationship between Ministers and Chief Executives”, organised by the New Zealand Centre for Public Law and the Institute of Policy Studies (Wellington, October-November 2001 and April 2002.) Comment quoted in: James, Colin *The Tie that Binds: The Relationship between Ministers and Chief Executives* (Institute of Policy Studies/New Zealand Centre for Public Law, Wellington, 2002) 13.

reinforces the convention by introducing transparency into any political input into the appointment process, and by removing Minister involvement in personnel decisions within the public service.

1 *Increased public accountability of chief executives*

Under the SSA and the PFA, chief executives are allocated responsibility for particular outputs and for financial and personnel matters, while Ministers retain responsibility for political matters.⁶¹ The SSA delegates to chief executives the authority to ensure that their departments deliver the contracted outputs in an efficient and effective manner.⁶² Chief executives are then publicly accountable for the exercise of this authority. Chief executives must explain fully and accurately all aspects of their own or their department's performance when called upon by the State Services Commissioner or their Minister.⁶³ This increases the transparency of the chief executive's role.⁶⁴

Because of this, and the greater openness of official information, chief executives are more in the public eye than they used to be, relative to their political masters... this has led to an uneasy interface in practice between the political wing of government and its administrative element.

One impact of the SSA has been that increasingly chief executives, rather than Ministers, "are held answerable for success or failure of management or administration, both in front of parliamentary committees and in the media."⁶⁵ In

⁶⁰ Graham Scott *Public Management in New Zealand: Lessons and Challenges* (Business Roundtable, Wellington, 2001) 16.

⁶¹ The principal responsibilities of chief executives under the State Sector Act 1988 are set out in section 32 of that Act.

⁶² State Services Commission "The Public Service and Government" *Public Service Principles, Convention and Practice - Guidance Material* (Wellington, 1995) 4.

⁶³ State Services Commission *Responsibility and Accountability: Standards Expected of Public Service Chief Executives - Key Documents* (Wellington, 1997.)

⁶⁴ Sir Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand Government under MMP* (3ed, Oxford University Press, Auckland, 1997) 74.

⁶⁵ Colin James *Under New Sail: MMP and Public Servants* (Institute of Policy Studies, VUW, Wellington, 1997) 14.

addition, “[s]elect committees of parliament examine departmental performance routinely with no involvement of Ministers.”⁶⁶

To an extent the distinct accountabilities set out by the SSA and the PFA 1989 make this increased public contact inevitable.⁶⁷

[F]or practical day to day purposes at least, chief executives have a distinct accountability that is separate in many respects from those of their ministers. In normal circumstances, the public and politicians look to public agencies for that accountability, rather than directly to the ministers.

Although chief executives are accountable for the day-to-day management of the department, departments politically remain “extensions of the Minister acting in the Minister's name and in accordance with the Minister's wishes and direction”.⁶⁸ Despite the increased accountability of chief executives, political responsibility continues to rest most appropriately with the Minister.⁶⁹

There are still significant incentives for chief executives to ensure that mistakes do not happen, as they risk severance or non-renewal of their contract on performance grounds.⁷⁰ In some circumstances, chief executives may decide to resign from office even where they are not at fault, due to the events that have taken place and the public perception of them. This possibility is identified in the Hunn-

⁶⁶ Graham Scott *Public Management in New Zealand: Lessons and Challenges* (Business Roundtable, Wellington, 2001) 124. The practice of chief executives appearing before select committees was instituted by the 1986 revision of Parliament's Standing Orders. This has also meant accountability to the public, as select committee hearings are open to the news media: James, Colin *The Tie that Binds: The Relationship between Ministers and Chief Executives* (Institute of Policy Studies/New Zealand Centre for Public Law, Wellington, 2002) 31.

⁶⁷ Graham Scott *Public Management in New Zealand: Lessons and Challenges* (Business Roundtable, Wellington, 2001) 124.

⁶⁸ State Services Commission "The Public Service and Government" *Public Service Principles, Convention and Practice - Guidance Material* (Wellington, 1995) 4.

⁶⁹ Matthew Palmer *The Relationship between Ministers and Public Servants: Forum Session 1: Constitutional Overview* (Paper presented to the New Zealand Centre for Public Law and the Institute of Policy Studies forum "The Relationship between Ministers and Public Servants", Wellington, 25 October 2001) 3.

⁷⁰ Scott, above, 126.

Wintringham 'Standards Letter', sent to chief executives by the State Services Commissioner.⁷¹ This letter states that there may be times "when a chief executive is seen as under pressure to resign because of public perception rather than personal culpability."⁷² In these cases it may be difficult for the State Services Commissioner to ensure that the political neutrality of the Public Sector is protected.

The increased public accountability of chief executives following the SSA and the PFA does not in its own right threaten the convention of political neutrality. The challenge posed by these Acts derives from the increased public presence that chief executives have developed as a result, and the risk that the public will perceive any conflict between a Minister and chief executive as representing a lack of ministerial control over that department. Further, with increased public visibility, the importance of public servants (and in particular chief executives) not displaying any behaviour that could be perceived as politically partial, intensifies.

2 *Appointment of chief executives*

The SSA transferred responsibility for the appointment of chief executives to the State Services Commissioner. The appointment of chief executives through this process, although not entirely free from political input, protects neutrality by making political input transparent.⁷³

The State Services Commissioner initiates the process of appointing a chief executive by consulting with an advisory group appointed for this purpose. The Commissioner then recommends a candidate to the Executive Council (Cabinet and the Governor-General). If the Executive Council accepts the candidate, the

⁷¹ This letter codified the principles of accountability that apply to chief executives following the Cave Creek disaster: State Services Commission *Responsibility and Accountability: Standards Expected of Public Service Chief Executives – Letter to Chief Executives* (Wellington, 1997).

⁷² State Services Commission *Responsibility and Accountability: Standards Expected of Public Service Chief Executives – Letter to Chief Executives* (Wellington, 1997)

⁷³ For instance, under the State Services Act 1988, s 35(2)(b), the State Services Commissioner must consider "any matters" the minister considers important when making the appointment: Scott, above, 16.

Commissioner will appoint that candidate as chief executive. If not, the search begins anew. In fourteen years, however, only one recommendation has been rejected:⁷⁴

In practice, informal discussions before a formal nomination are likely to obviate the possibility of a candidate being rejected by the Executive Council.

The requirement for Cabinet approval meant that some commentators feared that candidates would be judged on their political compatibility with the Minister, leading to political appointments of chief executives.⁷⁵ The SSA attempts to minimise this risk by ensuring that any direct ministerial intervention is relatively transparent, enabling parliamentary scrutiny and criticism.⁷⁶

Section 35(11) of the SSA enables Cabinet to make its own appointment to a position of chief executive, although this provision has not yet been used.⁷⁷ This has not prevented opposition politicians from threatening to sack senior civil servants if they get elected.⁷⁸ The SSA confers responsibility for personnel matters within a department upon chief executives.⁷⁹ This means that a political appointment of a chief executive could lead to politicisation within the rest of the public service.

The review and re-appointment of chief executives is delegated to the Commissioner under the SSA.⁸⁰ Chief executives are appointed for terms of up to five years, with possible reappointment:⁸¹

⁷⁴ Colin James *The Tie that Binds: The Relationship between Ministers and Chief Executives* (Institute of Policy Studies/New Zealand Centre for Public Law, Wellington, 2002) 6, 19.

⁷⁵ Colin James *Under New Sail: MMP and Public Servants* (Institute of Policy Studies, VUW, Wellington, 1997) 19.

⁷⁶ Jonathan Boston, John Martin, June Pallot, and Pat Walsh *Public Management: the New Zealand Model* (Oxford University Press, 1996, Auckland) 100.

⁷⁷ Boston, above, 102.

⁷⁸ Graham Scott *Public Management in New Zealand: Lessons and Challenges* (Business Roundtable, Wellington, 2001) 78, referring to comments made by Hon Michael Cullen in 1999, and National Party leaders before the 1990 election.

