

LUCY HARE

MINISTERS' PERSONAL APPOINTEES:
PART POLITICIAN, PART BUREAUCRAT

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This paper examines the constitutional position of personally appointed advisers to New Zealand government ministers' offices. Personal appointees are formally employed as public servants on events-based contracts. However, they work as partisan ministerial assistants and thus are not subject to the public service constitutional convention of political neutrality. Therefore, constitutionally they are interposed between ministers and public servants.

The practice of ministers making personal appointments to their offices has proliferated since the 1980s. In general, personal appointees make a positive contribution to both ministers and public servants. On the other hand, several objections can be made to their role. That is, they may unlawfully exercise executive power, mislead the public through the media, exacerbate tensions in the minister-public servant relationship and undermine public servant neutrality.

The paper draws on the experiences of Australia and the United Kingdom in seeking to address concerns regarding personal appointees in New Zealand. While much of the criticism of personal appointees' role in New Zealand appears to be based more on perception than reality, Australian and United Kingdom experiences illustrate the reality of the risk of abuse of power.

Thus, this paper recommends that personal appointees be legally disengaged from public servants to better reflect the reality of their position. Secondly, it recommends the adoption of separate personal appointee and public servant codes of conduct as a guide for personal appointees, ministers, public servants and the public. Thirdly, the paper recommends induction and training for incoming personal appointees regarding the New Zealand system of government. Finally, it advocates a complaints procedure to safeguard the integrity of relationships between ministers, public servants and personal appointees.

ABSTRACT

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MINISTERS' PERSONAL APPOINTEES: PART POLITICIAN, PART BUREAU The text of this paper (excluding contents page, footnotes, annex and bibliography) comprises about 14 450 words.

1 INTRODUCTION

What is the real Minister of Health? Amoxic King or the Prime Minister's senior adviser Heather Simpson?¹

(New Zealand High Commissioner in London, Russell Marshall's account of the chemistry between Clark and Simpson - her closest adviser and amoxic *prima* - is telling.

"If I'd had someone as good as that, who knew my instincts, who could go into another room and meet someone else and whom I could trust absolutely to say what I think and pick up the essence of it, who could be another pair of legs, ears and eyes for me, I'd have grabbed her - or him."²

It's hardly a novel observation - O what a tangled web we weave, when first we practise to deceive - but modern statecraft has increasingly devised itself in the (how appropriate the verb) spinning of threads from which those webs are woven.

... the lesson should be simple: spinning makes you dizzy, then you fall down.³

Over the last two decades, personally appointed advisers to government ministers' offices have become a reasonably well-established part of New Zealand politics. Personal appointees are in general employed to provide high level policy and advice to ministers.⁴ This policy and advice is often of an explicitly partisan nature. Thus within a minister's office they are interposed between the minister that they serve and the public servants that they work alongside. However, the presence of these advisers is not well known publicly, despite their often influential status in government. As such, there has been little academic or public discussion of their constitutional status.

Personally appointed advisers give rise to tensions in the New Zealand political framework. On the one hand, the effectiveness of a personal

¹ Wyatt Creech, New Zealand National Party "Will the Real Health Minister Please Stand Up?" (4 May 2000) Press Release.

² Carson Scott "Carson Scott Talks to Russell Marshall (our man in London)" (21 June 2003) *The Listener* New Zealand 13.

³ Finlay McDonald "Murder Will Out" (2 August 2001) *The Listener* New Zealand 7.

⁴ *Ministerial Services Job Profile: Ministerial Advisor* (Wellington, 2003) 2.

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I INTRODUCTION

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"If I'd had someone as good as that, who knew my instincts, who could go into another room and meet someone else and whom I could trust absolutely to say what I think and pick up the essence of it, who could be another pair of legs, ears and eyes for me, I'd have grabbed her – or him."²

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appointee depends on absolute confidentiality and the ability to determine and act on a minister's viewpoint. In order to be useful to a minister, a personal appointee must be able to act on his or her behalf, without requiring detailed and time consuming instructions.

On the other hand, constitutional principle demands that any exercise of government power be accountable to Parliament and the public. Ministers are responsible to Parliament for the actions they undertake as ministers and for acts performed on their behalf.⁵ Yet full accountability as regards personal appointees may be impeded by the secrecy of their role. This may be exacerbated where a personal appointee undertakes functions without the explicit instruction or even the knowledge of the minister. Furthermore, in practice there appears to be little effort to hold personal appointees to account at all, either personally or through the relevant minister. Thus there is a tension between political reality and the constitutional need for full accountability.

Personal appointees also give rise to issues in relation to the public service. In particular, they may control public servants' access to their minister and consequently undermine the relationship between these two actors. As well, public servants must act in a politically neutral manner.⁶ Within a minister's office, having to work alongside staff who are overtly political may potentially undermine the neutrality of public servants. Finally, personal appointees who deal with media issues may be perceived as controlling communications in a manner which is misleading to the public.

This paper seeks to clarify the constitutional position of personal appointees. In order to do this, the behavioural norms relating to ministers and public servants are first examined. Because these are the actors whom personal appointees work alongside, clarifying their position throws light on that of personal appointees. The paper then addresses the constitutional status

⁵ Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) 16.

⁶ State Services Commission *Public Service Code of Conduct* (State Services Commission, Wellington, 2001) 9.

of personal appointees by reference to ministers and public servants and to the constitutional conventions which guide their behaviour. Within this context, the functions which personal appointees undertake are found to make a valuable contribution to the New Zealand political system. However, these functions also create the potential for abuses of power and constitutionally inappropriate behaviour. Consequently, United Kingdom ("UK") and Australian experiences provide possibilities for dealing with these problems. The experiences of these two countries also reinforce the need for New Zealand to address potential problems. Thus, the paper recommends that personal appointees be legally distinguished from public servants. As well, it recommends the adoption of separate codes of conduct for personal appointees and public servants. Finally, it advocates training for incoming personal appointees and the implementation of a procedure to allow complaints to be made about personal appointees' conduct.

In the following section, the context in which personal appointees work is examined. Firstly, the nature of New Zealand's system of government is described. This explains how power is divided in the State. Because personal appointees are interposed between ministers and public servants, the constitutional controls on the exercise of power by these two sets of actors are addressed. This allows comparison and contrast between these actors and personal appointees. As a result, the constitutional position of personal appointees can be established. This analysis also highlights issues that may be of concern as regards personal appointees, for example in relation to accountability and their impact on the minister-public servant relationship.

II THE CONTEXT IN WHICH PERSONAL APPOINTEES ACT

New Zealand government ministers' offices employ several types of staff. These include administrative staff, public servants seconded from government departments, and personal appointees.⁷ The first aid the minister

⁷ 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) 59.

in terms of secretarial and administrative functions.⁸ In a formal legal sense, personal appointees are employed in the same way as public servants. That is, they are employed under the State Sector Act 1988 by the Ministerial Services branch of the Internal Affairs Department.⁹ However, public servants are employed as politically neutral policy advisers and ministerial assistants. In contrast, personal appointees are in general employed to provide ministers with explicitly partisan advice and to deal with political risk management.¹⁰ In practice, they may act as all-purpose assistants to a minister. Particular functions of personal appointees may include undertaking intra-coalition and intra party negotiations, managing media issues, providing policy advice and acting as a conduit between ministers and departmental public servants.¹¹

Personal appointees act within a broadly Westminster style democracy adapted to New Zealand's particular circumstances. A modern liberal democracy in this tradition is underpinned by the notion of government by or

⁸ James, above, 59.

⁹ James, above, 60.

¹⁰ Richard Shaw "Advisers and Consultants" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Auckland, 2001) 153.

¹¹ Ministerial Services *Job Profile: Ministerial Advisor* (Wellington, 2003) identifies the following as "Key Responsibilities/Tasks:

1. Providing political oversight and independent advice on policy proposals and submissions received.
2. Monitoring relevant cabinet committee papers/minutes to ensure that any issues of significance are drawn to the Minister's attention.
3. Managing the Ministerial office relationship with Coalition and support party spokespeople and working with Prime Minister's Office on relevant support party consultation issues.
4. Liaising with government members on select committees on relevant legislation to ensure the government is kept abreast of developments.
5. Managing OIA requests, including being able to identify potential political issues which may arise and liaising with Prime Minister's office as required.
6. Ensuring the Minister is appropriately briefed for all House responsibilities.
7. Liaising with Caucus Committees and Research Units.
8. Risk management of issues within Minister's [sic] portfolios and ensuring the Prime Minister's office is kept informed about potential risks and opportunities.
9. Attending meetings with officials, sector organisations, and any other relevant meetings as required.
10. Where required, providing input into the government's strategic planning.
11. Liaising with portfolio advisors, Senior Private Secretary, Press Secretary and other office staff on the implementation of portfolio plans.
12. Working with appropriate Associate Ministers' and Under-Secretaries' staff in relation to the Minister's portfolios.
13. Effective liaison and relationship development with key stakeholders in Ministers' portfolios.
14. Other duties as required."

with the consent of the people.¹² That is, the people delegate their sovereignty to their parliamentary representatives.¹³

The New Zealand political system is predicated on responsible government,¹⁴ in other words a government drawn from and responsible to an elected Parliament.¹⁵ It is a basic tenet of the Westminster political framework that the exercise of government power is at root accountable to Parliament. The government is thus accountable to the people through their parliamentary representatives.¹⁶ Such responsibility is the key means by which democratic accountability is exercised. Parliament possesses legal sovereignty and expresses support for a government through confidence votes.¹⁷ In practice, ministers delegate much of the exercise of government power to public servants.¹⁸ Therefore, ministers must also be responsible to Parliament for the actions of public servants.

The New Zealand system has developed to reflect several other important principles. Firstly, New Zealand government has become more open and its processes more transparent. This has occurred through the enactment of official information legislation, which seeks "to make official information more freely available."¹⁹ The Official Information Act ("OIA") is buttressed by other reforms, such as the establishment of the Office of Ombudsman in 1962,²⁰ other statutory requirements providing for freedom of information,²¹ the passage of the New Zealand Bill of Rights Act 1990 and the

¹² Richard Mulgan *Democracy and Power in New Zealand: a Study of New Zealand Politics* (Oxford University Press, Auckland, 1984) 8, 13.

¹³ H B Mayo *An Introduction to Democratic Theory* (Oxford University Press, New York, 1960) 72-73.

¹⁴ In this paper, "government" refers to the Executive branch of government.

¹⁵ Philip Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 8; Constitution Act 1986, s6.

¹⁶ Sir Ivor Jennings *Cabinet Government* (3 ed, Cambridge University Press, Cambridge, 1959) 90.

¹⁷ Constitution Act 1986, s14.

¹⁸ Sir Ivor Jennings *The Law and the Constitution* (5 ed, University of London Press, 1959) 200.

¹⁹ Official Information Act 1982, long title.

²⁰ Parliamentary Commissioner (Ombudsman) Act 1962 has been replaced by the Ombudsmen Act 1975.

²¹ For example, the Local Government Official Information and Meetings Act 1987, the Public Finance Act 1989, the Privacy Act 1993 and the Fiscal Responsibility Act 1994.

strengthening and development of administrative law.²² Secondly, state sector reforms in the 1980s and 1990s have focused the state sector on commercial efficiency.²³ These reforms have also strengthened and increased accountability mechanisms.²⁴ Finally, the adoption of a mixed member proportional ("MMP") electoral system in 1996 has created more representative, complex and potentially accountable government.²⁵

Within this framework, New Zealand has a largely unwritten and therefore convention-based and evolutionary constitution. That is, the behaviour of ministers and public servants is constrained by constitutional conventions. These are norms of political practice which have become so significant as to be regarded as binding principles.²⁶

The most important aspect of the New Zealand system in relation to the context in which personal appointees work is the relationship between ministers and public servants. The next section examines this relationship in order to illustrate the context of personal appointees' work. This in turn facilitates an understanding of the constitutional constraints which may impact on personal appointees. Finally, addressing the minister-public servant relationship indicates problems regarding ministers, public servants and personal appointees.

III THE MINISTER-PUBLIC SERVANT RELATIONSHIP

As mentioned, New Zealand has a largely convention-based constitution. Evolutionary norms ensure that the behaviour of government actors is kept within the bounds of constitutional propriety. Because personal appointees are positioned between ministers and public servants, the behaviour

²² New Zealand Law Commission *Review of the Official Information Act 1982* (NZLC E31AC, Wellington, 1997) 145-146.

²³ See for example Public Finance Act 1989, State Sector Act 1988.

²⁴ John R Martin "The Public Service" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Auckland, 2001) 133.

²⁵ J Boston *Governing Under Proportional Representation: Lessons from Europe* (Institute of Policy Studies, Wellington, 1998) 2-3.

²⁶ Philip Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 273.

of these two sets of actors impacts on them. Ministers, public servants and their relationship with each other in the modern political context contribute to a determination of the status of personal appointees. Thus, the constitutional conventions which affect the minister-public servant relationship must be examined. The nature of these conventions has been affected by certain changes to the political framework. Therefore, these changes, insofar as they may impact on the relevant conventions, are first set out. Next, the conventions themselves are discussed. The question of how the relationship consequently works in practice is then addressed.

A *Changes to the Political Context*

1. *Open government*

The OIA reversed the existing presumption regarding release of official information.²⁷ That is, information should be released if there is no good reason to withhold it.²⁸ As discussed, the passage of the OIA constituted a key feature of a broader and ongoing move towards open government in New Zealand.

The OIA was prompted by the report of the Danks Committee. Its recommendations,²⁹ which were largely adopted in the final legislation, reflect the principles underpinning the shift towards open government. First, a participatory and well informed public is thought to enhance the accountability of both politicians and administrators.³⁰ Secondly, transparent government processes allow the public to "follow and scrutinise the actions of government or the advice given and options canvassed."³¹ Finally, open government purports to enhance government effectiveness by allowing for a more participatory, better informed policy process and more cooperation between

²⁷ Official Secrets Act 1951, s6, which was repealed by the Official Information Act 1982, s51.

²⁸ Official Information Act 1982, s5.

²⁹ New Zealand Committee on Official Information General Report *Towards Open Government* (Government Printer, Wellington, 1981) Appendix One, 40.

³⁰ *Towards Open Government*, above, 14.

³¹ *Towards Open Government*, above, 14-15.

government and citizens.³² The principles of open government are now an established part of the New Zealand system.³³ They clearly have an impact on the behaviour of ministers and public servants given that they expose their actions to a much greater degree of public scrutiny.

2. State sector reforms

Broad reforms to the core public sector conducted in the late 1980s and early 1990s³⁴ have also had a significant impact on the minister-public servant relationship. The reforms installed departmental chief executives who are appointed for a fixed term. As well, the advisory and delivery elements of the public service were separated.³⁵ Consistent with this, outputs produced, rather than policy outcomes sought, became the measure of the bureaucracy's performance.³⁶ Finally, many commercial and other public sector activities were contracted out or released from direct government control.³⁷

The separation of governance and operation in the public sector has bestowed certain responsibilities on departmental chief executives personally, rather than on ministers.³⁸ For example, the State Sector Act 1988 gives chief executives authority in relation to human resources.³⁹ Similarly, the Public Finance Act 1989 gives chief executives responsibilities regarding the financial management of their department.⁴⁰

³² *Towards Open Government*, above, 15-16.

³³ Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) 1.

³⁴ Allen Schick *The Spirit of Reform: Managing New Zealand's State Sector in a Time of Change* (Report Prepared for the State Services Commission and The Treasury, Wellington, 1996) 2; John R Martin "The Public Service" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Auckland, 2001) 132-133.

³⁵ Martin "The Public Service," above, 133-134; John Martin "Advisers and Bureaucrats" in Raymond Miller (ed) *New Zealand Politics in Transition* (Oxford University Press, Auckland, 1997) 111.

³⁶ Schick, above, 74; Graham Scott and Peter Gorringer *Reform of the Core Public Sector* (The Treasury, Wellington, 1988) 6.

³⁷ Martin "The Public Service," above, 134.

³⁸ Scott and Gorringer, above, 15.

³⁹ State Sector Act 1988, s33.

⁴⁰ Public Finance Act 1989, s33.

