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Public servants and public accountability

JULIET PHILPOTT

**PUBLIC SERVANTS AND PUBLIC
ACCOUNTABILITY: THE CONVENTION OF
ANONYMITY**

**LLB (HONS) RESEARCH PAPER
PUBLIC LAW (LAWS 505)**

**LAW FACULTY
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I ABSTRACT

This paper addresses the fundamental constitutional convention of public service anonymity. This convention requires a minister to take public responsibility for the department. Public servants may not comment on Government policy and its implementation by individual departments unless they do so in the name of the minister.

Over the last fifteen years, a variety of legislative and quasi-legislative initiatives have led to an increased emphasis on government accountability. This paper contends that in light of this trend, the convention, as traditionally conceived, is no longer appropriate and a reformulation is necessary.

The paper concludes that senior public servants should take public responsibility for all administrative issues relevant to their position. The minister would remain politically responsible for the department.

This reform would clarify a public servant's obligation to the public without destroying the convention of individual ministerial responsibility. It would align a public servant's duty to the public with their internal responsibilities. Moreover, the reform anticipates and provides structure for the inevitable evolution of the convention.

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 12,700 words.

II INTRODUCTION

An effective relationship between minister and public service official is a vital facet of government in New Zealand. The convention of public service anonymity is one of a number of conventions that help to maintain this relationship.

The idea that the public service ... has no life of its own other than that derived from temporary Ministers is neither credible nor true.

The image of an official as the agent of the Minister, and accountable to the Minister alone, working unseen and anonymously is simply no longer accurate. Officials should be more broadly accountable to the community for what they do.¹

Over the last thirty years, however, the public service has undergone a number of changes designed to acknowledge and incorporate these obligations. A result is increased exposure for public servants, chief executives, in particular.

This paper assesses, using case studies and an examination of legislative change, whether the convention, in its traditional form, is sustainable given this propensity for greater accountability within government. It attempts a reformulation of the convention in light of its basic rationale and the problems associated with it.

Part III outlines some of the basic features of the public service. It addresses the convention in specific detail and identifies arguments for and against the convention in its traditional form. Parts IV and V examine the move towards greater accountability within the public service; part IV looks at significant legislative and quasi-legislative initiatives, while part V examines the practical application of the convention in light of two recent case studies. Finally, part VI attempts to reformulate the convention, given the discussion presented in this paper.

III THE TRADITIONAL PUBLIC SERVICE

A fundamental feature of the Westminster system of government is the public, or civil, service – an entity comprised of disparate government agencies specified in the

¹ Geoffrey Palmer *Unbridled Power: An Interpretation of New Zealand's Constitution and Government* (2 ed, Oxford University Press, Auckland, 1987) 82.

II INTRODUCTION

An effective relationship between minister and public service official is a vital facet of government in New Zealand. The convention of public service anonymity is one of a number of conventions that help to maintain this relationship.

Historically, the convention has been strictly obeyed. Until recently, public servants had almost no public profile. The public service in New Zealand generated a reputation for being 'grey and faceless' – for blending into the background.

Over the last fifteen years, however, increased emphasis has been placed on the dual obligations of openness and accountability. The public service has undergone a number of changes designed to acknowledge and incorporate these obligations. A result is increased exposure for public servants, chief executives, in particular.

This paper assesses, using case studies and an examination of legislative change, whether the convention, in its traditional form, is sustainable given this propensity for greater accountability within government. It attempts a reformulation of the convention in light of its basic rationale and the problems associated with it.

Part III outlines some of the basic features of the public service. It addresses the convention in specific detail and identifies arguments for and against the convention in its traditional form. Parts IV and V examine the move towards greater accountability within the public service; part IV looks at significant legislative and quasi-legislative initiatives, while part V examines the practical application of the convention in light of two recent case studies. Finally, part VI attempts to reformulate the convention given the discussion presented in this paper.

III THE TRADITIONAL PUBLIC SERVICE

A fundamental feature of the Westminster system of government is the public, or civil, service – an entity comprised of disparate government agencies specified in the

first schedule to the State Sector Act 1988.² For the purposes of this paper, the term 'public servants' will include the chief executive of each specified department and the employees of each chief executive.³

Although the fundamental purpose of the public service is to operate for the benefit of the citizens of the nation,⁴ traditionally a public servant's primary duty is to the minister; "[i]f their minister asks for something to be done, the officials should perform the required task, and do so efficiently, expeditiously, and to the best of their ability."⁵ The department represents an extension of the minister, and public servants act in the name of the minister. Adherence to this duty facilitates an open working relationship between minister and department – a relationship that is vital to the continued effectiveness of the government. A busy minister may have multiple portfolios and numerous groups to oversee; it is vital that the minister can rely on the chief executive and the department to inform and advise correctly and comprehensively, to undertake the day to day activities of the department, and to implement departmental policy.