⁷⁹ State Sector Act 1988, s 59(1).

⁸⁰ State Sector Act 1988, s 43.

⁸¹ Scott, above, 78. See also the State Sector Act 1988, ss 36, 38.

The five year contract term was chosen to ensure that a chief executive worked across at least one election and, on a change of government, would work for the new government for a period before facing contract renewal or termination. This helps to reinforce the non-political professional and managerial culture of the public service.

The criteria for contract renewal are primarily performance based.⁸² The early 1990s tradition of re-appointing a chief executive for a further three years and then 'moving them on', appears to have been replaced by a more department-specific approach in recent years.⁸³ The State Services Commissioner has a statutory obligation to regularly review the performance of each chief executive.⁸⁴ The views of the Minister are given significant weight, due to the importance of the chief executive and Minister retaining an effective working relationship.⁸⁵ Despite this, it is essentially the Commissioner, not the Minister, who determines whether the contract of a chief executive will be renewed, providing greater protection for political neutrality.

B The Mixed Member Proportional Electoral System (MMP)

The introduction of the Mixed Member Proportional electoral system (MMP) in 1996 has led to structural and practical changes in the public sector, introducing some political elements into previously apolitical roles. Minority and coalition governments have required public servants to deal with new issues, and have changed the way that some familiar institutions operate. MMP has also drawn new actors into executive government.

⁸² Sir Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand Government under MMP* (3ed, Oxford University Press, Auckland, 1997) 81.

⁸³ Colin James *The Tie that Binds: the Relationship between Ministers and Chief Executives* (Institute of Policy Studies/New Zealand Centre for Public Law, Wellington, 2002) 48.

⁸⁴ State Sector Act 1988, s 43.

⁸⁵ The minister's lack of confidence in Christine Rankin was a key reason for the State Services Commissioner's decision not to reappoint Rankin as chief executive of the Department of Work and Income in 2001: *Christine Kathryn Rankin v A-G in respect of the State Services Commissioner* (2 August 2001, Employment Court Wellington, WRC 8/01, Goddard CJ.)

Each of these developments require public servants to look at new ways to maintain their political neutrality, as the risk that this will be compromised is increased with each extension of the public servant's role into the political sphere.

1 Minority governments

By the end of the three-year term of the Labour-Progressive Coalition Government, seven of the first nine years under MMP will have been spent under minority governments. Working under a minority government can pose significant challenges for public servants as they navigate an environment of changing political alliances by the government.

(a) Generating a parliamentary majority

A government that does not have the authority of a majority must generate majority support in the House for legislation and government initiatives. Public servants can therefore face differing reporting and briefing requirements, and potentially varying accountabilities, with each new issue they work on.⁸⁶ Labour signed a coalition agreement with the Progressive Coalition party in preparation for the 2002-2005 government term. In addition, however, Labour also signed agreements with the United Future party and the Green party.⁸⁷ Opening the 47th Parliament, the Honourable Helen Clark recognised these three agreements and then stated:⁸⁸

My government also looks forward to co-operation with other parties on a case by case basis.

⁸⁶ Colin James *Under New Sail: MMP and Public Servants* (Institute of Policy Studies, VUW, Wellington, 1997) 7.

⁸⁷ Hon Helen Clark "Speech from the Throne" (Opening of the 47th Parliament, 27 August 2002). Available at <<http://www.beehive.govt.nz/throne.cfm>> (last accessed 3 September 2002).

The need for minority governments to generate a parliamentary majority for every Government Bill, including Supply Bills, also creates the risk that government may change hands part way through Parliament.⁸⁹ A change of government disrupts the work of public servants, who are likely to be required to advise upon and implement new policies. Public servants must also adjust to the working style of their new Minister, as they attempt to develop a positive working relationship with this new political master.

(b) Select committees

The proportional allocation of Members of Parliament to select committees poses a challenge to the public service when serving a minority government.⁹⁰ In 1999-2002, for instance, the Labour-Alliance Government held a majority in only one of the thirteen subject select committees.⁹¹ Select committees have had an increased level of contact with public servants, particularly chief executives, in recent years. The Cabinet Manual states:⁹²

The primary responsibility of officials remains to their Minister when they provide information or advice to select committees. Officials are subject to ministerial direction in relation to answers to be given and information to be supplied to select committees.

Despite this, the mere fact that a public servant appears to be defending a department that is the responsibility of a particular Minister can suggest political partiality to an uncritical viewer. This can occur even where the actual contribution by the public servant is strictly factual, and that servant has endeavoured not to be

⁸⁸ Hon Helen Clark "Speech from the Throne", above.

⁸⁹ James, above, 4.

⁹⁰ David McGee QC *Standing Orders of the House of Representatives 1999* (Office of the Clerk, Wellington, 1999). Standing Order 197 states that the membership of select committees should as far as possible be proportional to party membership in the House.

⁹¹ This was the Maori Affairs Select Committee. The thirteen subject select committees are listed in Standing Order 190. Parliament can set up additional select committees under Standing Order 186: *Standing Orders of the House of Representatives 1999*, above.

drawn into a political debate. If constitutionally inappropriate questioning by opposition MPs attempts to push officials beyond ministerial direction, "public servants will not be able to rely on a minority governing party ... to protect them."⁹³ Media coverage of select committee hearings then magnify any impact that this questioning may have upon public perceptions of political neutrality.

This impact is likely to be further increased by the likelihood that subject select committees without a government majority will undertake inquiries into government activity, thus increasing this contact with public servants, in a drive to acquire political 'points'.⁹⁴

(c) Contact with non-government Members of Parliament

One implication for public servants under a minority government (and potentially also under a coalition government) is an increased pressure from and contact with non-government MPs, as public servants are required to consult with other parties over government policies.⁹⁵ This consultation can potentially be extensive:⁹⁶

Public Servants must be ready to brief not only a coalition partner party or minister or MP but also any supporting party or MPs: in the 1999-2002 Parliament that included the Greens and New Zealand First and even, on free trade, the opposition parties.

⁹² Cabinet Office *Cabinet Manual 2001* (Wellington, 2001), para 5.69.

⁹³ Sir Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand Government under MMP* (3ed, Oxford University Press, Auckland, 1997) 14. Consider, for instance, the aggressive questioning of the Te Puni Kokiri chief executive by the Maori Affairs Select Committee over the government's 'closing the gaps' programme in 2001: Colin James *Under New Sail: MMP and Public Servants* (Institute of Policy Studies, VUW, Wellington, 1997) 31.

⁹⁴ Colin James *Under New Sail: MMP and Public Servants* (Institute of Policy Studies, VUW, Wellington, 1997) 4.

⁹⁵ Palmer and Palmer, above, 14.

⁹⁶ Colin James *The Tie that Binds: The Relationship between Ministers and Chief Executives* (Institute of Policy Studies/New Zealand Centre for Public Law, Wellington, 2002) 3.

This increased contact makes the provision of independent quality advice by public servants even more essential. This ensures that a relationship of trust is retained with the government without giving opposition MPs any opportunity to publicly criticise the service, which would potentially compromise future relationships.⁹⁷ As political jousting between parties becomes more commonplace, “public servants will need to be clear where the line lies between briefing and advising, which is their proper role, and political manoeuvring, which is the sphere of politicians and their political advisors.”⁹⁸

2 Coalition governments

Coalition governments can create challenges for public servants who must be aware of more than one political viewpoint as part of their obligations to government. This is a particular issue when public servants are accountable to Ministers from different parties.

(a) Party differentiation

One challenge for public servants serving a coalition government is the likelihood that coalition partners, who have different electoral objectives, will seek to differentiate themselves in voters' eyes. A public servant has obligations to both the government of the day and to their Minister, and can be placed in a difficult position when these obligations appear to come into conflict. The Minister's own obligations under collective ministerial responsibility ought to prevent this threat. There is, however, potential for Ministers in a coalition government to use the ‘agree to disagree’ clause in the Cabinet Manual 2001.⁹⁹ Ministers may choose to do this to

⁹⁷ Palmer and Palmer, above, 15.