These reforms were implemented to improve the economic efficiency and the effectiveness of the public service.⁴¹ Based on public choice theory, agency theory and contractual analyses,⁴² the restructured public sector is thought to be capable of much greater cost-effectiveness as well as better delivery of services.⁴³

The reforms also sought to enhance the accountability of government officials.⁴⁴ That is, they strengthen public servants' personal accountability, over and above the accountability imposed through their minister.⁴⁵ In this sense, state sector reforms represent a fundamental shift in the way the New Zealand system views accountability. Ministers and public servants are no longer always regarded as one entity for the purpose of accountability mechanisms.

3. Electoral system change

In 1993, New Zealand adopted a mixed member proportional electoral system (MMP).⁴⁶ This came into effect in 1996. The previous first-past-the-post electoral system (FPP) was based on simple plurality elections in single member constituencies.⁴⁷ As such, it was strongly biased towards single party majority government.⁴⁸ MMP is a predominantly proportional, party-based system, except for the retention of single member geographical constituencies. This tends to favour multi-partism, both within and outside of Parliament. In

⁴¹ Allen Schick *The Spirit of Reform: Managing New Zealand's State Sector in a Time of Change* (Report Prepared for the State Services Commission and The Treasury, Wellington, 1996) 11; John R Martin "The Public Service" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Auckland, 2001) 133.

⁴² Graham Scott and Peter Gorringer *Reform of the Core Public Sector* (The Treasury, Wellington, 1988) 2-3.

⁴³ John Roberts *Politicians, Public Servants and Public Enterprise* (Victoria University Press for the Institute of Policy Studies, Wellington, 1987) 14-15; Scott and Gorringer, above, 1.

⁴⁴ Martin, "The Public Service," above, 133.

⁴⁵ Philip Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 299.

⁴⁶ Electoral Act 1993, s2(1)

⁴⁷ Electoral Act 1956, ss2, 16.

⁴⁸ Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand Government Under MMP* (3 ed, Oxford University Press, Auckland, 1997) 12; J Boston *Governing Under Proportional Representation: Lessons from Europe* (Institute of Policy Studies, Wellington, 1998) 2.

turn, coalition majority, single party minority and coalition minority governments are systemically encouraged.⁴⁹ In fact, New Zealand has experienced minority government almost invariably since the introduction of MMP. Proportional representation has also increased diversity in Parliament, for example in terms of gender and ethnicity.⁵⁰

MMP purports to improve the accountability of governments to Parliament in two ways. First, government majorities, if they exist at all, are likely to be small. This makes governments much more vulnerable to Parliament. Secondly, a greater diversity of viewpoints in Parliament allows for greater accountability.⁵¹ Governments are also constrained from within where they must work with coalition partners.⁵²

1. Collective cabinet responsibility

These changes to the constitutional framework have added to the primary accountability mechanism of ministerial accountability to Parliament. That is, state sector reforms and open government have imposed personal accountability requirements on public servants in addition to their indirect accountability through ministers. Moreover, the accountability of ministers and public servants to Parliament and the public have been increased through improvements to the transparency of government processes. Finally, MMP has created a much more complex environment within which minister and public servants must work and has also enhanced accountability. In the following section, the constitutional conventions relating to the minister-public servant relationship are analysed. This analysis is undertaken with regard to how these conventions work in the modern New Zealand political context which has been described.

⁴⁹ Palmer and Palmer, above, 12; Boston, above, 2-3.

⁵⁰ Boston, above, 1; Bernie Steeds "MMP: Here to Stay? Questions about the Review" (19 April 2000) *The Press* Christchurch 9.

⁵¹ This occurs because of the increased number of parties and societal groups represented in Parliament.

⁵² Elizabeth McLeay "Cabinet" in Raymond Miller (ed) *New Zealand Politics in Transition* (Oxford University Press, Auckland, 1997) 91.

B Ministers' Conventions

Ministers and Cabinet exercise the power of government in New Zealand.⁵³ Ministers must be democratically elected members of parliament (MPs).⁵⁴ They are appointed to their ministerial posts by the Governor-General on the advice of the Prime Minister.⁵⁵ These two features of the New Zealand constitution mean that ministers are accountable to the electorate both directly, as elected MPs, and indirectly, through Parliament. Importantly, the accountability of ministers, qua ministers, is to Parliament. This accountability is effected through the constitutional conventions of collective cabinet responsibility and individual ministerial responsibility.⁵⁶

1. Collective cabinet responsibility

Collective cabinet responsibility refers to the principle that Cabinet as a whole is responsible to Parliament for its actions and decisions.⁵⁷ Although it has an important influence on ministers' behaviour, this convention does not impact directly on the minister-public servant relationship. As such, it is only briefly examined.

Collective cabinet responsibility is fundamental to Cabinet government⁵⁸ and to the Westminster constitutional structure.⁵⁹ Primarily, it allows Parliament to hold the government to account for its actions, by

⁵³ Elizabeth McLeay *The Cabinet and Political Power in New Zealand* (Oxford University Press, Auckland, 1995) 9-10.

⁵⁴ Constitution Act 1986, s6.

⁵⁵ The method of appointment to cabinet varies according to the political party of the particular Prime Minister. For example, Labour Party ministers are voted in by the party caucus, while National Party ministers are appointed at the leader's discretion. (McLeay *The Cabinet and Political Power in New Zealand*, above, 17.) In the context of coalition government, ministerial appointments are also subject to cross-party negotiation.

⁵⁶ Sir Ivor Jennings *Cabinet Government* (3 ed, Cambridge University Press, Cambridge, 1959) 112-113, 277; Arthur Berriedale Keith *An Introduction to British Constitutional Law* (Oxford University Press, Oxford, 1931) 40.

⁵⁷ Jennings *Cabinet Government*, above, 277.

⁵⁸ McLeay *The Cabinet and Political Power in New Zealand*, above, 2; Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) 45.

⁵⁹ Albert Venn Dicey *Introduction to the Study of The Law of the Constitution* (10 ed, MacMillan and Company, 1959) 419-420.

enabling it to dismiss Cabinet using a vote of no confidence.⁶⁰ This power ensures democratic control of government action between elections. Collective cabinet responsibility also empowers Cabinet to exert control over ministers and over the public service.⁶¹ This is fundamental to the government's capacity to act.⁶² Collective cabinet responsibility can be divided into three elements, namely confidence, unanimity and confidentiality.⁶³

First, the confidence element requires that the government always enjoy the confidence of Parliament.⁶⁴ This is supported by the unanimity principle, which requires that all ministers publicly support Cabinet decisions.⁶⁵ Except where unanimity is waived, a minister would traditionally be expected to resign from Cabinet prior to disagreeing publicly with a Cabinet decision or policy.⁶⁶ Finally, Cabinet discussions must remain

⁶⁰ Matthew S R 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) 2-3.

⁶¹ Palmer, above, 2.

⁶² Elizabeth McLeay *The Cabinet and Political Power in New Zealand* (Oxford University Press, Auckland, 1995) 200.

⁶³ Geoffrey Marshall *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press, Oxford, 1984) 55.

⁶⁴ Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* (10 ed, MacMillan and Company, 1959) 420; Sir Ivor Jennings *Cabinet Government* (3 ed, Cambridge University Press, Cambridge, 1959) 18; The increased likelihood of minority government and majority or minority coalition government under MMP make the confidence of Parliament less assured than was the case under FPP. In practice, Cabinet has never lost the confidence of Parliament under MMP. However, the issue of confidence has been far more important and arguably precarious since 1996. At times it has been the subject of intense negotiations. For example, between 1996 and 1999 the National-led Government variously had to rely for support on NZ First as coalition partner, ACT New Zealand and the United Party as support parties outside government, and independent MPs. Thus, the confidence element has been revitalised in the modern political context.

⁶⁵ Sir Ivor Jennings *Cabinet Government* (3 ed, Cambridge University Press, Cambridge, 1959) 277; Palmer, above, 4.

⁶⁶ O Hood Phillips and Paul Jackson *O Hood Phillips' Constitutional and Administrative Law* (7ed, Sweet and Maxwell, London, 1987) 125; A developing exception to unanimity can be attributed to MMP's promotion of coalition government. In particular, the 1999 Labour-Alliance coalition agreement included a clause, which stated that, on matters of "party distinction," parties within the coalition Cabinet may "agree to disagree." (The Coalition Agreement Between the Labour and Alliance Parties <<http://www.executive.govt.nz/coalition/>> (last accessed 22 April 2003); see also Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) 46.) However, this exception does not undermine the purpose of unanimity. That is, all Cabinet members are still required to implement in good faith the decisions on which they have disagreed. Thus, they are still accountable publicly and in Parliament for the effects of decisions.

confidential in order to uphold the appearance of unanimity.⁶⁷ This also facilitates the effectiveness of the confidence convention.⁶⁸

2. *Individual ministerial responsibility*

Cabinet ministers are individually responsible to Parliament for matters within their portfolio.⁶⁹ This convention reinforces Parliament's role in holding government to account. It allows individual ministerial action to come under the scrutiny of the House.⁷⁰ Secondly, it empowers ministers in respect of public servants.⁷¹ Thirdly, it reinforces collective cabinet responsibility by allowing Cabinet to override individual ministers⁷² and thus to control and coordinate the public service and implement coherent policy.⁷³ This convention has also undergone some evolutionary change. It has thus been modified but not fundamentally altered.

The first question which arises in the context of the content of the convention is what a minister is responsible for. This is usually divided into three categories. First, primary responsibility denotes responsibility for ministerial actions and decisions.⁷⁴ Second, personal responsibility refers to personal actions which may impact on the office. Finally, ministers are

⁶⁷ Palmer, above, 5.

⁶⁸ The confidentiality principle has undergone some change. Cabinet papers, Cabinet minutes and Cabinet discussions are now subject to release under the OIA (s12). Because the OIA opens up government to a much greater degree of scrutiny, confidentiality and unanimity may be eroded. However, oral cabinet discussions are usually withheld under provisions protecting constitutional conventions. These may relate to collective and individual ministerial responsibility (s9(2)(f)(ii)), or to the confidentiality of advice tendered by Ministers of the Crown and officials (s(9)(2)(f)(iv)). Alternatively, information may be withheld because release would prejudice the effective conduct of public affairs either by deterring the free and frank expression of opinions between government actors or by exposing those actors to improper pressure or harassment (s9(2)(g)). Thus, the OIA does not go to the heart of the convention. That is, Cabinet as a collective must in general publicly support and be responsible to Parliament for all decisions. Making Cabinet documents available for public inspection does not undermine this.

⁶⁹ Hood Phillips and Jackson, above, 126.

⁷⁰ Palmer, above, 10.

⁷¹ Palmer, above, 10.

⁷² Sir Ivor Jennings *Cabinet Government* (3 ed, Cambridge University Press, Cambridge, 1959) 134.

⁷³ Palmer, above, 2.

⁷⁴ Jennings *Cabinet Government*, above, 498.

vicariously responsible for the actions of public servant in departments within the scope of their ministerial portfolios.⁷⁵

It has been argued that personal responsibility has undergone some change. Specifically, recent claims that it has been breached have arisen in the case of allegations, rather than proof, of impropriety.⁷⁶ This may indicate that personal responsibility has been strengthened. The indication is reinforced in that the sanction for these breaches was loss of ministerial portfolios.⁷⁷ On the other hand, such treatment of the principle was really only experienced under the first years of the Clark-led Government. As such, it appears to have been more an aberration than evidence of evolution.

Vicarious responsibility has also arguably evolved. There have been recent publicised instances of ministers refusing to accept blame as regards the actions of public servants in their departments, and publicly criticising them.⁷⁸ This may be attributable to more transparent departmental processes and the increased focus on direct accountability of public servants for certain matters.⁷⁹ In the changed political context, it would be artificial for a minister to accept responsibility for errors which are publicly known to be the fault of or within the sphere of public servants. This does not detract from the minister's obligation to make an explanation to Parliament and attempt to amend such errors. Moreover, change in this area is not as widespread as has been claimed but is rather evidenced by isolated publicised instances. It can still be regarded as governing ministerial behaviour. In sum, individual

⁷⁵ Jennings *Cabinet Government*, above, 498-499.

⁷⁶ Palmer, above, 8.

⁷⁷ For example, in June 2000, Dover Samuels lost the Maori Affairs portfolio "in light of sexual allegations against him." ("Ultimatum to Samuels: Resign, or be Sacked" (28 June 2000) *The Evening Post* Wellington 1; Ruth Berry "No Questions if I had Stayed with Woman, Says Samuels" (28 June 2000) *The Evening Post* Wellington 3; Jonathan Milne "Maori Leaders who Pushed for Change" (29 June 2000) *The Dominion* Wellington 2.)

⁷⁸ For example, Prime Minister Helen Clark publicly criticised Ministry of Defence officials after they leaked information to Opposition MPs, saying that "pimping" happens "whenever there is some kind of hissy-fit going on in defence headquarters." (Phil Taylor "A Very Modern Major General" (23 September 2001) *The Sunday Star-Times* Auckland 11); 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.

⁷⁹ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 289.

ministerial responsibility remains vital in the New Zealand political framework.

C *Public Servant Conventions*

Public servants are employed under the State Sector Act 1988. Their role is to provide expert policy advice to ministers and to implement government policy.⁸⁰ Constitutional conventions relating to the public service consequently seek to safeguard the integrity of advice given to ministers. Further, they ensure that the powers of government are exercised by ministers and not by public servants. Since there must be democratic accountability for the exercise of government power, it would be inappropriate for unelected public servants to usurp that power from responsible ministers.⁸¹ The guiding constitutional conventions, as regards public servants, can be termed loyalty, neutrality and anonymity.⁸² These conventions have undergone change, mainly as a result of changes to the political framework which have already been discussed. However, these principles still govern the modern New Zealand public service.

1. *Loyalty*

Public servants have a duty to be loyal to the government of the day. This means that they must carry out the valid commands of their minister in good faith and to the best of their ability.⁸³ They should not bring the minister into disrepute in any way.⁸⁴ Underlying these principles is the concept that public servant actions lack legitimacy without valid authority. Responsible

⁸⁰ State Services Commission *Public Service Code of Conduct* (State Services Commission, Wellington, 2001) 8-9; Sir Ivor Jennings *Cabinet Government* (3 ed, Cambridge University Press, Cambridge, 1959) 126.

⁸¹ Sir Ivor Jennings *Cabinet Government*, above, 118-119.

⁸² Matthew S R 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) 12.

⁸³ Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) 34; *Public Service Code of Conduct*, above, 19-20; Palmer, above, 12.

⁸⁴ Palmer, above, 12.

ministers, and not public servants, must exercise the power of government.⁸⁵ The principles also allow the effective and properly informed development of policy and running of government.

Two major changes to the political framework have impacted on the convention of loyalty. The first is the adoption of MMP. In the context of coalition government, public servants are often under the command of two or more parties. This may result in them being faced with conflicting instructions.⁸⁶ In such a case, public servants may notify other ministers or the Cabinet in order to resolve the issue. However, this still constitutes an increased tension in the convention. Furthermore, it is one which may have repercussions in the other two elements of the public service convention.

The second important political change in this regard is the reform of the state sector. In particular, as discussed, the separation of governance and operation has bestowed responsibilities on departmental chief executives personally. As a result, the duty to be loyal has specific exceptions, at least for chief executives. Moreover, because public servants are often personally accountable for their actions, they face incentives to act in their own and not just in their minister's interests. In addition, in some situations, who has responsibility for an issue may be debatable. These factors complicate and weaken the loyalty convention.

It can be said that the loyalty convention has become subject to increased strain. However, generally speaking, it still appears to guide the behaviour of public servants.⁸⁷ Moreover, the inroads into the convention may be justified by the corresponding enhancement of other constitutional principles and of government effectiveness. Specifically, accountability is at least arguably more focused and thus more effective. As well, the state sector reforms are thought to have improved efficiency.

⁸⁵ Albert Venn Dicey *Introduction to the Study of The Law of the Constitution* (10 ed, MacMillan and Company, 1959) 325.

⁸⁶ 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) 20-21.

⁸⁷ James, above, 71-72.

2. *Neutrality*

Public service loyalty is tempered by the obligation to act in a manner which is politically neutral.⁸⁸ The New Zealand public service is completely comprised of permanent professionals. As such, their loyalty to the government of the day must not affect their ability to be loyal to future governments.⁸⁹ Neutrality allows for a permanent public service. This has the advantage that each department holds "a body of knowledge and experience – a corporate memory."⁹⁰ Such experience is of benefit to a government, particularly at the beginning of a parliamentary term.