Convention dictates that all public servants must demonstrate a number of characteristics to ensure this relationship flourishes.⁶ The Cabinet Manual requires members of the public service:⁷

- to act in accordance with the law;
- to be imbued with the spirit of service to the community;
- to give free and frank advice (as appropriate) to Ministers and others in authority, and, when decisions have been taken, to give effect to those decisions in accordance with their responsibility to the Minister or others;

² State Sector Act 1988, s 27.

³ Note that the State Services Commissioner and chief executives appoint public servants on behalf of the Crown.

⁴ State Services Act 1988, preamble.

⁵ Jonathan Boston, John Martin, June Pallot and Pat Walsh *Public Management: The New Zealand Model* (Oxford University Press, Auckland, 1994) 14. See also: Geoffrey Palmer *Unbridled Power: An Interpretation of New Zealand's Constitution and Government* (3 ed, Oxford University Press, Auckland, 1987) 78.

⁶ State Services Commission *Responsibility and Accountability: Standards Expected of Public Service Chief Executives* (Wellington, June 1997). <http://www.ssc.govt.nz/documents/responsibility_and_accountability.pdf> (last accessed 23 September 2001).

- when legislation so provides, to act independently in accordance with the terms of that legislation.

Additionally, there are the more general requirements of loyalty, political neutrality, and anonymity.⁸ The latter two characteristics are peculiar to this particular employer-employee relationship.

The obligation of political neutrality ensures an official can carry out his or her tasks regardless of the party in government:⁹

[t]he notion of a non-partisan, merit-based and professional service remains a foundation stone of the New Zealand Public Service. Public servants serve the Government in the formulation and implementation of its policies, but they do not serve the interests of the political parties that comprise the Government.

It also ensures public servants operate without working towards a specific political agenda. As a result, the interests of the department – and consequently the public – remain the focus. The requirement of political neutrality manifests itself most obviously in the means by which public servants are appointed – by the State Services Commissioner,¹⁰ or, for public servants below chief executive level, by the chief executive of the department. The appointment is, thus, usually administrative rather than political.¹¹

Despite remaining politically neutral, a public servant must demonstrate loyalty to the government of the day. A minister must be able to rely on public servants to provide accurate information, their honest opinion, and carefully considered advice, all of which ought to have the department's goals as the primary focus.

⁷ Cabinet Office *Cabinet Manual* (Wellington, 2000) <<http://www.dpmc.govt.nz/cabinet/manual>> (last accessed 3 August 2001) introduction. See also: Boston et al, above, 14.

⁸ Matthew S R Palmer "Ministerial Responsibility versus Chief Executive Accountability: Conflict or Complement?" (Paper presented to the Institute for International Research conference on "Analysing and Understanding Crucial Developments in Public Law", Wellington, 4 April 2001) 12.

⁹ *Responsibility and Accountability*, above. See also: *Christine Kathryn Rankin v A-G in respect of the State Services Commissioner* (2 August 2001) Employment Court Wellington WRC 8/01 Goddard CJ, Brief of Evidence of Sir Geoffrey Palmer, 18: "The public service must be able to serve governments of all political hues without fear or favour."

¹⁰ State Sector Act 1988, s 6(c). The appointment is in accordance with the provisions of s 35.

¹¹ However, s 35(2)(b) of the State Sector Act 1988 provides that the State Services Commissioner must consider "any matters" the minister considers important when making the appointment.

A *Convention of Public Service Anonymity*

“Traditionally, the administrator is the anonymous servant of his Minister, bound by constitutional convention to make his experience, judgement and departmental knowledge confidentially available to his political masters no matter what party is in office, and to accept and put into effect his Minister’s decisions. For those decisions, and for the manner of their execution, the Minister takes the responsibility, and hence any public credit or blame”¹²

The convention that public servants remain anonymous, leaving public representation of the department to the minister, has long been a fundamental feature of the public service in this country.

The convention dictates that:¹³

...public servants should not speak publicly themselves, even to the point of not answering criticism. Rather, the Minister speaks publicly and should defend public servants, if they are attacked, in the course of exercising ministerial responsibility.