⁹⁸ Colin James *Under New Sail: MMP and Public Servants* (Institute of Policy Studies, VUW, Wellington, 1997) 7.

⁹⁹ Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) para 3.23. The modification of collective responsibility to enable ministers to state publicly that they disagreed with a particular decision by Cabinet was included in the Cabinet Manual following its inclusion in the Labour-Alliance coalition agreement for 1999-2002. This provision, including the ability to express alternative views in

ensure that voters identify differences between the political parties in government, even if the Minister must still follow Cabinet's ultimate decision.¹⁰⁰

Even where the 'agree to disagree' clause is not used there can be significant strain in practice between an individual Minister and Cabinet, with a direct impact on public servants.¹⁰¹ When the parties in government are seeking to differentiate themselves in voters' eyes, it is even more imperative that public servants do not compromise their neutrality by appearing to support one party position on an issue over the other party in government.

(b) Short-term approach to policy making

The need to negotiate with other parties can mean that policy decisions made by individual departments carry a great deal of political weight. Coalition governments are more likely to take a shorter-term, less strategic approach to policy making than single-party governments as they attempt to comply with their coalition agreements.¹⁰² This can be viewed as essential to ensure that coalitions remain in working order. In this way MMP has increased the uncertainty and complexity of policy making.¹⁰³

A short-term approach can pose challenges for public servants who must implement such decisions and try to make them as effective as possible, while still acting consistently with the direction of their Responsible Minister. This can be difficult for public servants who were involved in offering policy advice to the

Parliament, has been included in the coalition agreement between Labour and Progressive Coalition for the 2002-2005 term.

¹⁰⁰ Cabinet Office *Cabinet Manual 2001* (Wellington, 2001), para 3.23.

¹⁰¹ Paragraph 3.23 of the Cabinet Manual can only be used to identify different party positions. This clause cannot be used by individual Ministers to dissociate from Cabinet decisions: Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) para 3.24.

¹⁰² Colin James *Under New Sail: MMP and Public Servants* (Institute of Policy Studies, VUW, Wellington, 1997) 7.

¹⁰³ State Sector Standards Board *A Report to the Minister of State Services on: The Ethos of the State Sector* (State Services Commission, Wellington, 2001). Available on

Minister on an issue, particularly where the decision appears not to have taken into account concerns that they had raised.

One practical implication of this, when applied to the formulation of legislation, can be seen in the negotiation between the Labour party and New Zealand First before Christmas 2001. In exchange for political support for 'urgency' for government business, Labour supported a piece of legislation sponsored by Winston Peters. This Bill, which gave police powers to curb alcohol consumption in public places, was not adequately prepared. Due to poor wording, the Bill as passed effectively banned all carrying of alcohol in public.¹⁰⁴

(c) Politically appointed policy advisors

The practice of Ministers (including the Prime Minister) appointing political policy advisors from outside the public service has increased over the past decade.¹⁰⁵ There are normally one or more political appointees in ministerial offices.¹⁰⁶ Appointees are 'political appointments', owing their allegiance primarily to the Minister, and providing 'contestable' sources of policy advice. Appointees are not bound by the convention of political neutrality, or by other rules governing the conduct of public servants.¹⁰⁷ These appointments are particularly likely under coalition governments:¹⁰⁸

[C]oalition governments [will probably] encourage these sorts of appointments as coalition partner parties, each with different electoral objectives, seek advice that is

<<http://www.ssc.govt.nz/display/document.asp?NavID=121&DocID=1470>> (last accessed 20 August 2002).

¹⁰⁴ Colin James *The Tie that Binds: The Relationship between Ministers and Chief Executives* (Institute of Policy Studies/New Zealand Centre for Public Law, Wellington, 2002) 23.

¹⁰⁵ Graham Scott *Public Management in New Zealand: Lessons and Challenges* (Business Roundtable, Wellington, 2001) 81.

¹⁰⁶ Interview with A, anonymous current Minister (the author, Wellington, 10 September 2002).

¹⁰⁷ Colin James *The Tie that Binds: The Relationship between Ministers and Chief Executives* (Institute of Policy Studies/New Zealand Centre for Public Law, Wellington, 2002) 60.

¹⁰⁸ Colin James *Under New Sail: MMP and Public Servants* (Institute of Policy Studies, VUW, Wellington, 1997) 7.

independent of their partners on portfolios held by their partner party or parties and seek independent assessment of initiatives and actions of those other ministers.

The political appointment of policy advisors protects public perceptions of political neutrality in the public service to a certain extent. These appointments highlight the distinction between the role of public servants, as neutral policy advisors, and the role of an appointee, as provider of politically partisan advice.¹⁰⁹ In this way, political appointees enable public servants to provide 'free and frank' balanced policy advice, without any pressure to tailor this advice to political demands.¹¹⁰

Political appointments will not necessarily always be in the best interests of public servants. There is a risk that a Minister will too readily accept appointee advice over that of the public service, potentially leading to poor policy decisions. In addition, if advice provided by an appointee is consistently different from that provided by the public service, and is consistently preferred by the Minister, a breakdown may occur in the relationship between the Minister and public servants. The Minister may feel that the public service is not sufficiently responsive to the Minister's needs when providing advice, or worse, that the service is operating to a different agenda. In such situations it could be difficult for public servants to continue to provide advice that is politically neutral. There may be a temptation to take a more party-political approach to make the advice more palatable for their Responsible Minister.

(d) Conflict between loyalty to the Minister and to government

Public servants "have a duty to the government as a whole - to the overall policy intentions of the government, to its cohesion, to co-ordination of policy and

¹⁰⁹ Graham Scott *Public Management in New Zealand: Lessons and Challenges* (Business Roundtable, Wellington, 2001) 81.

¹¹⁰ Scott, above, 81.

administration and to the principles of good government.”¹¹¹ The loyalty public servants owe to the government will normally fit comfortably with duties to a Responsible Minister. Even under a coalition government, the doctrine of collective ministerial responsibility should ensure that any differences of opinion are resolved at a high level, and that public servants are not required to attempt to balance both.

Nevertheless, public servants may be challenged where there is a lack of a clear-cut overall policy direction by the government. This is likely to occur if the relationship between coalition partners is tense or uncertain.¹¹² Coalition partners will not always see eye to eye. In the words of the Prime Minister: “MMP is about majority building, not consensus.”¹¹³

C An Increasingly Political Role for Public Servants?

After the introduction of MMP in 1996 the requirement to provide ‘free and frank advice’ was removed from chief executives’ performance agreements.¹¹⁴ The basis for this removal was not clear.¹¹⁵ The reference remains in other key documents that set out a chief executive’s obligations.¹¹⁶ Some commentators have suggested that public servants, particularly chief executives, should ‘keep an eye on’ the political environment as part of their advisory role:¹¹⁷

¹¹¹ Colin James *Under New Sail: MMP and Public Servants* (Institute of Policy Studies, VUW, Wellington, 1997) 61.

¹¹² James, above, 61.

¹¹³ James, above, 73, quoting a speech by Labour leader Helen Clark to a National Housing Conference in Auckland on 23 Sept 1995.

¹¹⁴ Graham Scott *Public Management in New Zealand: Lessons and Challenges* (Business Roundtable, Wellington, 2001) 80.

¹¹⁵ Scott, above, 80.

¹¹⁶ The obligation of chief executives to provide ‘free and frank’ advice is set out in: Cabinet Office *Cabinet Manual 2001* (Wellington, 2001), para 2.147; State Services Commission *Responsibility and Accountability: Standards Expected of Public Service Chief Executives – Letter to Chief Executives* (Wellington, 1997) 2; and State Services Commission *Public Service Code of Conduct 2001* (Wellington, 2001) 10.

¹¹⁷ Colin James *Under New Sail: MMP and Public Servants* (Institute of Policy Studies, VUW, Wellington, 1997) 18.