Like loyalty, the neutrality principle has arguably been modified, or at least strained. The advent of MMP has given rise to different pressures being placed on public servants. In particular, coalition government has dragged them into political negotiations and partisan policy disputes much more than was the case under a system of single party majority government.⁹¹ Nevertheless, this phenomenon should not be overstated. For one thing, in practice, politicking is not predominantly carried out by public servants. Rather, politicians and personal appointees fulfil the greater part of this role.⁹² For another, public servant neutrality is rarely seriously questioned in New Zealand.

The OIA can expose public servant advice, which may evidence differences of opinion among public servants and between ministers and

⁸⁸ Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) 34; State Services Commission *Public Service Code of Conduct* (State Services Commission, Wellington, 2001) 9; Sir Ivor Jennings *Cabinet Government* (3 ed, Cambridge University Press, Cambridge, 1959) 127-128.

⁸⁹ Matthew S R 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) 13.

⁹⁰ Sir Richard Wilson (Speech, 26 March, 2002) 2
<<http://www.civilservant.org.uk/srwspeech0302.pdf>> (last accessed 25 June 2002). See also, Jennings *Cabinet Government*, above, 123.

⁹¹ Palmer, above, 13.

⁹² 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) 62.

public servants.⁹³ This may undermine public perception of officials' neutrality.⁹⁴ However, the Act allows information to be withheld to protect neutrality.⁹⁵ In reality, although it may be at risk, public servant neutrality has not been called into serious question as a result of more open government. Thus, it can be said that neutrality is still a relevant constitutional convention, and one which does in fact guide the behaviour of public servants.

3. Anonymity

The principle of anonymity is closely related to individual ministerial responsibility. It requires that the relevant minister speak for and defend the actions of public servants.⁹⁶ This convention upholds the idea that the relationship between ministers and public servants is seamless. It also buttresses loyalty and neutrality.⁹⁷ That is, by avoiding personal publicity, public servants avoid appearing to have personal political persuasions.⁹⁸

The state sector reforms discussed above have had particular consequences for anonymity.⁹⁹ Chief executives now have some responsibilities for which they are personally answerable to the media and the public.¹⁰⁰ This clearly promotes the likelihood of them becoming well known. Open government has also contributed to an erosion of anonymity since it

⁹³ Arnikka MacIntyre-Daly "The Political Neutrality of the Public Service" (LLB(Hons) Research Paper, Victoria University of Wellington, 2002) 38.

⁹⁴ Richard Shaw "Advisers and Consultants" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Auckland, 2001) 149.

⁹⁵ Official Information Act 1982, s9(2)(f)(iii).

⁹⁶ Geoffrey Marshall *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press, Oxford, 1984) 66.

⁹⁷ Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 298-299.

⁹⁸ Matthew S R 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) 13.

⁹⁹ Joseph, above, 299; John Martin "Advisers and Bureaucrats" in Raymond Miller (ed) *New Zealand Politics in Transition* (Oxford University Press, Auckland, 1997) 108.

¹⁰⁰ Arnikka MacIntyre-Daly "The Political Neutrality of the Public Service" (LLB(Hons) Research Paper, Victoria University of Wellington, 2002) 21; Palmer, above, 14.

allows departmental processes to be scrutinised by the public.¹⁰¹ In practice, it is still exceptional and frowned upon for a public servant personally to establish a public profile.¹⁰² Further, exceptions appear not to have resulted in the calling into question of the loyalty or neutrality of the public service as a whole.¹⁰³

Along with institutional changes, it has been argued that there is a general trend towards ministers publicly naming and criticising public servants.¹⁰⁴ This would undermine anonymity and also risk publicly politicising officials.¹⁰⁵ Once again, this argument should not be overstated. Instances of attack of public officials have mainly occurred under the Clark-led Government.¹⁰⁶ Thus, it would be premature to conclude that this convention has been significantly eroded. Moreover, while they have been highly publicised, these instances have not been very many. As such, they do not appear to constitute a widespread trend.

Anonymity has faced a variety of pressures. It has been strained, particularly in terms of the separate accountabilities of chief executives. However, the convention has not fundamentally altered. It is still a basic principle in the New Zealand political framework and predominantly guides the behaviour of ministers and public servants.

In sum, most of the discussed constitutional conventions face strains, mainly as a result of the changed political context. Yet they can still be regarded as the relevant guiding norms of behaviour. However, heightened

¹⁰¹ Joseph, above, 288; 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) 16.

¹⁰² For example, former chief executive of the Department of Work and Income Christine Rankin was criticised for creating a notorious public profile (Simon Beattie "Agony but no Ecstasy for Public Servants" (4 August 2001) *The Sunday Star Times* Auckland 5).

¹⁰³ MacIntyre-Daly, above, 43, 56.

¹⁰⁴ "Loyalty Has to be Earned" (27 September 2002) *The Dominion Post* Wellington 4; Matthew S R 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) 15.

¹⁰⁵ MacIntyre-Daly, above, 37.

¹⁰⁶ "Loyalty Has to be Earned," above; Bernie Steeds "Prophet's Recipe for Egg on the Face" (11 January 2002) *The Evening Post* Wellington 4.

strains, particularly as a result of enhanced accountability mechanisms, have impacted on the minister-public servant relationship. The next section outlines the practical consequences of this impact.

D Conclusion

In theory, the minister-public servant relationship is supposed to be a seamless one, based on openness and trust.¹⁰⁷ Such a relationship facilitates government accountability and ensures government's ability to act. That is, firstly, ministers must be able to be properly held to account, through Parliament, for the actions of public servants within the scope of their portfolios. Secondly, ministers must have a strong relationship with public servants to allow for effective communication and effective implementation of government policy.

Primarily, the relationship has become more politicised.¹⁰⁸ This has arisen as a consequence of the MMP environment. It is also caused by increased media and public scrutiny in the context of open government. In addition, it stems from the direct accountability mechanisms that apply to public servants. Moreover, coalition government has arguably forced public servants into undertaking political negotiations, due to the need for bargaining and compromise.¹⁰⁹

Related to the above change, there has been some undermining of the relationship of trust between ministers and public servants. Of course, the existence of a relationship of trust depends in any case on the particular individuals involved. However, it can be argued that a more participatory

¹⁰⁷ Sir Ivor Jennings *Cabinet Government* (3 ed, Cambridge University Press, Cambridge, 1959) 126.

¹⁰⁸ For example, the relationship between Minister of Maori Affairs Hon Parekura Horomia and Te Puni Kokiri chief executive Leith Comer has been the subject of recent political debate. In particular, Comer publicly took responsibility for giving the minister incorrect answers to parliamentary questions (Nick Venter "Where Controversy Strikes, Often" (20 June 2003) *The Press* Christchurch 11); MacIntyre-Daly, above, 44-45.

¹⁰⁹ Matthew S R 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) 13.

policy process and the fear of policy capture by public servants have harmed the minister-public servant relationship. In addition, the Labour-led government which came to power in 1999 had an initial mistrust of public servants, due to lengthy periods in Opposition.¹¹⁰ However, this in itself is not evidence of a more general decline in the relationship. Further, trust has built up over the course of the current government's period in office.¹¹¹ It is, however, reasonable to suggest that an incoming minister will not initially have a close and trusting relationship with public servants. This may be particularly the case where the minister has previously been the Opposition spokesperson in relation to what is now his or her portfolio. In that capacity he or she is likely to have been critical of the department.¹¹²

A smooth relationship between these two actors is vital to a government's ability to develop and implement its policies. Firstly, a strained relationship may impact on the effectiveness of policy advice and implementation. Moreover, it may limit the extent to which ministers can be responsible for public servant actions. Secondly, politicisation runs counter to the basis of the relationship and undermines the constitutional framework of our system of government. Hence, while the guiding constitutional conventions still hold, problems in the relationship between ministers and their public servants may need to be addressed. Mitigating the strain in this relationship could both benefit government effectiveness and weaken the strain on constitutional conventions.

Personal appointees act in the context which has been described above. In light of this, the following section traces the development of personal appointees. Their constitutional position is then evaluated by reference to the above discussion.

¹¹⁰ 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; Nick Venter "Are You Listening, Minister?" (4 October 2000) *The Dominion* Wellington 11.

¹¹¹ Interview with Chris Eichbaum, former Adviser to Hon Steve Maharey (the author, Wellington, 8 September 2003); MacIntyre-Daly, above, 43; James, above, 61.

¹¹² Interview with Hon Murray McCully, MP (the author, Wellington, 6 August 2003).

IV PERSONAL APPOINTEES

A The Development of Personal Appointees

The development of the practice of making personal appointments to ministers' offices appears to have occurred incrementally in New Zealand. The incoming Labour Government in 1984 appointed "advisers" to many portfolios.¹¹³ These appointments were made on the basis that they were "compatible with the minister rather than because of party allegiance."¹¹⁴ On the other hand, they were not neutral public servants seconded from departments. To a lesser extent, the National Government which came to power in 1990 also appointed advisers to ministers' offices.¹¹⁵ As well, from about the late 1980s, press secretaries became personal appointments, rather than being secondees.¹¹⁶ Most recently, personal appointments have begun to be made on the basis of policy expertise.¹¹⁷

The number of advisers in ministers' offices has expanded considerably in recent years. From December 1989 to October 1999 many ministers' offices employed no advisers and the maximum number in any office did not exceed three.¹¹⁸ However, during that time there may have been other positions acting in advisory roles but under different job titles.¹¹⁹ In any event, recent data, which is more accurate, shows that there were eleven advisers by October 2000, 14 by September 2001, 17 by October 2002 and 25 by June 2003. In that time, advisers' average salary increased from \$65 333 to \$71 396. This means the total cost of advisers' salaries as at October 2000

¹¹³ Interview with Peter Harris, former Economic Adviser to Hon Dr Michael Cullen (the author, Wellington, 25 September 2003).

¹¹⁴ Simon King *Regulating the Behaviour of Ministers, Special Advisers and Public Servants* (The Constitution Unit, London, 2003) 51.

¹¹⁵ King, above, 51.

¹¹⁶ Interview with Hon Murray McCully, MP (the author, Wellington, 6 August 2003).

¹¹⁷ Interview with Peter Harris, former Economic Adviser to Hon Dr Michael Cullen (the author, Wellington, 25 September 2003).

¹¹⁸ This data was obtained as a result of a request under the OIA to Ministerial Services, Department of Internal Affairs.

¹¹⁹ Richard Lodge, Executive Manager, Ministerial Services (letter to the author, 18 September 2003).

was around \$718 663. At June 2003 that cost was about \$1 798 400.¹²⁰ Between December 1989 and June 2003, the total number of ministerial press secretaries varied between 20 and 27. Their average salary increased from \$49 136 to \$74 951.¹²¹

Therefore, it has been since the 1980s but mainly in the last few years that New Zealand government ministers have developed the practice of including personal appointees as part of their office staff.¹²² Personal appointees arguably represent a totally new role in New Zealand's constitutional structure. In fact, some aspects of their role may not conform with principles which are fundamental to New Zealand's system of government. The following section seeks to establish the constitutional position of personal appointees. Next, it is argued that personal appointees are a worthwhile part of the New Zealand political framework, on a practical level. However, some of their functions may give rise to issues which need to be acknowledged and addressed by the constitutional framework.

B The Constitutional Position of Personal Appointees

As mentioned, three types of staff can be identified in a minister's office. These are administrative staff, public servants who have been seconded from departments and personal appointees.¹²³ In reality, the distinction between these three types may not always be clear. For example, private secretaries may act politically neutrally and work under different governments. On the other hand, many private secretaries will be political appointments who have a close advisory relationship with their minister.¹²⁴ Similarly, some ostensibly political appointments, for example many executive assistants, will undertake few functions that a neutral departmental

¹²⁰ OIA data, above.

¹²¹ OIA data, above.

¹²² 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) 59; John Henderson "The Prime Minister" in Raymond Miller (ed) *New Zealand Politics in Transition* (Oxford University Press, Auckland, 1997) 76.

¹²³ James, above, 59.

¹²⁴ Interview with Luke MacMahon, Senior Adviser to Hon Phil Goff (the author, Wellington, 10 September, 2003).

secondee could not legitimately fulfil. As such, the status of a minister's employees may represent a continuum between absolute neutrality and overt political partisanship.¹²⁵ Even where the position of a staff member is clearly neutral, work will often be undertaken as an office team. Thus, neutral and partisan staff work very closely together. On a practical level, this may blur the line between politics and administration.¹²⁶

Personal appointees are employed under the State Sector Act 1988 by the Ministerial Services branch of the Internal Affairs Department.¹²⁷ That is, they are formally employed in the same way as public servants, except that they are usually employed on events-based contracts, rather than permanently.¹²⁸ In addition, they often perform similar functions to public servants, for example they may provide ministers with policy advice.¹²⁹ However, their position can be contrasted with that of a public servant seconded from a department to a minister's office. Departmental secondees continue to be employees of and retain strong links with their ministry. Personal appointees, on the other hand, work directly and solely under the command of their minister.¹³⁰

More importantly, public servants are subject to the constitutional conventions of loyalty, neutrality and anonymity. Jennings has formulated a test for determining the existence of a constitutional convention. This requires the following questions to be asked: "first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and

¹²⁵ Interview with Hon Murray McCully, MP (the author, Wellington, 6 August 2003); Interview with Peter Harris, former Economic Adviser to Hon Dr Michael Cullen (the author, Wellington, 25 September 2003).

¹²⁶ Interview with Luke McMahon, above; Interview with Chris Eichbaum, former Adviser to Hon Steve Maharey (the author, Wellington, 8 September 2003).

¹²⁷ 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.

¹²⁸ Chris Eichbaum and Richard Shaw "A Third Force? Ministerial Advisers in the Executive" (unpublished paper, Victoria University School of Government, 2003); Simon King *Regulating the Behaviour of Ministers, Special Advisers and Public Servants* (The Constitution Unit, London, 2003) 51.

¹²⁹ Interview with Hon Murray McCully, MP (the author, Wellington, 6 August 2003).

¹³⁰ James, above, 60.

thirdly, is there a reason for the rule?¹³¹ Applying the first of these questions to personal appointees, personal appointees act in a partisan rather than a politically neutral manner. The ministerial adviser job profile includes responsibilities and tasks of a political nature, such as “providing political oversight” and “providing input into the government’s strategic planning.”¹³² However, they appear to act similarly to public servants in terms of loyalty to their minister. Most are perceived as being completely loyal to their minister.¹³³ They are also, like public servants, largely anonymous – the minister is the public face of all his or her office’s actions. This is evidenced by the almost total lack of public knowledge of personal appointees’ role. Unlike in the UK, no personal appointees in New Zealand have so far personally established a significant public profile.¹³⁴

In respect of Jennings’ second question, despite a lack of evidence as to whether personal appointees believe they are bound to act loyally and anonymously, it appears that they almost invariably do. Certainly in terms of their ability to perform their often politically sensitive functions, they would be required to uphold these two principles. As well, the ability for ministers to be held to account for personal appointees’ actions requires loyalty. In contrast, personal appointees overtly believe they are not bound by a neutrality convention.¹³⁵ Moreover, political neutrality would undermine their functions, including providing explicitly partisan advice and dealing with political risk management.¹³⁶ It would therefore appear that personal appointees, while legally identical to public servants, are constitutionally distinct. They are arguably subject to the public service conventions of loyalty and anonymity. Further, it can be argued that they ought to be guided by these two conventions. However, they are not subject to neutrality.

¹³¹ Sir William Ivor Jennings *The Law and the Constitution* (5 ed, University of London, London, 1959) 136.

¹³² Ministerial Services *Job Profile: Ministerial Advisor* (Wellington, 2003) 3.

¹³³ Interview with Chris Eichbaum, former Adviser to Hon Steve Maharey (the author, Wellington, 8 September 2003).

¹³⁴ Finlay McDonald “Murder Will Out” (2 August 2003) *The Listener* New Zealand 7.

¹³⁵ Interview with Luke McMahan, Senior Adviser to Hon Phil Goff (the author, Wellington, 10 September 2003).

¹³⁶ Richard Shaw “Advisers and Consultants” in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Auckland, 2001) 153.

Furthermore, the role of a personal appointee can be contrasted with that of a minister. Like ministers, personal appointees are openly partisan and engage in party politics. In the case of the most trusted and high-powered, they may even be involved in influencing the strategic direction of government.¹³⁷ Yet they are not elected and are not strictly speaking politicians. Clearly, they are not subject to the constitutional conventions of collective cabinet responsibility and individual ministerial responsibility.