The convention thereby curtails any public comment on government policy and other political issues beyond the provision of purely factual material.¹⁴

However, it does not prevent the appointment of department spokespeople, whose role is to be the voice of the minister. These public servants are employed to report on the actions of the department and minister; they are not expected to accept any public responsibility for the actions of the department or to attribute credit or blame to any other public servant.¹⁵

The convention is inextricably linked to the convention of individual ministerial responsibility, which holds ministers accountable for the action – or inaction – of their department.¹⁶

¹² *The State Services in New Zealand: Report of the Royal Commission of Inquiry* (R E Owen Government Printer, Wellington, 1962) 26.

¹³ Matthew S R Palmer “Ministerial Responsibility versus Chief Executive Accountability: Conflict or Complement?” (Paper presented to the Institute for International Research conference on “Analysing and Understanding Crucial Developments in Public Law”, Wellington, 4 April 2001) 13.

¹⁴ Cabinet Office *Cabinet Manual* (Wellington, 2000) <<http://www.dpmc.govt.nz/cabinet/manual>> (last accessed 3 August 2001) cl 2.148.

¹⁵ *Cabinet Manual*, above, cl 2.165.

¹⁶ Peter Barbaris “The New Public Management and a New Accountability” (1998) 76(3) *Public Administration* 451.

ministers are accountable to the public, via Parliament, for their own decisions and for the work of their departments; civil servants are accountable internally – and only internally – to their political chiefs.

The two conventions work in tandem; ministers receive all public credit for their department but in return are obliged to protect their officials, accept all criticism and account for their department to Parliament and to the public. To “accept both the responsibility and the blame for actions of which [a minister has] no knowledge enhances the accountability of our system of ministerial government.”¹⁷

The convention of public service anonymity has been regarded as significant enough to warrant partial codification; the Public Service Code of Conduct refers to it, as does the newly revised Cabinet Manual, which states that: “[o]fficial comment on behalf of a department should be made only by those employees authorised to do so.”¹⁸ It also states that “[o]fficials must provide any factual or statistical material required but should not be required to offer comment or opinion on clearly political topics.”¹⁹

Furthermore, while public servants generally have the same rights of free speech as other citizens, in the course of their private lives they are required to “ensure that their personal contribution to public discussion maintains the discretion appropriate to the position they hold.”²⁰ While the Cabinet Manual does not form part of the recognised laws of New Zealand, it has been acknowledged as a “sound, transparent and proven basis on which to operate.”²¹

As our system of government changes we are faced with conflicting arguments for and against the convention of public service anonymity. The central conflict has been expressed as follows:²²

The extent to which a Minister will be held responsible for the errors of his civil servants is bound up with the conflicting aim of preserving the anonymity of civil servants. Only by making them reasonably secure from (and their political masters open to) public censure can they be expected to give frank advice to successions of Ministers. At one extreme a Minister’s responsibility could be formulated as involving total responsibility

¹⁷ Letter from David Lange, Prime Minister, to Roger Douglas, Minister of Finance, 12 August 1986.

¹⁸ *Cabinet Manual*, above, cl 2.165. The Cabinet Manual was revised in April 2001 and the Public Service Code of Conduct in May 2000.

¹⁹ *Cabinet Manual*, above, cl 2.148.

²⁰ *Cabinet Manual*, above, cl 2.166.

²¹ *Cabinet Manual*, above, forward by Helen Clark, Prime Minister.

²² Rodney Brazier *Ministers of the Crown* (Oxford, Clarendon Press, 1997) 270-275 in *Christine Kathryn Rankin v A-G in respect of the State Services Commissioner* (2 August 2001) Employment Court Wellington WRC 8/01 Goddard CJ, Brief of Evidence of Sir Geoffrey Palmer, 12.

for all the acts of his officials, however junior and even if he did not know of their existence ... At the opposite extreme, simple justice to blameless Ministers, and the improved administration which should result from the rooting out of incompetent public servants, require that individual officials be named publicly and disciplined for misconduct.