[A] skilful chief executive, even while maintaining a strictly apolitical stance in the sense of neutrality among parties, keeps a weather eye on the politics and potential fallout of policy initiatives and programmes as an element in fully informing a Minister of all relevant factors.

The line between political advice, and advice that merely takes into account the needs of the Minister, will not necessarily always be clear. In the view of a current Minister:¹¹⁸

It is political neutrality, but political neutrality does not mean having no sense of politics. You need it to make sure that policy advice is sufficiently comprehensive. You have got to have the political antennae; I call it "the front page of truth."

Public Servants must therefore balance their advice so that on the one hand they remain responsive to the Minister's needs, and on the other they do not appear to compromise their political neutrality. The Cabinet Manual attempts to describe the appropriate balance. It states that that when providing advice to their Minister:¹¹⁹

Officials must provide any factual or statistical material requested, but should not be required to offer comment or opinion on clearly political topics, such as policies mooted by other parties in Parliament.

Public servants manage this balancing act on a regular basis. This balance can be delicate, however, and can be threatened by media attention.

MMP has increased the potential for a more political role for public servants by increasing the political negotiations between parties. As a result of this:¹²⁰

¹¹⁸ Interview with A, anonymous current Minister (the author, Wellington, 10 September 2002).

¹¹⁹ Cabinet Office *Cabinet Manual 2001* (Wellington, 2001), para 2.148.

¹²⁰ Matthew Palmer *The Relationship between Ministers and Public Servants: Forum Session 1: Constitutional Overview* (Paper presented to the New Zealand Centre for Public Law and the Institute

public servants can be more involved in political decision-making than they used to be because their skills and advice are likely relevant to the matters under negotiation.

This was the case in the initial stages of the Labour-Alliance Government (1999-2002), when public servants were required to be involved in negotiation with Alliance and other supporting parties to garner enough political support to make certain government policies viable.¹²¹ A Minister who was involved in one such negotiation to generate support for a Bill, reflected:¹²²

Our officials had to go and negotiate with the Greens over how much of the Bill they would accept. They had never had to do that before. They had in the past accepted something that had come down from one party saying, 'this is the way we are going'. Now all of a sudden to get the Bill though they had to be involved in it. For some of the officials that was really hard.

The introduction of political appointees into ministerial offices has reduced the likelihood that public servants will be required to undertake this level of political negotiation. Despite this, the role of public servants remains more politically involved under MMP than historically. The possibility that a public servant will be required to brief a non-government MP on a Government Bill is one example of this. Other examples include the possibility that public servants will be required to report to ministers from different political parties, and the expectation by ministers that political considerations be included in policy advice. This political involvement increases the extent to which political parties, whether in government, support or opposition, will watch closely how public servants behave, in an attempt to identify any risk of party partiality.

of Policy Studies forum, "The Relationship between Ministers and Public Servants", Wellington, 25 October 2001) 4.

¹²¹ Interview with A, anonymous current Minister (the author, Wellington, 10 September 2002).

¹²² Interview with A, anonymous current Minister (the author, Wellington, 10 September 2002).

D *Government Use of Public Servants in Public Presentations*

Ministers are increasingly requiring chief executives and senior officials to front news media interviews, bringing public servants increasingly into the public eye. A recent example of this was the use of officials in support of the government in the media briefing for 'Corngate' (July 2002).¹²³ This support was solely in the provision of factual material to the Minister, for technical and administrative matters. Despite this, the fact that the officials participated in a public presentation by a Minister during an election campaign, has the potential to be misinterpreted by the public. Such assistance during a sensitive political period may have led some members of the public to believe that the officials present were supporting the political decisions made by the Labour party while in government.

Although requests for public servant assistance in media presentations were initially only made for technical matters, these requests are increasingly occurring in relation to general policy issues, including adequacy of funding in areas such as health.¹²⁴

E *Public Criticism of the Public Service by Politicians*

There has been a recent increase in public criticism of public servants by Ministers, occasionally even by name.¹²⁵ This has serious implications for political neutrality.¹²⁶

¹²³ Colin James "The Relationship between Ministers and Chief Executives" (Speech to academics and members of the public service, Wellington, 6 August 2002).

¹²⁴ Colin James *The Tie that Binds: The Relationship between Ministers and Chief Executives* (Institute of Policy Studies/New Zealand Centre for Public Law, Wellington, 2002) 24.

¹²⁵ Colin James *The Tie that Binds: The Relationship between Ministers and Chief Executives* (Institute of Policy Studies/New Zealand Centre for Public Law, Wellington, 2002) 27. Consider for example Prime Minister Helen Clark's criticism of MFAT officials, reported in: Bruce Kohn "Rowling's Timor Policy" *The Dominion Post* 12 September 2002, Edition 2, 6; and Jonathan Milne "PM's 'shameful' words prompt trio to speak out" *The Dominion Post* 14 September 2002, Edition 2, 2.

¹²⁶ Comment by participant under the Chatham House Rules at the series of forums on "The Relationship between Ministers and Chief Executives", organised by the New Zealand Centre for Public Law and the Institute of Policy Studies (Wellington, October-November 2001 and April 2002.)

If there is public criticism, if there are public roles for public servants, if public servants are perceived to be gathering public power bases, that could be seen by ministers as threatening. The relationship might break down over time, the trust that is so important to the relationship might be mitigated and there might be a breakdown in loyalty on the part of the public service.

Public criticism draws attention to public servants as distinct from their departments, and from government. This draws media attention to that department or official, in search of any hidden agenda.

The greatest risk for neutrality posed by public criticism of officials is that those officials may start to answer back publicly.¹²⁷ As well as eroding trust between Ministers and officials, this would compromise public perception of political neutrality.¹²⁸ A public response by an official to criticism could be interpreted by the general public as an attack by that official on current government.¹²⁹ This could easily generate a perception that the public servant is politically partial, given that most challenges to government in the media are politically motivated attacks by political rivals. Public criticism has also been identified as a likely cause for the increased aggressiveness of media inquiry in the past few years.¹³⁰

Comment quoted in: Colin James *The Tie that Binds: The Relationship between Ministers and Chief Executives* (Institute of Policy Studies/New Zealand Centre for Public Law, Wellington, 2002) 27.

¹²⁷ Matthew Palmer "Ministerial Responsibility versus Chief Executive Accountability: Conflict or Complement?" (Paper presented at the Institute for International Research conference on "Analysing and Understanding Crucial Developments in Public Law", Wellington, 4 April 2001) 16.

¹²⁸ State Sector Standards Board *A Report to the Minister of State Services on: The Ethos of the State Sector* (State Services Commission, Wellington, 2001). Available on <<http://www.ssc.govt.nz/display/document.asp?NavID=121&DocID=1470>> (last accessed 20 August 2002).

¹²⁹ Colin James *The Tie that Binds: The Relationship between Ministers and Chief Executives* (Institute of Policy Studies/New Zealand Centre for Public Law, Wellington, 2002) 27.

¹³⁰ James, above, 40, 72.

F Official Information Act 1982

The Official Information Act 1982 (OIA) has played a significant role in increasing the transparency of government processes. The Act specifically refers to the need to protect the convention of political neutrality when identifying possible reasons for withholding information.¹³¹ Despite this, the Act still poses significant challenges to political neutrality. The OIA removed the veil of discretion that used to cover public service activities, exposing differences between the public service and Ministers. The Act increases public access to material about activities undertaken by the public service. There is now almost routine disclosure of the advice provided to Ministers by public servants, and the work undertaken by departments.¹³² This has generated public pressure to look 'behind' the Minister to identify the specific steps that led to a particular outcome, particularly after major public events, such as the Cave Creek disaster.¹³³ As anonymity is eroded, absolute neutrality becomes even more essential to protect public confidence in the public service.¹³⁴

G Breaches of the Convention

1 Recent breaches of the convention

Another challenge to the convention of political neutrality has been posed by public servants who 'walk the line', sometimes breaching the convention publicly.¹³⁵

¹³¹ Official Information Act 1982, s 9(2)(f)(iii). Information can also be withheld to protect the convention of individual ministerial responsibility under section 9(2)(f)(ii), and to protect the confidentiality of advice tendered by officials under section 9(2)(f)(iv).