Personal appointees may be appointed from a range of occupations. In addition, some may be relatively inexperienced in political life. Consequently, personal appointees bring a variety of expertise to their position. Further, government departments are diverse in size and scope and also in the nature of the functions they undertake. Finally, the offices of individual ministers are potentially as different as the ministers themselves.¹³⁸ As a result of these factors, the functions as well as particular personal appointees' level of influence are almost infinitely various.

Despite the wide range of types of personal appointee, some categorisation of their functions is possible. Broadly, three types of personal appointee can be identified. The first is that of a political adviser, such as a party leader's chief of staff. The role of political advisers may include responsibility for intra-coalition negotiations. For example, they may negotiate policy positions and deal with coalition disputes and disciplinary matters in respect of ministers and MPs. They may also negotiate and mediate between politicians within the same political party. For example, they may be responsible for chastising an aberrant minister or MP on behalf of the party leader. Next, the role may involve management of media issues on behalf of their minister, including putting a party political perspective on policy and on answers to parliamentary questions.¹³⁹ This type of personal appointee is

¹³⁷ Ministerial Services *Job Profile: Ministerial Advisor* (Wellington, 2003) 3.

¹³⁸ Ministerial Services *Job Profile: Press Secretary* (Wellington, 2003) 1.

¹³⁹ Shaw, above, 153; 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) 20.

usually experienced and respected and therefore may be involved in influencing the strategic direction of government.

The second type of personal appointee is the policy adviser. Policy advisers usually undertake a role similar to that of a public servant. However, the advice they give to the minister will be openly partisan. They may also put a party political slant on public servant policy advice and assess its political implications. In addition, policy advisers are likely to be involved in managing media issues. Finally, they may mediate and pass messages between ministers and public servants.

The third and least influential type of personal appointee carries out mainly administrative functions. This may be the role of a university graduate or similarly junior member of the office. Their functions will be mainly confined to organisational tasks, for example in relation to the minister's diary.

Several points should be noted about this categorisation. First, as mentioned, it constitutes a generalisation – there are in reality as many different types of personal appointee as there are personal appointees.¹⁴⁰ Secondly, most personal appointees will engage in some of the functions of all three of these types at one time. Thirdly, it is possible for a personal appointee to change functions over the course of a career. For example, they may “graduate” from an administrative role to one which is predominantly centred on managing media issues. Nevertheless, the categories are useful in terms of identifying positive and negative aspects of the nature and functions of personal appointees.

A necessary contribution to the political framework is made in the exercise of all three functions. This is increasingly the case in modern New Zealand politics. Specifically, the work of personal appointees can be of

¹⁴⁰ Interview with Chris Eichbaum, former Adviser to Hon Steve Maharey (the author, Wellington, 8 September 2003); Interview with Luke McMahan, Senior Adviser to Hon Phil Goff (the author, Wellington, 10 September 2003).

benefit to both ministers and public servants. The next section argues that personal appointees fulfil an important function in the changed political context, which neither politicians nor public servants are able to undertake.

C The Role and Value of Personal Appointees

1. The New Zealand political framework

The real difficulty with the Prime Minister's office is that it has insufficient people to deal with the amount of work. Chief of staff Heather Simpson has really acted as a sieve on all policy issues and she has had the job of keeping the Coalition together and managing that as well. If political management is to be effective, the Leader needs a strong office and MMP has added to the problems of co-ordination enormously. There are so many different groups that now have to be consulted that the amount of work has expanded exponentially.¹⁴¹

As noted, personal appointees have been in existence mainly since the 1980s. Given that government functioned effectively without their help, the question arises whether personal appointees are really necessary or whether they are surplus to government requirements. This question is particularly relevant given the reduction in government since the 1980s. It has been argued that they are an unjustified burden on the taxpayer.¹⁴² Their proliferation has also been criticised as a desperate response to the declining fortunes of governing parties.¹⁴³ However, it is posited that changes to the New Zealand political context since the 1980s have contributed to and justified their development.

¹⁴¹ Chen Palmer and Partners *Wellington Watch* (11 October 2002) 3 <<http://www.brookers.co.nz/wellingtonwatch/issues/2002/111002.DOC>> (last accessed 2 August 2003).

¹⁴² Hon Roger Sowry MP "Beehive Staff List Grows as Labour's Luck Runs Out" (Media Release, National Party, 1 June 2003) <<http://national.org.nz/wcontent.asp?PageID=100015414>> (last accessed 3 June 2003).

¹⁴³ Sowry, above.

(a) Open government

The trend towards open government, as noted, has had an effect on the constitutional convention of anonymity on the part of public servants.¹⁴⁴ It has also raised questions about the loyalty and impartiality of public servants.¹⁴⁵ In particular, open government and a modern mass media have placed greater pressure on ministers' offices in terms of explaining and defending policies. Traditionally, this work is undertaken by public servants. Increasingly however, ministers may require political assistance in responding to media and parliamentary questions in relation to their responsibilities.¹⁴⁶ Requiring public servants to put a political "spin" on such issues would further call into question their neutrality and may place strain on their relationship with their minister. Such functions are better undertaken by openly partisan personal appointees.¹⁴⁷

(b) State sector reforms

Public sector reforms have also had repercussions for the use of personal appointees.¹⁴⁸ As discussed, chief executives of government departments have been given explicit responsibilities for which they appear to be personally answerable to Parliament and the news media.¹⁴⁹ This has implications for the theoretically seamless relationship between ministers and public servants. Linked to this, some senior public servants have been thrust into the public eye in relation to policy issues.¹⁵⁰ Here, personal appointees

¹⁴⁴ Arnikka MacIntyre-Daly "The Political Neutrality of the Public Service" (LLB(Hons) Research Paper, Victoria University of Wellington, 2002) 44; 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) 16.

¹⁴⁵ Richard Shaw "Advisers and Consultants" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Auckland, 2001) 149.

¹⁴⁶ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 299.

¹⁴⁷ John Martin "Advisers and Bureaucrats" in Raymond Miller (ed) *New Zealand Politics in Transition* (Oxford University Press, Auckland, 1997) 114-115.

¹⁴⁸ Shaw, above, 148.

¹⁴⁹ 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) 72.

¹⁵⁰ Arnikka MacIntyre-Daly "The Political Neutrality of the Public Service" (LLB(Hons) Research Paper, Victoria University of Wellington, 2002) 36; James, above, 72.

can be valuable to both ministers and public servants in lessening the tensions on the guiding constitutional conventions.

(c) Electoral system change

The change from FPP to MMP has had a significant impact on the need for personal appointees. The change has allowed more parties to gain representation in Parliament, which has given rise to the need for coalition government. Consequently, coalition formation and management comprise an important feature in New Zealand politics. This is an area which it would be constitutionally inappropriate for politically neutral public servants to enter into. In fact, it has been stated that, as a matter of principle, "officials are not involved in or present during actual negotiations"¹⁵¹ to form a coalition.

Overall, as discussed, these changes have resulted in both a more strained and a more politicised minister-public servant relationship. The changes have also contributed to the development of a more complex and pressured environment within which ministers' offices must work.¹⁵² In this context, personal appointees may be useful to ministers and public servants.

2. *The contribution of personal appointees*

(a) Political advice

Personal appointees undertake certain political functions. In particular, they are often instrumental or even pivotal in a government's intra-coalition negotiations. For example, Jim Anderton's chief of staff Andrew Ladley played a key role in drafting the Labour-Alliance coalition agreement. This experience is illustrative of the advantage of having personal appointees, rather than politicians, construct such an agreement. Ladley brought the experience of a constitutional law expert to the task of coalition formation. In

¹⁵¹ State Services Commission *Negotiations Between Political Parties to Form a Government: Guidelines on Support from the State Sector* (Wellington, 2002) 1.

¹⁵² Chris Eichbaum and Richard Shaw "A Third Force? Ministerial Advisers in the Executive" (unpublished paper, Victoria University School of Government, 2003) 10.

particular, the coalition agreement resulted in the successful modification of the constitutional convention of collective cabinet responsibility, by incorporating an "agree to disagree" exception.¹⁵³ It would therefore appear that Ladley materially contributed to developing processes of successful government formation under MMP.

Ladley, along with Prime Minister Helen Clark's chief of staff Heather Simpson, subsequently dealt with ongoing negotiations between the Labour and Alliance governing coalition partners.¹⁵⁴ Personal appointees undertake vital work in this area, for which other government actors are ill suited.¹⁵⁵ Personal appointees are best placed to carry out such negotiations, due to their delicacy. In particular, regard must be had for the fact that coalition negotiations are conducted between parties. While each party has a vested interest in ensuring the coalition is successful, each party also attempts to distinguish itself from the other in order to gain electoral appeal. Further, party discipline conventions do not apply between parties so disagreement cannot be as readily quashed as it can be in the case of intra-party disputes. Having Simpson and Ladley strike deals may have been advantageous in that they were removed from immediate political tensions and incentives. In this sense they can be seen as mediators between politicians. Being in a close and trusting relationship with Clark and Anderton also allowed them easy access to ministers. The substantial role played by Simpson and Ladley and the relatively smooth running of the Labour-Alliance coalition implies that personal appointees can have a positive impact on intra-coalition processes.

¹⁵³ The Coalition Agreement Between the Labour and Alliance Parties includes the following: "Where either party leader considers that a distinctive policy matter raises an issue of importance to the party's political identity, the leader will raise this with the coalition management committee which will resolve an appropriate course of action, including possibly identifying the matter as one of "party distinction." In this even there may be public differentiation between the parties in speech and vote which will not be regarded as being in breach of the convention. Such issues are expected to be infrequent and the parties recognise that dealing with them openly and responsibly is critical to the credibility of the coalition. Differentiation on such issues will not detract from the overall acceptance that the two parties are taking joint responsibility for the actions of the government. <<http://www.executive.govt.nz/coalition/>> (last accessed 22 April 2003).

¹⁵⁴ 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) 20.

¹⁵⁵ Interview with Hon Murray McCully, MP (the author, Wellington, 6 August, 2003).

It is suggested that in the changed political context, political advisers may also be of use to public servants. That is, in the environment of open government, corporate departmental structures and MMP, constitutional conventions of anonymity and neutrality are under increased strain. Chief executives may be subject to attack from both ministers and the general public.¹⁵⁶ Personal appointees undertake political tasks that may otherwise fall to public servants. For example, it was suggested when MMP was first introduced that public servants may be required to facilitate coalition formation.¹⁵⁷ Such a role would be undesirable since it is highly political and would expose the public service to criticism. However, personal appointees undertake this function and consequently take pressure off public servants.¹⁵⁸

The political work of personal appointees also includes answering or putting a party-political spin on answers to parliamentary questions, and managing media issues.¹⁵⁹ These are areas which it may be difficult or even inappropriate for a public servant to engage in due to their inherently political nature.¹⁶⁰ It is also important that a minister is able to convey his or her policies and views to the public through the media.¹⁶¹ For example, many will not have the media expertise required for these tasks. Moreover, deliberate politicisation of policy advice by public servants would run directly counter to the neutrality convention.

However, the media work of personal appointees has been seen as objectionable. That is, it is implied that the "spin" on policy and political

¹⁵⁶ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 299.

¹⁵⁷ John Martin "Advisers and Bureaucrats" in Raymond Miller (ed) *New Zealand Politics in Transition* (Oxford University Press, Auckland, 1997) 114.

¹⁵⁸ Interview with Luke McMahan, Senior Adviser to Hon Phil Goff (the author, Wellington, 10 September 2003).

¹⁵⁹ Interview with Chris Eichbaum, former Adviser to Hon Steven Maharey (the author, Wellington, 8 September 2003); 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) 20.

¹⁶⁰ Interview with Matthew Palmer, former Deputy Secretary for Justice (Public Law) and former Manager of the Law and Treaty section at Treasury (the author, Wellington, 16 September 2003).

¹⁶¹ Interview with Hon Murray McCully, MP (the author, Wellington, 6 August 2003).

matters may become misleading to the public.¹⁶² This is particularly so when skilled personal appointees are perceived to have influence over reporters or a dominant voice in the media.¹⁶³ A possible example of this may arise out of the "Corngate" scandal. This has followed an accidental release of genetically modified corn in 2000. A parliamentary inquiry is currently investigating whether Prime Minister Helen Clark and other key ministers knew of the release but kept it from the public.¹⁶⁴ Clark stated that she would not hide any information and in fact released about 1800 pages of documents to the media.¹⁶⁵ However, several crucial documents were withheld by Mark Prebble, chief executive of the Department of Prime Minister and Cabinet, on the grounds of constitutional convention.¹⁶⁶ Clark has claimed that these were withheld against her instructions.¹⁶⁷ Moreover, a memo from adviser Ruth Wilkie has been released, which expresses disapproval at Prebble's decision to withhold and suggests that Clark wanted the documents released.¹⁶⁸ The advantages of having ministerial staff undertake media work must not be allowed to undermine the public's interest in balanced and accurate information about the workings of government. Moreover, this situation may suggest that staff exercise some executive powers autonomously. This is a matter which is discussed below.

Personal appointees' media work does not appear to create tensions in relationships between personal appointees, public servants and ministers. This is because the different roles are relatively well defined and also because the personal appointees who are involved with the media tend to respect the neutrality of public servants.¹⁶⁹

¹⁶² Interview with Hon Steve Maharey, Minister of the Crown (the author, Wellington, 24 September 2003).

¹⁶³ Finlay McDonald "Murder Will Out" (2 August 2003) *The Listener* New Zealand 7.

¹⁶⁴ "MPs Point to Corngate 'Cover-up'" (28 August 2003) *The Dominion Post* Wellington 3.

¹⁶⁵ Tracy Watkins "Seeds of Distrust" (1 September 2003) *The Dominion Post* Wellington 5.

¹⁶⁶ "Difficult Issue" (29 August 2003) *The Press* Christchurch 10.

¹⁶⁷ Leah Haines "Did the Prime Minister Know?" (29 August 2003) *The Dominion Post* Wellington 1.

¹⁶⁸ Haines, above.

¹⁶⁹ Interview with Matthew Palmer, former Deputy Secretary for Justice (Public Law) and former Manager of the Law and Treaty section at Treasury (the author, Wellington, 16 September 2003).

The most important objection to the nature of the work of political advisers arises from their degree of influence. Personal appointees in this capacity are said to undermine the relationship between ministers and public servants.¹⁷⁰ Because they are interposed between these two actors, they may issue instructions to public servants that do not reflect commands from ministers.¹⁷¹ This tendency may also work in the opposite direction. Such an objection has far-reaching constitutional implications and is at the heart of the constitutional tensions in relation to personal appointees. In particular, issuing their own instructions to public servants constitutes personal appointees usurping the role of the minister.

The exercise of government power must be democratically accountable. However, if personal appointees effectively exercise government power, such accountability is not present, since they are not responsible to Parliament. Moreover, government policy will not be implemented as intended if it is not conveyed as intended. On the other hand, an important distinction must be drawn. It is entirely legitimate and practically necessary for ministers to use staff as filters on the advice they receive, due to the magnitude of issues with which they must deal. As such, instructions to a public servant from a personal appointee acting autonomously may be justified. Personal appointees will often instinctively know a minister's preferences due to their close professional and personal proximity to the minister. A minister will have ^{implicitly} mandated instructions issued on this basis.¹⁷² This is an efficient use of a personal appointee; in fact, the ability to know the preferences of the minister is an important measure of a personal appointee's capability.¹⁷³ Ministers would have little use for personal appointees if they were forced to give explicit and detailed instructions regarding every task they perform.¹⁷⁴ Implicit approval is to be distinguished

¹⁷⁰ 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) 60-61.

¹⁷¹ James, above, 61.

¹⁷² Interview with Chris Eichbaum, former Adviser to Hon Steven Maharey (the author, Wellington, 8 September 2003).

¹⁷³ Interview with Hon Murray McCully, MP (the author, Wellington, 6 August 2003).

¹⁷⁴ Interview with Hon Steve Maharey, Minister of the Crown (the author, Wellington, 24 September 2003).

from the situation of a personal appointee asserting ministerial power without authority.