1. *Rationale*

There are three main arguments in favour of the convention.

a) An effective public service

Public service anonymity aids in the maintenance of an efficient public service by cementing the relationship between minister and official; “[i]t is through this relationship that responsibility is enforced and the political credibility of governments tested.”²³ Because a minister protects the department’s officials from public criticism, a public servant feels free to provide the minister with an honest opinion, frank advice and comprehensive analysis. Thus, the minister is fully informed and in a position to make decisions quickly and accurately. A public servant may be less willing to provide such frank advice if they are personally at risk of being held to account in public.²⁴

A breach of the convention – or if it were abolished entirely – may have serious repercussions for this relationship. A minister may doubt the loyalty of a public servant who has spoken out in public. Depending on the seniority of the public servant, this lack of trust may affect the running of the department as a whole. The potentially negative publicity caused by a breach of the convention by a public servant may also diminish the department’s ability to run efficiently; the department may be plagued by inconsistencies leading to infighting and possibly a deterioration of departmental hierarchy. Depending on the gravity of the breach, time and money will be spent on punishing the errant public servant, rectifying the breach and defending the department to the public. The political consequences of a department in

²³ John Roberts *Politicians, Public Servants and Public Enterprise* (Victoria University Press for the Institute of Policy Studies, Wellington, 1987) 27.

²⁴ Peter Barbaris “The New Public Management and a New Accountability” (1998) 76(3) *Public Administration* 451, 465.

disarray may be fatal for a government, especially given the often tenuous grasp on power of modern coalition governments in this country.

b) The rights of the public

The convention helps to ensure that consistent information is disseminated to the public. It is vital that the representatives of a government department present a united front to the public. The potential political consequences of public disagreements, or even minor discrepancies in policy statements, are significant, although admittedly less so in a multi-party system of government. Moreover, the public service has an obligation to present clear and unambiguous statements to the public who should not be left to decipher government policy from a number of contradictory reports.

c) The elected representative

New Zealand is a democracy. Ministers – and not their officials – are the elected representatives of the people of New Zealand. For three years they administer a particular sphere of the nation's executive in the name of its inhabitants. As the chosen representatives, ministers must take responsibility for the actions of their department for the duration of their tenure. They protect subordinate officials from public observation and censure. To expose a person who is not an elected representative to public examination, may call into question the value of electing representatives at all.

2. *Problems with the Convention*

Despite the significant rationale above, the convention does create some basic problems. These problems may impact on the minister's ability to run his or her department, the department's performance, the government's majority in Parliament, the minister's – and in extreme circumstances, the government's – political future, the likelihood of taxpayer funds being used appropriately, and the public's perception of, and benefit from, the public service.

a) Lack of public accountability and transparency

The primary difficulty with the convention is the inherent lack of public accountability and departmental transparency. Any obligation to answer to the public lies with the minister. This will usually mean that the people who are actually responsible for certain departmental acts, omissions, decisions or undertakings are not required to publicly account for these actions. Although public servants will be required to account internally and may receive some internal credit or censure, the public is more often than not unaware of who is actually responsible for specific actions of the department.

This lack of accountability leads to three main problems.

Firstly, the fact that public servants are not required to answer to the public may provoke slipping performance standards amongst officials. The effect of this may be mitigated by internal accountability procedures.

Secondly, and more importantly, the convention ignores the fact that a busy minister may not have time to adequately consider and assess all departmental undertakings. This is especially the case where a minister has multiple portfolios. In this instance, greater responsibility falls on the department's public servants – in particular the more senior officials – to make decisions on the minister's behalf. To allow senior public servants to carry out tasks in the name of the minister without imposing equivalent standards of public accountability upon them does not equate with internal accountability structures, whereby officials are responsible for their actions and must account to their superiors for them. To an extent, therefore, the public is required to accept an artificial construction of government accountability; we accept a minister's assumption of responsibility when it is patently obvious that he or she is not at fault. Given the current drive for greater accountability within government, any ability to pass the buck may no longer be one the public is willing to – or should – accept. This concern is even greater in an MMP environment where public servants have access to documents and make decisions with more political impact than previously.²⁵ It seems only appropriate that they are held to account for any actions relating to this material.

²⁵ See part IV A below.

The third major problem with the absence of public accountability within the public service is the resulting lack of transparency. Because the minister is the sole representative of the department, the public may not receive a completely objective view of the facts in any given situation. There are few checks on a minister, therefore he or she has a wide discretion to choose what information is disseminated to the public and how that information is presented. A minister can bury information that might lead to bad publicity if he or she chooses to do so.²⁶

Allowing public servants to represent the department is likely to result in a more balanced portrayal of events or information. The public servant may well have the advantage of more in-depth knowledge and a sounder analytical basis for discussion than the minister, whose schedule may only have permitted a brief glance over the matter at hand. Thus, the public benefits from more detailed information and a wider variety of opinions.

b) No public defence mechanisms for public servants

Ministers are in a powerful position to publicly undermine public servants, despite their obligation to the contrary. A minister may fail to display support for their public servants. Moreover, the minister may reject his or her obligations entirely and publicly chastise officials. In October 2000, Lianne Dalziel chose to publicly blame her public servants for the mistaken deportation of a Filipino family.²⁷ Although this kind of behaviour occurs infrequently and would arguably be dealt with most effectively by the public at a general election, it still exists as a potential threat to a public servant's career.