¹³² James, above, 24.

¹³³ Juliet Philpott *Public Servants and Public Accountability: the Convention of Anonymity* (LLB (Hons) Research Paper, Victoria University of Wellington, 2001) 31.

¹³⁴ Names are not attached to most policy advice and advice is only released after the Responsible Minister has made their decision. Despite this, public access to policy advice increases public awareness of the significance of the role of officials. Increased public interest fuels media attention, which would draw attention to any political activity by public servants.

¹³⁵ Despite this, the Transparency International Corruption Perceptions Index 2002, which measures levels of corruption by officials and politicians, ranks New Zealand second equal out of over 100 countries. See: Michael Wintringham, State Services Commissioner (29 August 2002) Media Statement. Available on: <<http://www.ssc.govt.nz/display/document.asp?NavID=113&DocID=2256>> (last accessed 4 Sept 2002).

The most concerning breaches of the convention relate to the spate of leaks by lower level officials to opposition politicians and the media in 2001.¹³⁶ These leaks are sometimes attributed to public servants who are active in a political party, and who leak material when they feel that something is 'wrong' in the sense of offending that party's principles or policies:¹³⁷

They almost see it as a right that, if the government is doing something they disagree with, they give the information to the party they are members of. That is something I wasn't aware of 10 years ago.

At a higher level, communication between the Serious Fraud Office director David Bradshaw and the government has been criticised by opposition leaders and the media as evidence of party partiality.¹³⁸ Bradshaw telephoned the Prime Minister's office and the head of the State Services Commission earlier this year to tell them of his inquiry into the 1996 donation to the National Party by Fay Richwhite. Although Bradshaw's disclosure was probably made in compliance with an obligation to disclose any delicate matters to the government, this has not stopped the media (and opposition politicians) from claiming evidence of political partiality.

This incident highlights the tentative balance between a public servant's loyalty to the government, and partiality as between political parties. It can be difficult for a senior public servant to decide what to do when there is widespread concern in a department that their chief executive is acting outside agreed values and

¹³⁶ Consider for instance leaks by a contractor within the Crown Company Monitoring Unit regarding the proposed 'Kiwibank' in 2001: Colin James *The Tie that Binds: The Relationship between Ministers and Chief Executives* (Institute of Policy Studies/New Zealand Centre for Public Law, Wellington, 2002) 28, 31.

¹³⁷ Comment by participant under the Chatham House Rules at the series of forums on "The Relationship between Ministers and Chief Executives", organised by the New Zealand Centre for Public Law and the Institute of Policy Studies (Wellington, October-November 2001 and April 2002.) Comment quoted in: James, above, 29.

¹³⁸ Colin Espiner "Politicians turn to public servant bashing in election year" *The Press* 20 May 2002, Edition 2, 9; Prosser, Richard "Donation to Labour needs checking" *National Business Review* 27 May 2002.

principles, thereby undermining the department's internal culture and external reputation.¹³⁹

It is even less clear what the position is for government departments with independent responsibilities. Although independence by necessity implies an obligation to act impartially, the Code of Conduct does not govern departments such as the Reserve Bank.¹⁴⁰ The Governor of the Reserve Bank, Dr Don Brash, was severely criticised when he resigned from his position earlier this year then joined the National Party list within the month. His move led to public re-evaluation of his behaviour while in office. Statements made by Dr Brash at the Knowledge Wave Conference in 2001 re-emerged, with the media publicly questioning whether Brash in fact acted neutrally while Governor.¹⁴¹

Although independent government departments are outside the scope of this paper, most members of the public are not aware of the distinction between the Reserve Bank and other branches of the public service. As a result, any negative publicity arising from behaviour by employees of independent government departments is of concern to all public servants.

2 *Implications of a breach of the convention*

(a) Disciplinary implications

Breaches of the convention of political neutrality can only be used to support disciplinary action to the extent that the convention is provided for in the Code of

¹³⁹ Graham Scott *Public Management in New Zealand: Lessons and Challenges* (Business Roundtable, Wellington, 2001) 127.

¹⁴⁰ Only Departments listed in the First Schedule to the State Sector Act 1988 are governed by the Public Service Code of Conduct.

¹⁴¹ Graeme Hunt "Frustration drives Brash to Politics" *National Business Review* Editorial Comment, 3 May 2002; New Zealand Press Association "Speak out then duck, Don" *The Evening Post* 3 August 2001, Edition 3, 13.

Conduct. A breach of the convention can not itself give rise to disciplinary action.¹⁴² Realistically, however, the breadth of the references to the convention in the Code of Conduct make it unlikely that a public servant could significantly breach the convention without invoking disciplinary action.

The standards set out in the Code of Conduct are implied into the terms and conditions of employment for every public servant.¹⁴³ Where a public servant undertakes an activity referred to in the Code that compromises, or appears to compromise their political neutrality, they can be subjected to disciplinary action for breach of contract. Given the broad application of the Code to all public servants this can appear rather harsh. A public servant in a role with no contact with the Minister, policy development or implementation is still limited in the extent to which they are able to exercise their right of free speech in the media on political issues. Yet their role may be secretarial or administrative, and their political activity unlikely to have any real impact on public perceptions of the convention of political neutrality.

In fact the discretion available to employers in enforcing the Code militates against these concerns. This is reinforced by the Code, which states:¹⁴⁴

Determining what is appropriate in any particular case will depend on the extent of the participation of the individual, the nature of the issue, and the position held by the individual in the Public Service.

Departments will only take disciplinary action when activity by a public servant is not appropriate to the constraints of their position. This has the advantage of providing departments with significant flexibility when considering whether activity ought to give rise to disciplinary action in a particular situation. This does not encourage transparency, however, which can be a problem given the reliance by

¹⁴² A public servant who breaches section 52 or section 53 of the Electoral Act 1993 would still be obliged to resign from their position, and could be fined under section 48 of that Act.

¹⁴³ Interview with C, anonymous senior public servant (the author, Wellington, 4 September 2002).

¹⁴⁴ State Services Commission *Public Service Code of Conduct 2001* (Wellington, 2001) 5.

public servants on the political activity of their peers when governing their own behaviour.

(b) Constitutional implications

Constitutional conventions evolve continually. Their practice and obligatory elements mean that the form (and sometimes even the existence) of the convention can be very transient. Unlike laws, conventions are not bound to a particular written form. In fact, although the expression of conventions in documents such as the Cabinet Manual can help shape a convention, the ambit and characteristics of the convention in practice can be rather different.¹⁴⁵ The repudiation of a convention can even generate doubt as to whether that practice ever existed as a convention.¹⁴⁶ This can occur even where the convention is described in the Cabinet Manual, as inclusion in this document does not of itself confer constitutional status.

As a result, one of the risks when a public servant breaches the convention of political neutrality is that this political behaviour may become generally accepted practice, gradually reducing the ambit of the convention. If political neutrality in the New Zealand Public Service was undermined in this manner, the efficacy of government would also be reduced, as public servants become less willing to respond to the needs of their political masters. In the long term this convention would give way to the politicisation of the public service.

¹⁴⁵ Phillip Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers Ltd, Wellington, 2001) 275.

¹⁴⁶ Joseph, above, 271.

V THE FUTURE OF POLITICAL NEUTRALITY IN NEW ZEALAND

A Evaluation of Political Neutrality in New Zealand

The convention of political neutrality has two key purposes. The first is to ensure that individual ministerial responsibility remains an effective method of controlling the public service. The second is to preserve government, and public, confidence in the public service.

Despite an initial lack of confidence in the public service by the incoming Labour-Alliance Government in 1999, early in that government term the confidence was restored and the public service developed a good relationship with government.¹⁴⁷ The current Labour-Progressive Government expressed no concerns about the public service when commencing their term of government. These examples suggest that current and incoming governments still retain sufficient confidence in the public service to maintain the efficacy of individual ministerial responsibility.