Usurpation of executive power has been identified as a potential problem within the current framework.¹⁷⁵ Further, there may be a perception among some public servants that this does occur. Despite this, interviewees maintained that the exercise of independent power by personal appointees happens extremely rarely, if at all, in practice.¹⁷⁶

It appears that overall, political advisers contribute to New Zealand government. Yet, their power may give rise to some inappropriate behaviour. In particular, they may be perceived as manipulating the public through the media. As well, it is possible that they may at times unlawfully exercise the power of government. At least, tensions between public servants, ministers and personal appointees may arise from the perception that this occurs.

(b) Policy advice

A key function of many personal appointees is provision of policy advice.¹⁷⁷ Public servants also provide policy advice, however personal appointees contribute a useful addition to this. Many personal appointments are based as much on expertise in a policy area as they are for any political skill.¹⁷⁸ Thus, while these appointees may share the broad political philosophies of their minister, they may be primarily concerned with providing balanced expert policy advice.¹⁷⁹ As such, their role would be very close to that of a seconded public servant. To the extent that they are openly

¹⁷⁵ Interview with Matthew Palmer, former Deputy Secretary for Justice (Public Law) and former Manager of the Law and Treaty section at Treasury (the author, Wellington, 16 September 2003); Interview with Hon Steve Maharey, above.

¹⁷⁶ Interview with Hon Steve Maharey, above; Interview with Chris Eichbaum, former Adviser to Hon Steven Maharey (the author, Wellington, 8 September 2003); Interview with Luke McMahan, Senior Adviser to Hon Phil Goff (the author, Wellington, 10 September 2003).

¹⁷⁷ 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.

¹⁷⁸ Interview with Chris Eichbaum, above; Interview with Luke McMahan, above.

¹⁷⁹ Interview with Hon Murray McCully, MP (the author, Wellington, 6 August 2003).

partisan, they can provide a useful party political perspective on policy, which would be inappropriate coming from a public servant.

Policy advice from someone who the minister trusts and whose ideological and personal views are known to him or her may provide a useful alternative to public service policy advice.¹⁸⁰ A personal appointee with policy expertise can also ensure the minister is being given well-formulated and credible advice. In fact, "a good part of the reasons ministers bring in personal appointees is that they feel they do not get quality advice from their departments."¹⁸¹ Furthermore, as discussed, an incoming government often doubts the neutrality, loyalty and competence of the public service.¹⁸² It has been noted that this doubt usually dissipates over the course of a government's term.¹⁸³ However, receiving advice from a trusted appointee during this initial period of distrust will be beneficial from a minister's perspective.

Policy advice from outside the public service is also valuable from a public choice theory perspective. Public choice theory assumes that bureaucrats' advice is tailored towards securing benefits for their department.¹⁸⁴ Thus, advice from a personal appointee, who does not have the same vested interest in the resulting policy, may balance public service advice.¹⁸⁵ For example, in 1998-1999, the minister in charge of the accident compensation portfolio, Hon Murray McCully, sought to introduce competition from private sector insurers to the accident compensation scheme.¹⁸⁶ It would have been problematic for public servants to give policy advice on this issue, for one thing because of its potential effect on their personal interests. But as well, the departmental chief executive decides on

¹⁸⁰ James, above, 61.

¹⁸¹ James, above, 67.

¹⁸² Interview with Chris Eichbaum, former Adviser to Hon Steven Maharey (the author, Wellington, 8 September 2003).

¹⁸³ Interview with Chris Eichbaum, above; James, above, 61.

¹⁸⁴ William A Niskanen *Bureaucracy: Servant or Master?* (The Institute of Economic Affairs, Great Britain, 1973) 22; Peter Self *Government by the Market? The Politics of Public Choice* (MacMillan, Hong Kong, 1993) 33; Richard Shaw "Advisers and Consultants" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Auckland, 2001) 147-148.

¹⁸⁵ Interview with Hon Steve Maharey, Minister of the Crown (the author, Wellington, 24 September 2003).

¹⁸⁶ Murray McCully, MP (email to the author, 24 April 2003).

the role a secondee will take up when he or she returns to the department. This may taint a secondee's advice where, as in this situation, the chief executive has a vested interest in policy outcomes.¹⁸⁷

Regardless of the actual motivations of public service policy advice, ministers may lack the specialist expertise personally to critique that advice. This is particularly the case in the New Zealand system in which ministers are first and foremost politicians.¹⁸⁸ They are thus unlikely to be experts in the field of their portfolio.¹⁸⁹ Access to specialist advice from outside the public service is therefore useful both politically and to facilitate effective government.

Another aspect of the role of personally appointed policy advisers is as an intermediary between ministers and public servants. As discussed, relationships between ministers and public servants can be tense. An advantage of placing personal appointees between ministers and public servants is that a personal appointee can provide a buffer when advice may conceivably be unpopular. It may also encourage free and frank advice. In this way personal appointees may help mitigate a strained minister-public servant relationship. Personal appointees may also mediate between ministers and public servants, allowing for the possibility of arms-length conflict resolution in delicate situations.

Due to the need to work to other pressures, ministers are not in constant contact with public servants in their departments. Personal appointees can provide ministers with a link to public servants.¹⁹⁰ They can be a preliminary check on messages being passed from a department to its minister. In particular, ministers are likely to have a direct relationship with

¹⁸⁷ Murray McCully, MP (email to the author, 24 April 2003).

¹⁸⁸ Sir Ivor Jennings *Cabinet Government* (3 ed, Cambridge University Press, Cambridge, 1959) 113.

¹⁸⁹ Constitution Act 1986, s6 requires ministers to be members of Parliament. Consequently, ministers may not be appointed to cabinet from outside the ranks of elected politicians; J Boston *Governing Under Proportional Representation: Lessons from Europe* (Institute of Policy Studies, Wellington, 1998) 124-125.

¹⁹⁰ Interview with Chris Eichbaum, former Adviser to Hon Steven Maharey (the author, Wellington, 8 September 2003).

only the chief executives of departments. Personal appointees, however, may be able to engage constructively with officials at all levels of departments.¹⁹¹ This constitutes a significant advantage. Trusted personal appointees are also able to get to the bottom of and distil important issues before they are presented to a minister. This may reduce demands on ministers' time. It may also cut the other way in that personal appointees can deliver ministerial messages to public servants. Public servants may be able to use personal appointees as an effective channel of communication with a minister.¹⁹²

On the other hand, personal appointees as policy advisers may undermine the relationship between ministers and public servants. Another perspective on policy advice may be helpful to a minister. However, policy advice from personal appointees may be perceived to be usurping the role of public servants.¹⁹³ This is especially so where personal appointees provide advice instead of, rather than as well as, public servants.¹⁹⁴ This situation is not constitutionally problematic, since public servants have no monopoly on providing ministers with advice and influence. But it may impact on the minister-public servant relationship. An example of this occurred in the office of Hon Dr Michael Cullen following the 1999 election. Despite being Minister of Finance, Cullen refused to employ a secondee from the Treasury in his office. Instead, he relied on a personally appointed economic adviser.¹⁹⁵ Such situations have obvious consequences in terms of creating tensions in the minister-public servant relationship, especially where the relationship is already not one of complete trust.

In addition, where ministers feel as though public servants are not completely loyal to them, they may rely more on their personal appointees.¹⁹⁶

¹⁹¹ Interview with Chris Eichbaum, above.

¹⁹² Interview with Chris Eichbaum, above.

¹⁹³ 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.

¹⁹⁴ Richard Shaw "Advisers and Consultants" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Auckland, 2001) 155.

¹⁹⁵ Interview with Peter Harris, former Economic Adviser to Hon Dr Michael Cullen (the author, Wellington, 25 September 2003); Nick Venter "Are You Listening, Minister?" (4 October 2000) *The Dominion* Wellington 11.

¹⁹⁶ James, above, 30.

This may itself further undermine the loyalty of public servants. In this way, the presence of personal appointees strains the loyalty convention.

It can also be argued that there is no evidence that receiving advice from more sources has contributed to the overall quality of advice. In fact, it may be seen as detrimental to government policy coherence.¹⁹⁷ Furthermore, politically affiliated policy advisers are arguably more likely than neutral public servants to tell ministers what they want to hear rather than what they need to hear.

Rather than conveying messages, personal appointees may block public servants' access to their minister. This is seen as a problem by many public servants.¹⁹⁸ In reality, blocking access seems to be more a function of constraints on ministers' time than deliberate thwarting of public servants objectives.¹⁹⁹ To the extent that "blocking" does occur, this is likely to be the wish of the minister rather than simply that of the personal appointee.²⁰⁰ Clearly, where a minister needs to communicate information to public servants which may be received unfavourably, it is expedient to delegate this task to a personal appointee.²⁰¹ Whatever the reason, openness and trust between ministers and public servants are eroded where this occurs or appears to occur. In addition, the efficacy of our system of government relies on the flow of information between ministers and public servants. This is thwarted by impediments to public servants' access to their minister.

To the extent that a personal appointee is increasingly likely to be consulted and included in discussions with their minister, public servants may

¹⁹⁷ Shaw, above, 154.

¹⁹⁸ Interview with Matthew Palmer, former Deputy Secretary for Justice (Public Law) and former Manager of the Law and Treaty section at Treasury (the author, Wellington, 16 September 2003).

¹⁹⁹ Interview with Luke McMahon, Senior Adviser to Hon Phil Goff (the author, Wellington, 10 September 2003).

²⁰⁰ Interview with Matthew Palmer, above.

²⁰¹ Interview with Chris Eichbaum, former Adviser to Hon Steven Maharey (the author, Wellington, 8 September 2003).

be left out.²⁰² As a result, public servants may be ill informed as regards ministers' thinking. This will impact on their ability to implement government decisions and to formulate policy based on ministers' objectives.

More broadly, it has been suggested that the presence of personal appointees undermines the neutrality convention in respect of public servants seconded to the minister's office.²⁰³ Quite simply, working closely with officials who openly "share the minister's political stance,"²⁰⁴ may raise questions about seconded public servants' neutrality.²⁰⁵ Generally speaking, maintaining the neutrality of seconded public servants appears to be something that is at least attempted in ministers' offices.²⁰⁶ However, it has been suggested that some personal appointees' lack of knowledge regarding the system of government may impede the ability to uphold public servants' neutrality.²⁰⁷ That is, if a personal appointee is not aware of the neutrality convention, he or she is unlikely to consider whether tasks being asked of public servants abrogate that convention. Many personal appointees are considered more senior than their public servant colleagues.²⁰⁸ As such, public servants may not feel easily able to decline work on the basis that it would conflict with the neutrality convention.²⁰⁹ While it is arguable whether neutrality does in fact suffer under these circumstances, there is a clear risk that public perception may be affected. This is exacerbated by the usually secret nature of personal appointees' role.

²⁰² 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; Nick Venter "Are You Listening, Minister?" (4 October 2000) *The Dominion* Wellington 11.

²⁰³ James, above, 28.

²⁰⁴ James, above, 28.

²⁰⁵ Michael Wintringham *Annual Report of the State Services Commissioner* (State Services Commission, Wellington, 2002) 10.

²⁰⁶ Interview with Chris Eichbaum, former Adviser to Hon Steven Maharey (the author, Wellington, 8 September 2003); Interview with Luke McMahon, Senior Adviser to Hon Phil Goff (the author, Wellington, 10 September 2003).

²⁰⁷ Interview with Matthew Palmer, former Deputy Secretary for Justice (Public Law) and former Manager of the Law and Treaty section at Treasury (the author, Wellington, 16 September 2003).

²⁰⁸ Interview with Matthew Palmer, above; Interview with Hon Steve Maharey, Minister of the Crown (the author, Wellington, 24 September 2003).

²⁰⁹ Interview with Matthew Palmer, above.

In general, personal appointees appear to play a useful role in the policy development process. The major concern with personally appointed policy advisers relates to their exacerbation of tensions between ministers and both departmental and seconded public servants. According to most interviewees, this concern is based more on a perception of deceptive dealings by personal appointees than reality. Ministers may contribute to this perception by delegating to personal appointees the task of turning down public servant suggestions and requests for meetings. However, the fact that tensions may often lack a real basis does not lessen their seriousness.

(c) Administrative functions

The administrative functions of personal appointees are the least controversial since they are the least politically important and influential. Increased organisational staff is warranted by the increased complexity of government. Further, ministers face more commitments and come under more intense pressure than has previously been the case.²¹⁰ Administrative functions may be undertaken by a junior member of a minister's office, who is not likely to have much influence. Further, few objections can be raised to their role due to the innocuous nature of the functions they undertake. As such, this paper does not address administrative ministerial staff.

3. Evaluation

"Spin doctors," or those personal appointees who deal with media relations, may be seen as misleading or hiding information from the public. This erodes public confidence in its democratic representatives, especially given the perceived lack of personal appointee accountability. Personal appointees can also be seen as usurping the constitutional function of ministers. As a result, ministers are in charge of less that is done in their name, undermining the ability of Cabinet and Parliament to hold them to

²¹⁰ 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.

account. This means that individual ministerial and collective cabinet responsibility are impeded.

Personal appointees can also be detrimental to government in two other major ways. Both of these stem from the tendency of personal appointees to undermine the relationship between ministers and public servants. Firstly, a poor relationship impedes government effectiveness by preventing the smooth formulation and implementation of policy. Secondly, a poor relationship weakens the effectiveness of the constitutional controls on both ministers and public servants. That is, the loyalty and neutrality of the public service are eroded, or at least appear to be eroded. This latter problem is particularly salient since in any case it may not be clear which staff members are meant to be political and which neutral. These problems go to the heart of our constitutional system.

These objections to the presence of personal appointees in a minister's office outlined above are valid and important. Nevertheless, on balance, the advantages personal appointees offer the New Zealand system outweigh these objections. This is firstly because ministers work under conditions of increased pressure and complexity in government. Secondly, ministers may need to ensure they will receive advice that may conflict with the interests of public servants in their department. Thirdly, particularly in the context of MMP, ministers must engage in a great deal of political negotiation in order to gain sufficient support for their policies. It would be inappropriate and potentially damaging for public servants to offer them the assistance they may need in this process. As such, the work of personal appointees may actually work to uphold both government effectiveness and constitutional principle. Finally, the outlined objections are at least partly attributable to perception rather than reality. Thus, their presence is warranted.

The next section examines the experience of Australia and the UK. These systems are closely related to New Zealand's and have a more strongly established use of personally appointed ministerial advisers. As such, they

may provide some guidance as to how the constitutionally and politically problematic aspects of a personal appointee's role may be ameliorated.

V PERSONAL APPOINTEES IN THE UK AND AUSTRALIA

A Australia

1. Context

As in New Zealand, the Australian federal government is based on responsible government,²¹¹ with power being exercised by a convention-governed Cabinet.²¹² The constitutional conventions relating to the exercise of government power are thus collective cabinet responsibility and individual ministerial responsibility.²¹³ As in New Zealand, individual ministerial responsibility has recently become attenuated as a result of direct scrutiny of public service actions. This has occurred through "the establishment of numerous procedures to scrutinise official actions, such as inquiry by the Ombudsman or parliamentary committees."²¹⁴

The Australian public service is, like its New Zealand counterpart, theoretically apolitical. It is governed by the Australian Public Service Act 1999. The Australian public service has also undergone reforms similar to those which have occurred in New Zealand.²¹⁵ They have included, for example, the devolution of some responsibilities to departmental chief executives.²¹⁶ The reforms also enhance public service accountability²¹⁷ and

²¹¹ P H Lane *An Introduction to the Australian Constitutions* (6ed, The Law Book Company, Sydney, 1994) 146.

²¹² Suri Ratnapala *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, South Melbourne, 2002) 35-36; Peter Hanks and Deborah Cass *Australian Constitutional Law: Materials and Commentary* (6th ed, Butterworths, Sydney, 1999) 440.

²¹³ Ratnapala, above, 37.

²¹⁴ Ratnapala, above, 39.

²¹⁵ Simon King *Regulating the Behaviour of Ministers, Special Advisers and Public Servants* (The Constitution Unit, London, 2003) 23.

²¹⁶ See for example, Public Service Act 1999 (Cth), ss20, 57; King, above, 24.