Despite a willingness to question the neutrality of individual public servants, the media has not questioned the neutrality of the public service as a whole. Perhaps as a result of this, there does not appear to be any public doubt that the New Zealand Public Service is politically neutral.

Viewed in light of these dual purposes, then, political neutrality continues to operate effectively in New Zealand. There is no guarantee, however, that this will remain the case. The developments set out in Part IV impose a cumulative effect upon the operation of the convention. Although examples of public servants 'walking the line' are currently still limited, the public attention generated by these examples increase the likelihood that the convention will be undermined. If

¹⁴⁷ Colin James *The Tie that Binds: The Relationship between Ministers and Chief Executives* (Institute of Policy Studies/New Zealand Centre for Public Law, Wellington, 2002) 61.

disciplinary action is not seen to result from these incidents, other public servants may also undertake this level of political activity. Despite this, privacy and political concerns are likely to prevent the State Services Commission and individual departments from publicising any disciplinary action that arises from political behaviour.¹⁴⁸ Other steps are necessary, then, to further clarify for public servants what behaviour falls within the convention, and what is prohibited.

MMP has led to an infiltration by politics into the everyday functions of public servants. The introduction of political appointees into ministerial offices to undertake negotiation between government and supporting parties, represents a positive step in protecting the public service from too much political interaction. Despite this, the political involvement of the public service has increased. Even operating under the dual political mastery of Ministers from different coalition parties can challenge the neutrality of public servants, who must not appear to favour one Minister over the other.

Each of these developments increases the likelihood that public servants will be perceived to be acting partially towards one of the political parties. Ongoing party negotiation and interaction under minority or coalition government generates a level of political tension and media attention that prior to MMP would have arisen only around an election. Under MMP, public servants must display exemplary behaviour throughout the duration of the government term.

Other developments that have impacted upon public servants over the past few decades include an increased overall transparency of government processes, due to the Official Information Act 1983, and the marketing of information gathered under this Act to the wider public by the media. Combined with the increase in criticism by politicians, and the use of the media as a publicity tool by high profile

¹⁴⁸ Interview with C, anonymous senior public servant (the author, Wellington, 4 September 2002).

public servants,¹⁴⁹ these developments have transformed the public service into an object of interest and entertainment for the public. This has created a situation in which the media will now jump upon, and manipulate, any behaviour by public servants that has a political element.

This is particularly concerning given the apparent reduction in commitment to political neutrality within the public service. The mobility of the New Zealand work force has increased staff turnover, weakening the extent to which political neutrality can be effectively protected through internal self-monitoring and peer-guidance.¹⁵⁰ In addition, commitment to political neutrality has been weakened by a societal reluctance to constrain personal behaviour to comply with professional obligations.¹⁵¹ Public servants are unlikely to monitor their own behaviour appropriately, unless the importance of complying with political neutrality and the other conventions governing the public service are emphasised sufficiently in their training.

The increased media willingness to identify political partiality in the Public Service also means that traditional protection of neutrality by requiring public servants to take leave for candidacy, is no longer sufficient. The ability of public servants to make partisan political statements during a campaign, and then return to the public service unchallenged if not appointed, is no longer appropriate in this new media-focussed political environment.¹⁵²

¹⁴⁹ This remains rare, but when the media has been used in this way this has had a significant impact upon public awareness of the public service. Consider the attention generated by Christine Rankin, who, while chief executive of the Department of Work and Income, encouraged media publicity prior to her Employment Court action against the State Services Commissioner. Other example is the publicity sought by Celia Lashie, Nelson Special Education Service Manager, to draw attention to youth offending: Juliet Philpott *Public Servants and Public Accountability: the Convention of Anonymity* (LLB (Hons) Research Paper, Victoria University of Wellington, 2001) 25.

¹⁵⁰ State Sector Standards Board *A Report to the Minister of State Services on: The Ethos of the State Sector* (State Services Commission, Wellington, 2001). Available on <<http://www.ssc.govt.nz/display/document.asp?NavID=121&DocID=1470>> (last accessed 20 August 2002).

¹⁵¹ State Sector Standards Board *A Report to the Minister of State Services on: The Ethos of the State Sector*, above.

¹⁵² It is possible for a department to take disciplinary action against a public servant who returns to the public service after an unsuccessful candidacy that was damaging to the department. A public

Political neutrality remains central to the public service, but the extent to which this will continue to be the case is reliant on increased protection of the convention by ongoing reinforcement of these values, and strict regulation of behaviour in certain situations. This paper suggests that traditional methods of protecting the convention through the Electoral Act 1993, the Public Service Code of Conduct and the Cabinet Manual are no longer sufficient. Although these methods provide a good basis for the protection of the convention, in order to survive recent challenges, additional layers of protection are necessary.

B Recommendations for Effective Protection of Political Neutrality

This section sets out recommendations for the more effective protection of the political neutrality of the New Zealand Public Service. These suggestions draw upon some of the ways in which other countries protect political neutrality, and upon views of current members of the New Zealand Public Service and government.

1 Mandatory resignation before candidacy for election

(a) Overseas practice

In Australia and in Canada, public servants must resign from their position before being nominated as a candidate for election.¹⁵³ Each country also provides measures to mitigate the harshness of this requirement. Canadian public servants may apply to the Public Service Commission of Canada for leave without pay to stand as a candidate.¹⁵⁴ In contrast, in Australia, if a candidate only takes leave from

servant on leave is still bound by the terms and conditions of their contract. (Interview with B, anonymous senior public servant (the author, Wellington, 17 September 2002).

¹⁵³ Commonwealth of Australia Constitution Act 1900 (Australian Constitution) s 44.

¹⁵⁴ Canadian Public Service Employment Act 1985, s 33(3).

the public service, their election is void.¹⁵⁵ Instead, the Australian Public Service Act 1999 provides for a right of re-appointment to the public service if a public servant fails to be elected.¹⁵⁶

Although the Australian approach of requiring resignation initially appears harsh, public servants have a right to return to their position if unsuccessful.¹⁵⁷ This right is limited only by the requirement that the public servant's resignation to contest the election took effect within 6 months before the closing date for nominations, and that the candidacy was unsuccessful.¹⁵⁸ Public Servants are entitled to be re-employed on the same basis, with the same or similar duties and at the same classification as they had before resigning.¹⁵⁹ This approach protects the constitutional principle that a public servant is politically neutral, by making clear that if a public servant wishes to be political they must resign from their position. Despite this, this approach does not protect the public service if the candidate makes damaging statements about the government while campaigning, then rejoins the public service.

A more practical method of protecting political neutrality has been adopted in Canada. The discretionary candidacy leave available in Canada enables a department to determine whether an unsuccessful political campaign would threaten political neutrality, by assessing the contact that that official has with Ministers and the public in their role. The Public Service Commission of Canada will only grant candidacy leave:¹⁶⁰

¹⁵⁵ Australian Constitution, Section 44(iv). See also *Sykes v Cleary* (1992) 176 CLR 177 (HCA), where the election of a teacher with the Victorian Department of Education was found to be void as he had not resigned from his position before nominating as a candidate.

¹⁵⁶ Australian Public Service Act 1999 (No. 147, 1999) s 32.

¹⁵⁷ Australian Public Service Act 1999 (No. 147, 1999) s 32.

¹⁵⁸ Australian Public Service Act 1999 (No. 147, 1999) s 32 (1). The election must also be listed in paragraph 3.13 of the Public Service Regulations 1999, No. 300.

¹⁵⁹ Australian Public Service Regulations 1999 (No. 300, Division 3.2) para 3.15.

¹⁶⁰ Canadian Public Service Employment Act 1985, s 33(3).

if it is of the opinion that the usefulness to the Public Service of the employee in the position the employee then occupies would not be impaired by reason of that employee having been a candidate.

Even discretionary candidacy leave has been criticised by the Canadian courts as posing risks for political neutrality:¹⁶¹

the ordinary incidents of a campaign for nomination and election to Parliament or a legislature include at least a real potential for public disagreement with major subsisting federal government policy. A credible campaign may demand it; the enthusiasm of a campaign may invite it, perhaps irresistibly. A public servant entering into a nomination or election campaign as a candidate must be taken to realize that he may, more likely unintentionally than not, call into legitimate question at least his apparent ability to function thereafter impartially. He should not expect to be paid while running nor to return unchallenged to his position if the race is lost.

Discretionary candidacy leave is only appropriate, therefore, when a return to the public service by that public servant is highly unlikely to compromise the political neutrality of the public service.

(b) Implementation in New Zealand

This paper recommends that a three-tier system be put in place in New Zealand for public servants who wish to stand for Parliament. All public servants would be governed by the principle that public servants must resign before standing for Parliament. The only exception to this principle would be for low-level public servants, who may apply for discretionary candidacy leave from the State Services Commission. Public servants would only be eligible for candidacy leave if a campaign critical of government would be unlikely to compromise their role or the public service. By making leave discretionary, rather than New Zealand's current

¹⁶¹ *Osborne v Canada (Treasury Board)* [1988] 3 F.C. 219 (Federal Court of Appeals) para 20.

system, the State Services Commission could consider the demands of the individual public servant's role when allocating leave. In particular, the Commission could take into account any professional contact with Ministers, other politicians, and the public.

For higher-level public servants, resignation before candidacy would better protect political neutrality than providing candidacy leave. Resignation would enable the Commission to decide after a campaign whether neutrality would be threatened by the return of that public servant to their position. This means that the Commission could take into account all statements made by the applicant during their election campaign when deciding whether to reappoint them. This also has the advantage of providing an incentive to Public Servants who are not confident about their chances of election, to 'tone down' their election campaign, to ensure that their reappointment prospects are not compromised.

In addition to mandatory resignation before candidacy, a more formal requirement should be put into place for department chief executives. This is necessary following the aftermath of Don Brash's resignation as Governor of the Reserve Bank, then announcement of his candidacy for National only weeks later. Brash's resignation and announcement were, strictly speaking, consistent with the current requirements for chief executives. Despite this, the significant media attention that was devoted to this move, and the questions that were raised about Brash's neutrality while in office, suggest that this is an issue that requires tighter regulation. It is the author's understanding that the State Services Commissioner considered introducing into the employment contract for the new Reserve Bank Governor, a minimum period after resignation from public office before they may stand for Parliament. This is an important move given the potentially significant impact another chief executive resignation and swift move to politics could have upon public confidence in the public service. This paper recommends that a

minimum period between resignation from public office and standing for Parliament be introduced into the employment contract for all chief executives.¹⁶²

2 *Category-based clarification of behaviour expected of public servants*

Effective political neutrality is reliant upon the exercise of good judgement by public servants when regulating their own conduct. Greater clarification of government expectations of public servants increases the likelihood that public servants will make the right decision. One way to clarify expectations of public servants is by introducing categories into the public service. This enables the tailoring of rules and guidance to the demands of a public servant's individual position.

(a) Overseas practice

In the United Kingdom, the civil service is specifically divided into three categories for this purpose. These categories are set out in the United Kingdom Civil Service Management Code.¹⁶³ They consist of the politically free category (industrial and non-office grades), the politically restricted category (Executive Officer level and higher), and an intermediate category (all other staff, mainly clerical and typing grades.) The Management Code sets out specific rules for the political activity of public servants within each category. Off-duty political activity, including campaigning for election, is permissible for the politically free category, while the politically restricted category is prohibited from taking part in any national political activities.¹⁶⁴ Some flexibility is retained through the discretion available to departments regarding employee involvement in some political activities.¹⁶⁵

¹⁶² This period could be for one year, and be similar in application to the 'restraint of trade' provisions that are commonly included in employment contracts.

¹⁶³ United Kingdom Civil Service Management Code, Rule 4.4.1. Available on: <<http://www.cabinet-office.gov.uk/civilservice/managementcode>> (last accessed 15 September 2002). This Code is issued under the authority of the United Kingdom Civil Service Order in Council 1995 (10)(b).

¹⁶⁴ United Kingdom Civil Service Management Code, Rule 4.4.6, 4.4.1b.

¹⁶⁵ United Kingdom Civil Service Management Code, Rule 4.4.3.

(b) Implementation in New Zealand

The civil service in the United Kingdom is designed with a clearly defined structure and hierarchy.¹⁶⁶ The role of each political servant, and their contact with the Minister, is closely related to this structure. In contrast, the New Zealand Public Service is more fluid in its allocation of grades and responsibilities,¹⁶⁷ although this may be changing.¹⁶⁸ In addition, when compared to the United Kingdom civil service, the New Zealand Public Service is small and fragmented.

These factors limit the extent to which categorisation would be effective as a means of imposing strict rules upon the conduct of New Zealand public servants. Despite this, some categorisation of the service would be beneficial. This paper recommends that a limited category structure be introduced into the New Zealand Public Service to enable greater clarification of the behaviour expected from public servants. Provided that this structure remains at guidance-level, the fluidity of public servant roles and responsibilities will not render categorisation ineffective.

The development of a category structure would permit the State Services Commissioner to provide more specific guidance to public servants, whatever their level. Categorisation would enable the State Services Commissioner and government departments to take into account divisions in policy-advisory, policy-implementation, and policy-free roles when describing permissible political activity.

¹⁶⁶ The Management Code, for instance, refers to industrial and non-office grades, Executive Officers and related grades such as Information Officers, clerical and typing grades. See: United Kingdom Civil Service Management Code, above, paras 4.4.2, 4.4.9.

¹⁶⁷ Levels of public servant are not standardised across departments, as each department has its own structure and pay scales. A role in one department will not necessarily equate with one in a similar department. Alternatively the role may not involve the same level of policy content or public contact.

¹⁶⁸ The State Services Commissioner has undertaken to bring forward proposals to develop a senior management development regime for the Public Service by the end of September 2002. This regime would replace the ineffective Senior Executive Service that was established under the State Sector Act 1988. If this move is implemented, this regime could be used as a structural guide for the more detailed provision of behavioural expectations to senior management employees. This would assist in getting around the current lack of clear roles across the government departments currently. See: State Services Commission *Briefing for the Minister of State Services* (Wellington, 2002) 13.

Categorisation would also enable the needs of particular departments to be taken into account, particularly those with significant security demands. Currently, this level of specificity is available only for chief executives.¹⁶⁹

The Public Service Code of Conduct applies to all government department employees.¹⁷⁰ Some of these public servants, such as administrative staff, could comfortably undertake even high-level political activity without harming the political neutrality of the public service as a whole. The potential harshness of this is mitigated by the fact that departments are unlikely to take disciplinary action against breaches of the Code by these lower level public servants, given that they pose no threat to political neutrality. Although this approach promotes flexibility, this is achieved at a significant cost to clarity and transparency. This is a problem given the importance of public perceptions of neutrality.

This paper recommends that lower-level public servants be specifically identified in the Code as being permitted to undertake limited political activity. This identification can be descriptive, by reference to extent of contact with policy, and level of professional contact with politicians and the public. Public servants who are involved in work with a policy content would make up a second category. A third category would comprise of chief executives, whose role demands exemplary, politically neutral behaviour.¹⁷¹ Inclusion of chief executives in this structure facilitates internal monitoring of chief executive behaviour, as well as providing public servants with an incentive to strive for this level of neutrality.

¹⁶⁹ Consider the range of guidance material published by the State Services Commissioner for chief executives. This range includes: *Standards Expected of Chief Executives – Standards Letter and Key Documents* (Wellington 1997), and from the Guidance Series: *The Senior Public Servant* (Wellington 1995).

¹⁷⁰ The Public Service Code of Conduct applies to all public servants, as defined by the State Sector Act 1988, s 27. This definition includes almost all government departments.

¹⁷¹ Top-tier senior public servants could also be included in this category.