²¹⁷ Public Service Act 1999 (Cth); Financial Management and Accountability Act 1997 (Cth); King, above, 24.

attempt to improve efficiency.²¹⁸ As a result, pressures on ministers, public servants and the relationship between these two actors are similar to those discussed in relation to the New Zealand political framework.²¹⁹

2. *Position and functions of personal appointees*

Personal appointees are more commonly referred to in Australia as ministerial advisers. Ministerial advisers were first instituted under the Whitlam Government from 1972.²²⁰ As in New Zealand, there has been almost continuous growth in numbers and influence of ministerial advisers since that time.²²¹ There are currently 152 political advisers in Australia, which is an average of around five per minister.²²² Apart from seconded public servants, all ministerial staff in Australia are employed under the Members of Parliament (Staff) Act 1984 ("MoPS Act").²²³ As such, they are explicitly distinguished from public servants.

There is general acceptance that ministerial advisers are an entrenched feature of federal Australian politics. Their usefulness to government and the civil service is also advocated.²²⁴ In particular, they are central to the policy process.²²⁵ This appears to be so to a much greater extent than is the case in New Zealand. They offer a significant alternative to public service advice as

²¹⁸ King, above, 23.

²¹⁹ Parliament of Australia Senate Select Committee *Inquiry Into a Certain Maritime Incident* (Australia, 2002) 176
<http://www.aph.gov.au/senate/committee/maritime_incident_ctte/report/contents.htm> (last accessed 29 September 2003).

²²⁰ Maria Maley "Too Many or Too Few? The Increase in Federal Ministerial Advisers 1972-1999" (2000) 59(4) *Australian Journal of Public Administration* 48, 48.

²²¹ Maley, above, 48; Ian Holland "Accountability of Ministerial Staff?" (Research Paper no. 19, Department of the Parliamentary Library, Canberra, 2001-02) 19
<<http://www.aph.gov.au/library/pubs/rp/2001-02/02rp19.pdf>> (last accessed 10 September 2003).

²²² Maley, above, 48-52; Simon King *Regulating the Behaviour of Ministers, Special Advisers and Public Servants* (The Constitution Unit, London, 2003) 10.

²²³ *Inquiry Into a Certain Maritime Incident*, above, 174; Members of Parliament (Staff) Act 1984 (Cth) Part III.

²²⁴ "Shergold Speaks Out on the Quiet Revolution" (15 June 2003) *Canberra Times* Canberra 50; John Halligan et al *The Australian Public Service: The View from the Top* (Coopers and Lybrand, University of Canberra, 1996) 71.

²²⁵ Maria Maley "Conceptualising Advisers' Policy Work: The Distinctive Policy Roles of Ministerial Advisers in the Keating Government, 1991-96" (2000) 35(3) *Australian Journal of Political Science* 449-470; King, above, 29.

well as facilitating relationships between various other actors in the policy making process.²²⁶

On the other hand, the objections raised in relation to personal appointees in New Zealand also apply in Australia. For example:²²⁷

“The activities of ministerial advisers can now significantly overlap those of both ministers and public servants, leading to confusion as to who should be responsible for what,” [Meredith Edwards, head of the University of Canberra’s National Institute of Governance and former deputy secretary at the Department of the Prime Minister and Cabinet] said.

“The main factor leading to confusion would appear to be the assumption by ministerial advisers of executive authority. The increase in the roles and power of ministerial advisers can be argued to have contributed to a breakdown in governing processes.”

And:²²⁸

Rather than seek out the truth, staffers seek the best “spin” on an issue, whether it’s the children overboard claim or Senator Bill Heffernan’s allegations. Any information that does not fit with the spin is ignored or distorted.

I wonder whether the PM’s staff is capable of establishing the facts about anything. The spin-doctor culture encourages laziness and an inability to deal with the real world.

The assumption of executive authority is an important concern as regards ministerial advisers in the Australian context. It has been suggested that some advisers’ level of influence is such that in practice they are able to exercise executive authority independently of their minister. That is, they are no longer purely the agents of their responsible minister.²²⁹

The role of ministerial advisers in Australia has been the subject of more academic and media scrutiny than is the case in New Zealand. Despite this, there has been little acknowledgement of their existence by the constitutional and political framework. The Prime Minister’s *Guide on Key*

²²⁶ *Inquiry Into a Certain Maritime Incident*, above, 175; King, above, 29.

²²⁷ “Accountability: An Increasingly Vexed Question” (21 July 2002) *Canberra Times* Canberra 21.

²²⁸ “Political Culture Goes into a Spin” (23 March 2002) *The Weekend Australian* Australia 18.

²²⁹ *Inquiry Into a Certain Maritime Incident*, above, 173.

Elements of Ministerial Responsibility refers to them only in terms of avoiding conflicts of interest.²³⁰ However, as mentioned they are legally distinguished from neutral public servants.

Perceived problems with ministerial advisers in Australia have come to light as a result of scandals in the media. Interestingly, given their prominence in the policy process, there has been much less public debate about the policy advice aspect of advisers' role. Rather, the focus has been on manipulation of the public through the media and the illegitimate exercise of executive power.

A particular example of this occurred in relation to the "children overboard affair."²³¹ This scandal arose several days prior to the 2001 election. Government ministers released pictures to the media which were said to demonstrate that asylum-seekers on a ship off the coast of Australia were threatening to throw children overboard. Allegedly, this was to protest at not being allowed to enter Australia. It was subsequently revealed that such threats were not made, but rather that the boat was sinking.²³²

A Senate select committee has since inquired into these events.²³³ It found that ministerial staff were instrumental in either deliberately using this false story for political advantage or at least in failing to correct the story promptly and publicly when it was found to be untrue.²³⁴ Moreover, the select committee's request to question ministerial staff in the course of its inquiry was refused. The basis for this was an extension of the principle that MPs are not compulsorily required to appear before select committees.²³⁵

²³⁰ *A Guide on Key Elements of Ministerial Responsibility* (Prime Minister, Canberra, 1998) 20-21; *Inquiry Into a Certain Maritime Incident*, above, 173.

²³¹ David Solomon "Unelected Rulers" (16 March 2002) *Courier Mail Queensland* 32; "Accountability: an Increasingly Vexed Question," above; "Ministers' Staff Get a Hiding" (27 October 2002) *Canberra Times* Canberra 52.

²³² Simon King *Regulating the Behaviour of Ministers, Special Advisers and Public Servants* (The Constitution Unit, London, 2003) 29; *Inquiry Into a Certain Maritime Incident*, above, chapters 3-6.

²³³ *Inquiry Into a Certain Maritime Incident*, above.

²³⁴ *Inquiry Into a Certain Maritime Incident*, above, 177.

²³⁵ *Inquiry Into a Certain Maritime Incident*, above, 177-178.

The report concluded that there is "a serious accountability vacuum at the level of ministers' offices."²³⁶ Accountability of advisers through their ministers was found to be inadequate given that they do not always act on the direction or with the knowledge and consent of ministers.²³⁷ Moreover, the reformed Australian public sector, as is the case in New Zealand, incorporates separate accountability mechanisms for public servants beyond their accountability through their minister. There is no reason why this should not extend to ministerial advisers. As such, the high level of importance and influence of ministerial advisers, and the consequential potential for abuse of power, was found to justify advisers being subject to separate accountability mechanisms.²³⁸

The report made two specific recommendations. Firstly, it advocated making advisers subject to parliamentary committee scrutiny in the same way as public servants. Secondly, it recommended that a legislative code of conduct and set of values be enacted. This would set out the behavioural requirements for ministerial advisers and would also allow for redress for breach of the code.²³⁹

Recent publicised political scandals involving ministerial advisers, such as the "children overboard affair," have prompted discussion regarding their regulation. The *Inquiry Into Members of Parliament Staff* by the Senate Finance and Public Administration references committee is due to report on 8 October 2003.²⁴⁰ The results of this report may provide useful guidance for New Zealand.

²³⁶ *Inquiry Into a Certain Maritime Incident*, above, 173.

²³⁷ *Inquiry Into a Certain Maritime Incident*, above, 173, 186.

²³⁸ *Inquiry Into a Certain Maritime Incident*, above, 183.

²³⁹ *Inquiry Into a Certain Maritime Incident*, above, 187.

²⁴⁰ The terms of reference of the Finance and Public Administration references committee's inquiry are:

- (a) the adequacy and appropriateness of the framework for employment and management of staff under the Members of Parliament (Staff) Act 1984 (the MOPS Act)
- (b) the role and functions of MOPS staff in assisting and advising their employers and interacting with the Australian Public Service and other stakeholder groups
- (c) the remuneration and conditions of employment of MOPS staff

Australian ministerial advisers appear to wield greater power than their New Zealand equivalents. Importantly however, within New Zealand's current unregulated framework, advisers have the potential to gain similar powers. Moreover, it would be desirable for New Zealand to address any potential problems in advance of publicised abuses.

B The United Kingdom

1. Context

UK constitutional arrangements which impact on the role of personal appointees are similar to those in New Zealand and Australia. The UK has a system of Cabinet government, based on responsible government.²⁴¹ It also has a largely unwritten, convention-based constitution. As such, ministerial and Cabinet behaviour are guided by the constitutional conventions of collective cabinet responsibility and individual ministerial responsibility.²⁴²

The UK civil service is governed differently to its New Zealand equivalent. That is, it is governed by royal prerogative rather than statute. Thus, conditions of service are mainly controlled by regulations and Orders in

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- (d) the means by which MOPS staff are accountable to government, the Parliament and the public
 - (e) suitable means by which the accountability of MOPS staff could be enhanced
 - (f) the merits of introducing a code of conduct for MOPS staff reflecting the Values and Code of Conduct of the Public Service Act 1999, the key elements such a code should contain and the process by which such a code should be developed and introduced
 - (g) suitable means by which the accountability of the Government for the employment of MOPS staff can be enhanced
 - (h) the role of departmental liaison officers and their interaction with MOPS staff and departments; and
 - (i) appropriate amendments to the MOPS Act flowing from the above.

²⁴¹ Sir Ivor Jennings *Cabinet Government* (3 ed, Cambridge University Press, Cambridge, 1959) 1; Colin Turpin *British Government and the Constitution: Texts, Cases and Materials* (5th ed, Butterworths, London, 2002) 227, 443-445; Martin Burch and Ian Holliday *The British Cabinet System* (Prentice Hall, New York, 1996) 10-11.

²⁴² Cabinet Office *Ministerial Code: A Code of Conduct and Guidance on Procedures for Ministers* (United Kingdom, 2001) chapter one <<http://www.cabinet-office.gov.uk/central/2001/mcode/contents.htm>> (last accessed 28 September 2003); Turpin, above, 212-221.

Council rather than legislation.²⁴³ This theoretically makes their employment more tenuous, since it is “at the pleasure of the Crown.” However, that tenuousness is at least arguable, in practice.²⁴⁴ The more important difference is that the civil service is subject to regulation by the executive branch.²⁴⁵ Aside from this, the UK and New Zealand civil services share a similar constitutional basis. That is, the UK civil service comprises permanent professionals.²⁴⁶ All members are subject to the constitutional conventions of loyalty, neutrality and anonymity.²⁴⁷

UK constitutional conventions have come under increased strain in recent decades. They still operate under a FPP electoral system which predominantly entails single party majority government. However, many of the state sector reforms discussed in relation to New Zealand have been mirrored in the UK. Similar changes in terms of the greater complexity of government and intrusiveness of the media also apply.²⁴⁸ That is, there has been increased emphasis on accounting to the voting public for ministerial and also civil servant actions.²⁴⁹

Although the same sorts of strains have been acting on the UK constitutional conventions, questions about the continued relevance of some of those conventions have arguably been raised more seriously. Loyalty has been at issue from time to time, but this appears to be based on specific and fairly isolated instances of civil servants obstructing government policy.²⁵⁰ The

²⁴³ Jennings *Cabinet Government*, above, 147; Turpin, above, 245.

²⁴⁴ Jennings *Cabinet Government*, above, 131; Arthur Berriedale Keith *An Introduction to British Constitutional Law* (Oxford University Press, Oxford, 1931) 60-61.

²⁴⁵ 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) 64.

²⁴⁶ Sir Ivor Jennings *Cabinet Government*, above, 127-128.

²⁴⁷ Cabinet Office *Civil Service Code* (United Kingdom, 1996) <<http://www.cabinet-office.gov.uk/central/1999/cscode.htm>> (last accessed 28 September 2003); Colin Turpin *British Government and the Constitution: Texts, Cases and Materials* (5th ed, Butterworths, London, 2002) 248-252.

²⁴⁸ House of Commons Public Administration Select Committee *These Unfortunate Events: Lessons of Recent Events at the Former DTLR* (United Kingdom, 2002) 18 <<http://www.publications.parliament.uk/pa/cm200102/cmselect/cmpublicadm/303/303.pdf>> (last accessed 29 September 2003).

²⁴⁹ Simon King *Regulating the Behaviour of Ministers, Special Advisers and Public Servants* (The Constitution Unit, London, 2003) 15.

²⁵⁰ Turpin, above, 252-253.

neutrality of the public service has also been questioned and the minister-public servant relationship has become increasingly strained in recent years.²⁵¹ In general, while some "dilution" of these conventions has been noted,²⁵² they are still regarded as important guiding constitutional principles.²⁵³

2. *Position and functions of personal appointees*

Personal appointees, or special advisers as they are known in the UK, began to be used from the mid-1970s.²⁵⁴ They are now an established and widely used part of British government. For example, there were 38 special advisers under the Major Government, 67 by April 1998²⁵⁵ and 81 by March 2002.²⁵⁶ As in New Zealand, special advisers are formally employed as temporary civil servants.²⁵⁷ They also undertake functions similar to their New Zealand equivalents in terms of political and policy advice.²⁵⁸ As in Australia, their policy work at times replaces rather than supplements that of the public service.²⁵⁹

There has been a great deal more controversy surrounding the role of special advisers in the UK than in New Zealand. The major concerns about personal appointees in New Zealand and Australia appear to be broadly shared in Britain. Thus:²⁶⁰

In general it appears that special advisers make a useful contribution in supporting ministers and are able to work in a constructive relationship with established civil servants. There have, however, been instances of friction and some blurring of responsibilities ... leading to a damaging breakdown of trust

²⁵¹ King, above, 15.

²⁵² Turpin, above, 221.

²⁵³ Cabinet Office *Ministerial Code: A Code of Conduct and Guidance on Procedures for Ministers* (United Kingdom, 2001) chapter one <<http://www.cabinet-office.gov.uk/central/2001/mcode/contents.htm>> (last accessed 28 September 2003).

²⁵⁴ Turpin, above, 254.

²⁵⁵ Turpin, above, 255.

²⁵⁶ Robert Armstrong "Daylight Jobbery" (2 March 2002) *The Spectator* United Kingdom <<http://www.spectator.co.uk/article.php3?table=old§ion=current&issue=2003-08-02&id=1624&searchText=>>> (last accessed 7 August 2003).

²⁵⁷ Simon King *Regulating the Behaviour of Ministers, Special Advisers and Public Servants* (The Constitution Unit, London, 2003) 11; Turpin, above, 255.

²⁵⁸ King, above, 11; Chris Eichbaum and Richard Shaw "A Third Force? Ministerial Advisers in the Executive" (unpublished paper, Victoria University School of Government, 2003) 2.

²⁵⁹ King, above, 16.

²⁶⁰ Turpin, above, 255.

within the department and the discomfiture of the Secretary of State. Some observers perceive a threat to the tradition of a politically neutral civil service, bringing a collective experience and objective judgment to bear on government decision-making.

In addition:²⁶¹

The numbers of 'special advisers' have proliferated and their roles and responsibilities, their accountability, and their relationships to ministers and civil servants have been insufficiently thought through.

And:²⁶²

[Former head of the Treasury press office, Jill Rutter] warned that we could be turning the Government Information Service into "a powerful machine to secure the permanent advantages of incumbency."

On the other hand, special advisers are widely thought to be useful to government.²⁶³ The Committee on Standards in Public Life reported in 2000 that "almost all witnesses made clear their view that special advisers were valuable components of the machinery of Government."²⁶⁴ Thus, the problematic aspects of their role have been sought to be resolved by incorporating certain safeguards into the system. For example, they are subject to a code of conduct.²⁶⁵ The code contains similar behavioural standards as for the civil service, with exceptions in terms of political neutrality.

²⁶¹ Robert Armstrong "Daylight Jobbery" (2 March 2002) *The Spectator* United Kingdom <<http://www.spectator.co.uk/article.php3?table=old§ion=current&issue=2003-08-02&id-1624&searchText=>> (last accessed 7 August 2003).

²⁶² Ivor Gaber "A World of Dogs and Lamp-Posts" *New Statesman* United Kingdom (19 June 1998) 14.

²⁶³ Chris Eichbaum and Richard Shaw "A Third Force? Ministerial Advisers in the Executive" (unpublished paper, Victoria University School of Government, 2003) 3; House of Commons Public Administration Select Committee *These Unfortunate Events: Lessons of Recent Events at the Former DTLR* (United Kingdom, 2002) 5, 14-15 <<http://www.publications.parliament.uk/pa/cm200102/cmselect/cmpublicadm/303/303.pdf>> (last accessed 29 September 2003).

²⁶⁴ Sixth Report of the Committee on Standards in Public Life *Reinforcing Standards* (United Kingdom, 2000) para 6.26 <<http://www.archive.official-documents.co.uk/document/cm45/4557/4557-00.htm>> (last accessed 29 September 2003).

²⁶⁵ Cabinet Office *Code of Conduct for Special Advisers* (United Kingdom, 2001) <<http://www.cabinet-office.gov.uk/central/2001/codconspads.htm>> (last accessed 24 June 2003). See Appendix.

However, effective accountability is still problematic. Public servant complaints about special advisers must be made to departmental permanent secretaries. Complaints are eventually passed on to the relevant minister.²⁶⁶ Moreover, UK public servants are subject to personal accountability rather than just being indirectly accountable through individual ministerial responsibility. There is no reason why direct accountability should not extend to special advisers. In any event, the nature and degree of power exercised by special advisers warrant close scrutiny. Nevertheless, special advisers are not subject to separate accountability mechanisms.

The House of Commons Public Administration Committee issued a report in response to scandal relating to special advisers.²⁶⁷ The report recommended that boundaries be drawn around special advisers' role in government communications. More broadly, it suggested a merit-based system of recruitment and training courses for incoming special advisers regarding the machinery of government and the role of public servants. Finally, it urged the adoption of a procedure for dealing with disputes between ministers, special advisers and career civil servants. This procedure would clarify who has final disciplinary responsibility for disputes. It also recommended clarification of the Prime Minister's role in this process.²⁶⁸ On the latter point, it should be noted that the Prime Minister has little incentive to step in on disputes between civil servants and special advisers. Such a move could undermine the authority of the minister and possibly senior public servants involved. Further, the high level of risk would expose the Prime Minister to adverse public attention.²⁶⁹ It is suggested that there would be little to be gained from giving the Prime Minister a role in this process.

²⁶⁶ *Code of Conduct for Special Advisers*, above, para 22; Simon King *Regulating the Behaviour of Ministers, Special Advisers and Public Servants* (The Constitution Unit, London, 2003) 11.

²⁶⁷ The scandal arose following a series of revelations about communications issues in the Department of Transport, Local Government and the Regions. This began with the actions of Jo Moore, special adviser to Stephen Byers. Moore sent an email stating that the 11 September 2001 terrorist attack might be a good day to "get out anything we want to bury." The events which followed demonstrated a serious breakdown in the relationships between departmental civil servants, ministerial staff and ministers. (*These Unfortunate Events: Lessons of Recent Events at the Former DTLR*, above.)

²⁶⁸ *These Unfortunate Events: Lessons of Recent Events at the Former DTLR*, above, 22.

²⁶⁹ *These Unfortunate Events: Lessons of Recent Events at the Former DTLR*, above, 16.

Since November 2002, incoming special advisers in the UK have been given training. The training relates to “the roles and responsibilities of special adviser and Ministerial codes, their relationships within departments and with the Prime Minister’s office and their balancing of their political role.”²⁷⁰

In April 2003, the UK Committee on Standards in Public Life reported on the controls acting on the government executive, including ministers, special advisers and the permanent civil service.²⁷¹ The Committee acknowledged the valuable role played by ministerial advisers who are not politically neutral.²⁷² It then made a number of recommendations relating to special advisers that may be relevant to the New Zealand context. These were, firstly, that “special advisers should be defined as a category of government servant distinct from the Civil Service.”²⁷³ Secondly, it was recommended that the functions special advisers are allowed to perform be codified and the functions of particular special advisers be set out in individual employment contracts.²⁷⁴ Thirdly, the report recommended confirmation that ministers are responsible to Parliament and the Prime Minister for the actions of their special advisers.²⁷⁵ The Committee also recommended that ministers investigate allegations of breaches by special advisers of the Code of Conduct and that provision be made for the Prime Minister to refer complaints for investigation in the same way as an alleged breach of the Ministerial Code.²⁷⁶ Transparency as regards the numbers, costs and roles of special advisers was

²⁷⁰ Simon King *Regulating the Behaviour of Ministers, Special Advisers and Public Servants* (The Constitution Unit, London, 2003) 15.

²⁷¹ Ninth Report of the Committee on Standards in Public Life *Defining the Boundaries Within the Executive: Ministers, Special Advisers and the Permanent Civil Service* (United Kingdom, 2003) <<http://www.public-standards.gov.uk/reports/9th%20report/report/report.pdf>> (last accessed 24 June 2003).

²⁷² *Defining the Boundaries Within the Executive: Ministers, Special Advisers and the Permanent Civil Service*, above, 43.

²⁷³ *Defining the Boundaries Within the Executive: Ministers, Special Advisers and the Permanent Civil Service*, above, 45.

²⁷⁴ *Defining the Boundaries Within the Executive: Ministers, Special Advisers and the Permanent Civil Service*, above, 48.

²⁷⁵ *Defining the Boundaries Within the Executive: Ministers, Special Advisers and the Permanent Civil Service*, above, 49.

²⁷⁶ *Defining the Boundaries Within the Executive: Ministers, Special Advisers and the Permanent Civil Service*, above, 49.

advocated,²⁷⁷ as was a limit on the number of special advisers.²⁷⁸ Finally, added special adviser training and induction was recommended.²⁷⁹

As in Australia, controversy surrounding special advisers in the UK has centred on particular instances of powerful but unaccountable special advisers attempting to mislead the public. For example, recent government communications scandal has given rise to serious concerns about the power and lack of accountability of certain special advisers. In May 2003, Andrew Gilligan reported on BBC radio that he had been informed that the British Government had exaggerated the security threat posed by Iraq.²⁸⁰ This threat had been used to garner public support for invading Iraq. Gilligan subsequently claimed that Alastair Campbell, Prime Minister Tony Blair's director of communications, had asked that the threat be exaggerated. The Foreign Affairs Select Committee cleared Campbell of this allegation. However, Dr David Kelly, a Ministry of Defence weapons expert, was revealed to be the official who had informed Gilligan's story.²⁸¹ Kelly committed suicide and a judicial inquiry into the circumstances surrounding his death was instigated.²⁸² Alastair Campbell announced his resignation on 29 August 2003.²⁸³

The Hutton Inquiry adjourned on 25 September 2003 and Lord Hutton is currently writing his report.²⁸⁴ Alastair Campbell's alleged role in these events highlights the potential seriousness of concerns relating to personal

²⁷⁷ *Defining the Boundaries Within the Executive: Ministers, Special Advisers and the Permanent Civil Service*, above, 50.

²⁷⁸ *Defining the Boundaries Within the Executive: Ministers, Special Advisers and the Permanent Civil Service*, above, 51.

²⁷⁹ *Defining the Boundaries Within the Executive: Ministers, Special Advisers and the Permanent Civil Service*, above, 53.

²⁸⁰ CBBC Newsround *David Kelly Inquiry* <http://news.bbc.co.uk/cbbcnews/hi/find_out/guides/2003/david_kelly_inquiry/newsid_308400/3084395.stm> (last accessed 26 September 2003).

²⁸¹ *David Kelly Inquiry*, above.

²⁸² "David Kelly: Death of WMD Mole" (22 July 2003) *CNN.com* <<http://cnn.worldnews.printthis.clickability.com/pt/cpt?action=cpt&expire=-1&urlID=695>> (last accessed 26 September 2003); Hutton Inquiry Website <<http://www.the-hutton-inquiry-org-uk/>> (last accessed 26 September 2003).

²⁸³ "Alastair Campbell Quits" (29 August 2003) *BBC News UK* <http://news.bbc.co.uk/2/hi/uk_news/politics/3191937.stm> (last accessed 26 September 2003).

²⁸⁴ Hutton Inquiry Website, above.

appointees. If the allegations are found to be true, Campbell will have been instrumental in triggering the UK to go to war based on an exaggerated threat and against the wishes of the United Nations. Moreover, even aside from any responsibility for Dr Kelly's death, he will have manipulated the media so as to mislead public opinion.

The role of personal appointees in New Zealand is even less regulated than is the case in the UK. As such, the potential for this kind of abuse is at least as real in the New Zealand context. These events demonstrate the extent of that potential and reinforce the need for regulation if New Zealand is to avoid similar problems.

VI ANALYSIS

Personal appointees play a valuable role in the New Zealand system of government. This role appears to be qualitatively different from that of a public servant or a minister. Yet there is no legal distinction between a public servant and a personal appointee. Thus, the legal and constitutional positions have failed to keep up with the political reality. This in turn gives rise to potential gaps in mechanisms of accountability.

Several issues have been identified regarding the role of personal appointees in the New Zealand context. The first is their potential unlawfully to exercise executive power. Secondly, they may mislead or manipulate the public through the media. Thirdly, they may have a detrimental effect on the already fragile relationship between ministers and public servants. Finally, they may impact on the conventions that guide the behaviour of these two sets of actors. Interviewees expressed the view that at least the former two of these problems are based more on a perception of inappropriate conduct than reality.²⁸⁵ Nevertheless, given the unregulated nature of their role, there is

²⁸⁵ Interview with Matthew Palmer, former Deputy Secretary for Justice (Public Law) and former Manager of the Law and Treaty section at Treasury (the author, Wellington, 16 September 2003); Interview with Luke McMahon, Senior Adviser to Hon Phil Goff (the author, Wellington, 10 September 2003); Interview with Chris Eichbaum, former Adviser to Hon Steve Maharey (the author, Wellington, 8 September 2003).

certainly the potential for these issues to arise. The Australian and UK experiences illustrate that this potential is a very real risk.²⁸⁶ In addition, the public perception of inappropriate behaviour is itself an issue which ought to be addressed. Moreover, where public servants have such a perception, problems in their relationships with ministers may be exacerbated.

In New Zealand, the exercise of government power must be accountable to Parliament. However, the doctrine of individual ministerial responsibility is considered inadequate on its own to comprise effective accountability for government action. Thus, additional accountability mechanisms are used. These include personal accountabilities for public servants, which are exercised through providing for transparent processes and personal responsibilities. Personal accountabilities are warranted for personal appointees for two reasons. First, the problems regarding personal appointees outlined above are potentially serious. As well, the perception that the problems exist could significantly undermine the public's confidence in the system of government.

On the other hand, mechanisms of accountability should not be allowed to undermine government effectiveness. The principle of transparency may be at issue in this context. It is acknowledged that much of the work undertaken by personal appointees comprises politically sensitive advice. As such, it would be harmful to subject that advice to public scrutiny. However, political sensitivity can not justify the current level of secrecy surrounding the nature of personal appointees' role. Moreover, given the argument that inappropriate behaviour is more perception than reality, a degree of transparency should only enhance public confidence.

It is recommended that personal appointees be legally distinguished from public servants, as they are in Australia. This would better reflect the constitutional difference of their role. As well, it is recommended that a

²⁸⁶ Chris Eichbaum and Richard Shaw "A Third Force? Ministerial Advisers in the Executive" (unpublished paper, Victoria University School of Government, 2003) 11.

separate code of conduct be developed for personal appointees.²⁸⁷ In this way, their role can be further delineated and distinguished from that of public servants, in line with the reality of their position. This may also require amendments to the current public service code. The updated codes could prevent confusion on the part of public servants, ministers and personal appointees about the boundaries of their respective roles.

As discussed, the UK has a code of conduct for special advisers.²⁸⁸ Its behavioural standards are similar to those applicable to civil servants with exceptions as regards neutrality. Therefore, given the similar position of personal appointees, much of this code provides a relevant model for the New Zealand context.

The UK code could be improved in several ways in light of concerns raised in the New Zealand. Specifically a New Zealand code could be clearer about the limits of personal appointees' functions.²⁸⁹ Specifically, it should delineate what would constitute an unlawful usurpation of power. That is, it should require that only the minister's views be conveyed to public servants, not those of a personal appointee. The code should also specifically allow for public servants to have recourse to the minister if they are in doubt as to the authority on which a personal appointee is acting. In cases of doubt, explicit confirmation should always be sought from the minister. The code should also seek to safeguard the minister-public servant relationship by providing for public servants' access to the minister. In terms of media relations, ethical conduct should be outlined as in the UK code.²⁹⁰ However, it should be made clear that spin-doctors should not engage in extracting political outcomes from departments.

²⁸⁷ A similar recommendation has been made by Chris Eichbaum and Richard Shaw, above, 11.

²⁸⁸ Cabinet Office *Code of Conduct for Special Advisers* (United Kingdom, 2001) <<http://www.cabinet-office.gov.uk/central/2001/codconspads.htm>> (last accessed 24 June 2003).

²⁸⁹ *Code of Conduct for Special Advisers*, above, paras 4-7.

²⁹⁰ *Code of Conduct for Special Advisers*, above, paras 8-10.

Separate codes for personal appointees and public servants would serve an important function in delineating the various roles, particularly for the benefit of the public. However, codes of conduct may have little practical effect in terms of preventing a personal appointee from overstepping the bounds of his or her role. This is because politicking in practice is more subtle and the lines more blurred than what can be set out in a code. Personal appointees and public servants will frequently have to rely on discretion and judgment as to the appropriateness of particular actions. Moreover, as discussed, many personal appointees are unfamiliar with the workings of the system of government, including how constitutional conventions may impact on what public servants are allowed to do. As such, more practically effective safeguards need to be implemented.

Primarily, training should be provided to new personal appointees regarding the boundaries of their role and the manner in which they should exercise their discretion. This has already been recommended in New Zealand.²⁹¹ Training should also cover the workings of the New Zealand system of government, in particular the need to uphold the neutrality of public servants. The UK induction courses could be drawn on in this regard.

In addition, effective oversight of personal appointee behaviour is vital to the ability to hold them to account. It is also important if behavioural guides are to be adhered to. Finally, oversight of personal appointees is necessary from a public servant perspective. Personal appointees are in many cases regarded as more senior than their public servant colleagues. Certainly, they are likely to have a close relationship and strong degree of sway with the minister. Consequently, it may be difficult for public servants to maintain the integrity of their position in the face of pressure from personal appointees.

A complaints procedure is required in order to ensure personal appointees behave appropriately. In light of failures in the UK system, oversight by a government minister, such as the Minister of Ministerial

²⁹¹ 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) 64.

Services, is unlikely to be effective. Rather, independent oversight is necessary. One possibility would be to make use of the proposed Judicial Commission, which seeks to implement independent procedures for complaints about judges.²⁹² This would avoid problems of political oversight.

VII CONCLUSION

Personal appointees are legally regarded as public servants. However, constitutionally they appear to be positioned between their employing minister and their public servant colleagues. They may be regarded as being subject to the public service constitutional conventions of loyalty and anonymity, but not that of political neutrality. In practice, there may also be some tensions in their relationships with public servants. Further, personal appointees may cause tensions between ministers and public servants. However, overall they can be regarded as making a positive contribution to government.

It is apparent that public scandal and controversy can arise in relation to the work of personal appointees. This is evidenced by experiences of the UK and Australia. Such scandal understandably appears more likely to be focused on two of the identified objections to personal appointees. These are the perceptions that personal appointees are misleading the public through the media and that they are unlawfully exercising the power of government. Such scandal in the UK and Australia has been based partly on actual abuse of power by personal appointees and partly as a result of suspicion of inappropriate behaviour.

Interviewees were largely united in the view that little actual abuse of power takes place in New Zealand. That is, most felt that only extremely rarely could personal appointees be regarded as personally exercising executive power. However, evidence was given that public servants feel suspicious that abuses of power do take place. Moreover, some media,

²⁹² See Bills Digest no 1000, Judicial Matters Bill 2003 5; Memorandum to the Hon Margaret Wilson, Attorney-General "Judicial Administration Issues" (Chen Palmer and Partners, 2002) <http://www.beehive.govt.nz/wilson/judicial/judicial_administration_issues_report.pdf> (last accessed 29 September 2003).