3 Reinforcement of a public service culture

(a) The need for reinforcement

The regulation of the New Zealand Public Service is very reliant on the ability of public servants to manage their own behaviour according to the constraints of their position. Even with detailed guidance, a public servant is likely to find themselves in more than one situation in their career in which they do not know how they ought to behave. This is where the culture and values of the public service are essential:¹⁷²

In theory, public servants are only promoted to a senior level if there is confidence that the public servant's judgement is good. This is what makes the culture of the public service so important. Fundamentally, this is about judgement more than it is about rules, as the rules can never be sophisticated or detailed enough.

A new employee in the public service is only likely to pay close attention to principles that are supported by their colleagues, as they learn the requirements of their new position. The public service culture must, therefore, include recognition of the importance of political neutrality for this convention to be effective.

The State Sector Standards Board's Report on the Ethos of the State Sector noted several trends that are detrimentally affecting the public service culture.¹⁷³ One such trend is the increased mobility of the New Zealand work force, which has eroded state sector career patterns. As well as compromising the 'public service' ethos among staff, this has led to a loss of institutional knowledge due to frequent staff turnover. Another trend compromising the public service ethos relates to

¹⁷² Interview with Patricia Sarr, senior public servant, Ministry of Justice (the author, Wellington, 4 September 2002).

¹⁷³ State Sector Standards Board *A Report to the Minister of State Services on: The Ethos of the State Sector* (State Services Commission, Wellington, 2001). Available on <<http://www.ssc.govt.nz/display/document.asp?NavID=121&DocID=1470>> (last accessed 20 August 2002). The Board defined 'ethos' as the "values and culture demonstrated by organisations and individuals in the state sector."

changing behavioural norms in society. These have led to “an increasing reluctance of staff to constrain behaviour away from work to the standards required in employment.”¹⁷⁴ As a result of these trends:¹⁷⁵

[M]any public servants do not understand the basic rule of ministerial responsibility and the corollaries of loyalty, party-political neutrality and anonymity.

The lack of a public service culture means that departments are inclined to become insular, and less likely to consider the impact of their actions on the public service as a whole. This can be significant when these implications have long-term constitutional significance rather than immediate consequences. For instance, a public servant’s political involvement may not immediately threaten their Minister’s confidence in their work, but can still foster a belief within their department that such involvement is of no consequence. This would be likely to lead to an increase in the level of political activity in that department, with a corresponding impact upon perceptions of political neutrality in the wider public service.

(b) Options for reinforcement

The State Services Commissioner is already attempting to increase awareness of the importance of values such as political neutrality within the public service, following the State Services Board’s report.¹⁷⁶ Although steps are being taken to reinforce values such as political neutrality:¹⁷⁷

¹⁷⁴ State Sector Standards Board *A Report to the Minister of State Services on: The Ethos of the State Sector*, above.

¹⁷⁵ Comment by participant under the Chatham House Rules at the series of forums on “The Relationship between Ministers and Chief Executives”, organised by the New Zealand Centre for Public Law and the Institute of Policy Studies (Wellington, October-November 2001 and April 2002.) Comment quoted in: Colin James *The Tie that Binds: The Relationship between Ministers and Chief Executives* (Institute of Policy Studies/New Zealand Centre for Public Law, Wellington, 2002) 37-8.

¹⁷⁶ Michael Wintringham, State Services Commissioner (16 August 2001) Media Statement. Available on: <<http://www.ssc.govt.nz/display/document.asp?NavID=113&DocID=2256>> (last accessed 4 Sept 2002).

¹⁷⁷ State Services Commission *State Services Commissioner’s Annual Report on the State Services (2001)* from the *Annual Report of the State Services Commission for the year ending 30 June 2001* (Wellington, 2001) 23

These efforts need to be systematic, and more visibly led from the top, rather than resting with individual managers.

Political neutrality can be reinforced in the culture of government departments through increased facilitation of discussion about this issue. Seminars and workshops are needed for public servants across the public service to discuss the issues facing them. Environments such as these generate discussion by public servants about the underlying reasons for neutrality, and encourage public servants to take personal responsibility for their behaviour. Focussing on neutrality in ongoing public service training "says that this is a live issue and one which is really important."¹⁷⁸

Promoting these values through facilitation of discussion is particularly important for experienced public servants. These public servants may well become complacent about the constraints of political neutrality unless there is mature and regular discussion of these constraints.¹⁷⁹

In the Knowledge working-end of the Public Service, discipline is very hard to impose. People are clever, and they know they are clever and they think they know what is right, and mostly they do. They learn lessons by absorbing it themselves in their own way and at their own pace and then they come up with an answer.

These public servants are also the least likely to respond to further guidance material from the State Services Commission, as this material is unlikely to be targeted at their level or easily seen as relevant to their particular situations. These are people whose neutrality dilemmas are also likely to be complex beyond the range of the State Services Commissioner's guidelines.¹⁸⁰ For these public servants,

¹⁷⁸ Interview with Patricia Sarr, senior public servant, Ministry of Justice (the author, Wellington, 4 September 2002).

¹⁷⁹ Interview with B, anonymous senior public servant (the author, Wellington, 17 September 2002).

¹⁸⁰ Interview with Patricia Sarr, senior public servant, Ministry of Justice (the author, Wellington, 4 September 2002).

then, simply promoting the Code without an opportunity for discussion would be ineffective.

Another possible way to strengthen the public service culture, and political neutrality within this culture, is through the Partnership for Quality between the State Services Commission and the Public Service Association. The Partnership was an early initiative of the Labour-Alliance Government, "designed to more strongly integrate the perspectives of staff in the operation of the state sector."¹⁸¹ This integration potentially provides an opportunity for a comprehensive approach to the promotion of values in the public service. The increased involvement of public servants in the management of the service through the Public Service Association should also increase the sense of ownership by public servants over this process. Hopefully this will foster constitutional and management level discussion within the public service, increasing perception of the public service as a unifying body with a certain culture.

VII CONCLUSION

I am firmly in the camp of those who conclude... that the public management system, especially that part designed to preserve the political neutrality of the Public Service, is fundamentally sound. That was my view when I was appointed Commissioner. It remains my view today. Calls for radical change are misplaced. However, that does not excuse us from providing better value to the citizens of New Zealand by improving our performance.¹⁸²

This paper supports the view of the State Services Commissioner that political neutrality remains a core feature of the New Zealand Public Service, but that this is no reason for complacency. Maintaining public perception of political

¹⁸¹ State Services Commission *Report of the Advisory Group on the Review of the Centre* (Wellington, 2002) Appendix 8, 65.

¹⁸² State Services Commission *State Services Commissioner's Annual Report on the State Services (2001)* from the *Annual Report of the State Services Commission for the year ending 30 June 2001* (Wellington, 2001) 1.

neutrality is an ongoing concern, particularly given the increased media focus and other developments that have challenged public servants in recent years. The public service will need to pay particular attention to the demands of political neutrality as they adjust to minority and coalition governments under MMP. Increased contact with (and even briefing of) non-government politicians, and facing select committees without a government majority are only two of the developments that could threaten political neutrality if public servants do not continue to guard against this.

Political neutrality is not merely important to the constitutional legitimacy of the public service. This convention is central to the retention of a relationship of absolute trust and confidence between Ministers and their departments. Without this relationship, a breakdown in communication would render ministerial responsibility ineffective as a method of control over the public power exercised by the bureaucracy.

The appearance of political neutrality of the public service is essential to ensure public confidence in government. If there is a public perception that departments are operating independently of their political masters, the legitimacy of the New Zealand government, based as it is on democratic validity, will be compromised.

This paper sets out some of the ways in which political neutrality could be better protected in the New Zealand Public Service. Some of these suggestions, such as the introduction of mandatory resignation before public servants stand for Parliament, involve some statutory amendment. Despite this, the paper does not suggest that the overall management of the public service be revamped. Instead, protection of this convention will best be achieved through its promotion within the values of public service culture, and facilitation of discussion about what political neutrality means in the New Zealand political climate. A convention is only as strong as the commitment of its actors. In the case of the New Zealand Public

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