VIII Opposition MPs and members of the public appear to have similar suspicions. This is largely a result of two major factors. The first is the high degree of secrecy that surrounds the work of personal appointees. The second is the unregulated nature of their role. The latter is particularly concerning given that it gives rise to the potential for actual abuse of power.

Less public controversy surrounds the other major objection to the functions of personal appointees. These relate to the detrimental effect that personal appointees may have on the relationship between ministers and public servants and on public servant neutrality. However, in a constitutional sense and in terms of the impingement of effective government, these objections are at least as important as the first two.

On the other hand, personal appointees are an established and useful feature of New Zealand government. As such, the identified problems with their functions need to be addressed before scandal arises unnecessarily and public confidence is damaged. Most importantly, the constitutional and legal position of personal appointees is out of step with the political reality of their role. The reality of personal appointees' position thus needs to be acknowledged by the legal framework. This would allow for the implementation of appropriate regulatory controls. Such controls must include safeguards which protect the integrity of personal appointees and that of the other government actors with whom they associate.

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IX APPENDIX**CODE OF CONDUCT FOR SPECIAL ADVISERS**

1. As the Ministerial Code explains, the employment of special advisers on the one hand adds a political dimension to the advice available to Ministers, and on the other provides Ministers with the direct advice of distinguished experts in their professional field, while reinforcing the political neutrality of the permanent Civil Service by distinguishing the source of political advice and support.
2. Special advisers are employed to help Ministers on matters where the work of Government and the work of the Government Party overlap and it would be inappropriate for permanent civil servants to become involved. They are an additional resource for the Minister providing advice from a standpoint that is more politically committed and politically aware than would be available to a Minister from the Civil Service.
3. The sorts of work a special adviser may do if their Minister wants it are
 - i. reviewing papers going to the Minister, drawing attention to any aspect which they think has Party political implications, and ensuring that sensitive political points are handled properly. They may give advice on any aspect of departmental business, including giving advice to their Minister when the latter is taking part in Party political activities;
 - ii. "devilling" for the Minister, and checking facts and research findings from a Party political viewpoint;
 - iii. preparing speculative policy papers which can generate long-term policy thinking within the Department, including policies which reflect the political viewpoint of the Minister's Party;
 - iv. contributing to policy planning within the Department, including ideas which extend the existing range of options available to the Minister with a political viewpoint in mind;
 - v. liaising with the Party, to ensure that the Department's own policy reviews and analysis take full advantage of ideas from

5. the Party, and encouraging presentational activities by the Party which contribute to the Government's and Department's objectives;
- vi. helping to brief Party MPs and officials on issues of Government policy;
- vii. liaising with outside interest groups including groups with a political allegiance to assist the Minister's access to their contribution;
- viii. speechwriting and related research, including adding Party political content to material prepared by permanent civil servants;
- ix. representing the views of their Minister to the media including a Party viewpoint, where they have been authorised by the Minister to do so;
- x. providing expert advice as a specialist in a particular field;
- xi. attending Party functions (although they may not speak publicly at the Party Conference) and maintaining contact with Party members;
- xii. taking part in policy reviews organised by the Party, or officially in conjunction with it, for the purpose of ensuring that those undertaking the review are fully aware of the Government's views and their Minister's thinking and policy.

Status and conduct as temporary civil servants

4. Special advisers are temporary civil servants appointed under Article 3 of the Civil Service Order in Council. They are exempt from the general requirement that civil servants should be appointed on merit and behave with political impartiality and objectivity so that they may retain the confidence of future governments of a different political complexion. They are otherwise required to conduct themselves in accordance with the *Civil Service Code*, attached at A. Their appointment ends at the end of the Administration which appointed them.

5. Special Advisers should conduct themselves with integrity and honesty. They should not deceive or knowingly mislead Parliament or the public. They should not misuse their official position or information acquired in the course of their official duties to further their private interests or the private interests of others. They should not receive benefits of any kind which others might reasonably see as compromising their personal judgement or integrity. They should not without authority disclose official information which has been communicated in confidence in Government or received in confidence from others. The principles of public life set down by the Committee on Standards in Public Life, attached at B, provide a framework for all public servants.
6. Special Advisers should not use official resources for Party political activity. They are employed to serve the objectives of the Government and the Department in which they work. It is this which justifies their being paid from public funds and being able to use public resources, and explains why their participation in party politics is carefully limited. They should act in a way which upholds the political impartiality of civil servants and does not conflict with the Civil Service Code. They should avoid anything which might reasonably lead to the criticism that people paid from public funds are being used for Party political purposes. They stand outside the departmental hierarchy. They should not be responsible for budgets or for the line management of permanent civil servants including their recruitment and matters covered by their contract of employment such as their appraisal, reward, discipline and promotion.
7. Article 3(3) of the Civil Service Order in Council allows the Prime Minister to appoint up to three special advisers in No.10 who are not subject to the general restriction that their role is to provide advice to a Minister.

Contacts with the media

8. Special advisers are able to represent Ministers' views on Government policy to the media with a degree of political commitment that would not be possible for the permanent Civil Service. Briefing on purely Party political matters should however be handled by the Party machine.
9. All contacts with the news media should be authorised by the appointing Minister and be conducted in accordance with the *Guidance on the Work of the Government Information Service (GWGIS)*, issued on behalf of the Prime Minister. Departmental Heads of Information are responsible for managing press and publicity operations in their department, and should be kept informed of Special Advisers' contacts with the news media not only to ensure consistency of briefing, but also to ensure that contacts are recorded. Heads of Information are the department's source of advice on the GWGIS.
10. Special Advisers must not take public part in political controversy whether in speeches or letters to the Press, or in books, articles or leaflets; must observe discretion and express comment with moderation, avoiding personal attacks; and would not normally speak in public for their Minister or the Department.

Relations with the Government Party

11. Special Advisers provide advice on the development of Government policy and its presentation. It is in these two areas of activity that Government and Party may overlap.
12. The Civil Service has no monopoly of policy analysis and advice. The Government takes account of views from many sources of which the Government Party is legitimately one. Although public funds and resources must not be used to support the contribution of such views, the Government may need to liaise with the Party, as it does with others, to obtain a full and accurate understanding of the Party's policy analysis and advice.

13. The Government needs to present its policies and achievements to the public in order to aid understanding and so maximise the effectiveness of its policies, and this is a legitimate use of public funds and resources. It would be damaging to the Government's objectives if the Party took a different approach to that of the Government, and the Government therefore needs to liaise with the Party to make sure that Party publicity is factually accurate and consistent with Government policy. To secure this consistency, the Government will also want to make sure that Party MPs and officials are briefed on issues of Government policy.
14. In providing a channel of communication in these areas of overlap, special advisers paid from public funds have a legitimate role in support of the Government's interest, which they can discharge with a degree of party political commitment and association which would not be permissible for a permanent civil servant. In all contacts with the Party, special advisers must observe normal Civil Service rules on confidentiality unless specifically authorised, in a particular instance, by their appointing Minister.
15. Special advisers must not take part in the work of the Party's national organisation; and although they may continue, during Elections, to give specialist or political advice to their Ministers they must be careful not to take any active part in the campaign going beyond the provision of such advice.
16. Where a special adviser wishes to undertake work for a political Party which does not arise out of government business they may do this either in their own time, outside office hours, or under a separate contract with the Party, working part-time for the government. Detailed rules on their involvement in political activities are set out below.

Involvement in politics in a private capacity: national political activities

17. Special Advisers must not take part in national political activities, which are: holding, in a party political organisation, office which

impinges wholly or mainly on party politics in the field of Parliament, the Scottish Parliament, the National Assembly for Wales, the Northern Ireland Assembly or the European Parliament; speaking in public on matters of national political controversy; expressing views on such matters in letters to the Press, or in books, articles or leaflets; being announced publicly as a candidate or prospective candidate for Parliament, the Scottish Parliament, the National Assembly for Wales, the Northern Ireland Assembly or the European Parliament; and canvassing on behalf of a candidate for the institutions or on behalf of a political party.

18. In particular:
- i. if Special Advisers are publicly identified as a candidate or prospective candidate for Parliament, the Scottish Parliament, the National Assembly for Wales, the Northern Ireland Assembly or the European Parliament, either by adoption by a political party or in any other way, they must resign their appointment;
 - ii. if they wish to take part in a General, European or by-election campaign, or to help in a Party headquarters or research unit during such a campaign, they must first resign their appointment. If they wish their appointment to carry on during a campaign, they may continue to give specialist or political advice to their Minister as before, but they must be careful not to take any active part in the campaign going beyond the provision of such advice. They should not, for example, take part in public meetings.
 - iii. if, with the approval of their Minister, they wish to assist with other party political matters such as a leadership campaign, they may do so while on paid or unpaid leave or at times which do not interfere with their normal duties, for example, out of office hours.

Involvement in politics in a private capacity: local political activities

19. With the approval of their Minister, Special Advisers may undertake, or continue to undertake, all forms of local political activity, but not local activities in support of national politics. They must comply with any conditions laid down by their Department.
20. Local political activities are: candidature for, or co-option to, local authorities; holding, in a party political organisation, office impinging wholly or mainly on party politics in the local field; speaking in public on matters of local political controversy; expressing views on such matters in letters to the Press, or in books, articles or leaflets; and canvassing on behalf of candidates for election to local authorities or a political organisation.
21. If Special Advisers take part in local political activities, they must at all times observe discretion, take care to express comment with moderation and avoid personal attacks. In particular, if they serve on a local authority they must adhere to the following points:
 - i. they should not speak publicly or in the Council, or vote, on matters for which their Minister has responsibility;
 - ii. they should not serve on any committee considering such matters;
 - iii. they should not take part in deputations or other representations to Ministers;
 - iv. they should declare an interest in relation to any case or application which comes before the Council in which their Department is involved;
 - v. they should observe discretion in relation to policies for which other Ministers are responsible, in order to avoid causing them embarrassment;
 - vi. they should not disclose to the Council privileged information obtained in the course of their duties.

Complaints

22. Any civil servant who believes that the action of a special adviser goes beyond that adviser's authority or breaches the Civil Service Code should raise the matter immediately with the Secretary of the Cabinet or the First Civil Service Commissioner, directly or through a senior civil servant.

July 2001

ANNEX A

THE CIVIL SERVICE CODE

The Civil Service Code sets out the constitutional framework within which all civil servants work and the values they are expected to uphold. It is modelled on a draft originally put forward by the House of Commons Treasury and Civil Service Select Committee. It came into force on 1 January 1996, and forms part of the terms and conditions of employment of every civil servant. It was revised on 13 May 1999 to take account of devolution to Scotland and Wales. The full text follows, and hard copies are available from the address at the end of the document.

1. The constitutional and practical role of the Civil Service is, with integrity, honesty, impartiality and objectivity, to assist the duly constituted Government of the United Kingdom, the Scottish Executive or the National Assembly for Wales¹ constituted in accordance with the Scotland and Government of Wales Acts 1998, whatever their political complexion, in formulating their policies, carrying out decisions and in administering public services for which they are responsible.
2. Civil servants are servants of the Crown. Constitutionally, all the Administrations form part of the Crown and, subject to the provisions

of this Code, civil servants owe their loyalty to the Administrations¹ in which they serve.

3. This Code should be seen in the context of the duties and responsibilities set out for UK Ministers in the Ministerial Code, or in equivalent documents drawn up for Ministers of the Scottish Executive or for the National Assembly for Wales, which include:

the duty to give an account of their actions to Parliament² or, for Assembly Secretaries, to the National Assembly;

the duty to give Parliament or the Assembly and the public as full information as possible about their policies, decisions and actions, and not to deceive or knowingly mislead them;

the duty not to use public resources for party political purposes, to uphold the political impartiality of the Civil Service, and not to ask civil servants to act in any way which would conflict with the Civil Service Code;

the duty to give fair consideration and due weight to informed and

impartial advice from civil servants, as well as to other considerations and advice, in reaching decisions; and

the duty to comply with the law, including international law and treaty obligations, and to uphold the administration of justice;

together with the duty to familiarise themselves with the contents of this Code.

4. Civil servants should serve their Administration in accordance with the principles set out in this Code and recognising:

the accountability of civil servants to the Minister³ or, as the case may be, to the Assembly Secretaries and the National Assembly as a body or to the office holder in charge of their department;

the duty of all public officers to discharge public functions reasonably and according to the law;

10. Civil servants should have the duty to comply with the law, including international law and treaty obligations, and to uphold the administration of justice; and
Civil servants should also be bound by the ethical standards governing particular professions.
5. Civil servants should conduct themselves with integrity, impartiality and honesty. They should give honest and impartial advice to the Minister or, as the case may be, to the Assembly Secretaries and the National Assembly as a body or to the office holder in charge of their department, without fear or favour, and make all information relevant to a decision available to them. They should not deceive or knowingly mislead Ministers, Parliament, the National Assembly or the public.
6. Civil servants should endeavour to deal with the affairs of the public sympathetically, efficiently, promptly and without bias or maladministration.
7. Civil servants should endeavour to ensure the proper, effective and efficient use of public money.
8. Civil servants should not misuse their official position or information acquired in the course of their official duties to further their private interests or those of others. They should not receive benefits of any kind from a third party which might reasonably be seen to compromise their personal judgement or integrity.
9. Civil servants should conduct themselves in such a way as to deserve and retain the confidence of Ministers or Assembly Secretaries and the National Assembly as a body, and to be able to establish the same relationship with those whom they may be required to serve in some future Administration. They should comply with restrictions on their political activities. The conduct of civil servants should be such that Ministers, Assembly Secretaries and the National Assembly as a body, and potential future holders of these positions can be sure that confidence can be freely given, and that the Civil Service will conscientiously fulfil its duties and obligations to, and impartially assist, advise and carry out the lawful policies of the duly constituted Administrations.

10. Civil servants should not without authority disclose official information which has been communicated in confidence within the Administration, or received in confidence from others. Nothing in the Code should be taken as overriding existing statutory or common law obligations to keep confidential, or to disclose, certain information. They should not seek to frustrate or influence the policies, decisions or actions of Ministers, Assembly Secretaries or the National Assembly as a body by the unauthorised, improper or premature disclosure outside the Administration of any information to which they have had access as civil servants.
11. Where a civil servant believes he or she is being required to act in a way which:
- is illegal, improper, or unethical;
 - is in breach of constitutional convention or a professional code;
 - may involve possible maladministration; or
 - is otherwise inconsistent with this Code;
- he or she should report the matter in accordance with procedures laid down in the appropriate guidance or rules of conduct for their department or Administration. A civil servant should also report to the appropriate authorities evidence of criminal or unlawful activity by others and may also report in accordance with the relevant procedures if he or she becomes aware of other breaches of this Code or is required to act in a way which, for him or her, raises a fundamental issue of conscience.
12. Where a civil servant has reported a matter covered in paragraph 11 in accordance with the relevant procedures and believes that the response does not represent a reasonable response to the grounds of his or her concern, he or she may report the matter in writing to the Civil Service Commissioners, Horse Guards Road, London SW1P 3AL. Telephone: 0171-270 5066.
13. Civil servants should not seek to frustrate the policies, decisions or actions of the Administrations by declining to take, or abstaining from, action which flows from decisions by Ministers, Assembly Secretaries or the National Assembly as a body. Where a matter cannot be

resolved by the procedures set out in paragraphs 11 and 12 above, on a basis which the civil servant concerned is able to accept, he or she should either carry out his or her instructions, or resign from the Civil Service. Civil servants should continue to observe their duties of confidentiality after they have left Crown employment.

Footnotes

¹ In the rest of this Code, we use the term Administration to mean Her Majesty's Government of the United Kingdom, the Scottish Executive or the National Assembly for Wales as appropriate.

² In the rest of this Code, the term Parliament should be read, as appropriate, to include the Parliament of the United Kingdom and the Scottish Parliament.

³ In the rest of this Code, Ministers encompasses members of Her Majesty's Government or of the Scottish Executive.

ANNEX B

THE SEVEN PRINCIPLES OF PUBLIC LIFE

Selflessness

Holders of public office should act solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.

Integrity

Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might seek to influence them in the performance of their official duties.

Objectivity

In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

Accountability

Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.

Openness

Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.

Honesty

Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

Leadership

Holders of public office should promote and support these principles by leadership and example.

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