²⁶ This is tempered somewhat by the State Sector Act ss 6-10, which allow the State Services Commissioner to undertake investigations into the workings of the department. s 13 of the Ombudsman Act 1975 gives the Ombudsman a similar power. The ability to hide some information will be subject to the new Protected Disclosures Act 2000 which protects employees who reveal information relating to serious wrongdoing within their department; see part IV B 2 b) below.

²⁷ Alan Perrott "Immigration Service in strife for 'inhuman' treatment" (13 October 2001) *The New Zealand Herald* Auckland 13. See also Eugene Bingham "Privacy Commissioner investigating actions of Immigration Service" (20 October 2000) *The New Zealand Herald* Auckland 11.

A chastised official may:²⁸

... leave or answer back, or both. Either option is undesirable. In particular, the duty of loyalty that public servants owe to Ministers is likely to come under strain in practice.

Alternatively, a public servant may choose to manipulate their information or advice to ensure the minister hears what he or she wants to hear. This may be a viable defence mechanism for public servants who feel unable to rely on their minister to protect their anonymity. It may mean the minister receives inaccurate data or dubious advice; in such circumstances a bad decision is likely.

c) Conflicting duties

The convention exacerbates the conflicting duties of officials to the public and to the minister. Difficulties may arise where a public servant considers a minister's decision to be detrimental to the public. In this situation, their obligations of loyalty, political neutrality and anonymity require them to put aside any personal conflict and to support the decision of the minister. Conversely, the preamble of the State Sector Act dictates that a fundamental purpose of that Act is to "ensure that employees in the State Services are imbued with the spirit of service to the community." This obligation is indicated by the very words 'public service.'

The friction created by these conflicting duties may create an untenable position for public servants. Depending on the circumstances involved, their obligation to remain anonymous places them in an awkward position. Some public servants may choose to ignore this obligation where a threat to public health, safety or wellbeing is apparent.²⁹

we can sympathise when... officials believe justly that they are acting in the public interest by covertly revealing government intentions. That it is contrary to the acceptable behaviour of public officials there is no doubt. That it reveals a certain humanity within these same officials, however, is similarly true.

d) No sanction for breach

²⁸ Matthew Palmer "Ministerial Responsibility versus Chief Executive Accountability: Conflict or Complement?" (Paper presented to the Institute for International Research conference on "Analysing and Understanding Crucial Developments in Public Law", Wellington, 4 April 2001) 16.

²⁹ Terence Green "Undirected ship of public service" (17 August 2001) *The Evening Post* Wellington 6. Terence Green is a public servant and tutor in political science at Victoria University of Wellington.

Despite the significant consequences of breach of the convention, there are no pre-determined sanctions imposed upon those public servants who are guilty of infringement. Consequently, there is nothing – save possible unemployment – to deter a public servant from breaching their obligations. Where punishment is deemed appropriate, its nature is determined on an ad hoc basis according to the specific circumstances involved. The lack of consistent, pre-determined censure may explain the increasing number of public servants who choose to run the risk of breaching the convention.

e) Lack of public recognition for public servants

The personal interests of public servants are undermined by the convention. Because an official is not permitted a public profile, they receive no public recognition for their duties, despite the significant impact of those duties on ordinary citizens. As mentioned above, under MMP these duties may have increasing political – and hence, public – significance. This lack of recognition may lead to job dissatisfaction, and in turn to a decline in the number of people seeking work as a public servant.

IV THE NEW PUBLIC SERVICE

The public service has undergone significant change over the past two decades. The advent of a proportional electoral system shifted the public service into the political arena. In addition, a variety of legislative initiatives have implemented changes to public service management structures and have encouraged a focus on enhanced performance and greater accountability.

A The impact of MMP

A proportional system of government has encouraged a more decentralised decision-making process. Both governments since the advent of MMP have been coalition governments. Both have functioned as a minority in Parliament. The difficulties associated with merging the often disparate political goals of coalition partners, and the need to maintain good relations between these parties in order to sustain their

often tenuous power base in Parliament, mean that decisions made by individual departments carry a great deal of political weight. In turn, "the increased burden on ministers to explain and account for the actions of their department naturally filters down to the public servants concerned."³⁰ Public servants can no longer escape the political negotiations that are to be expected of a coalition government operating without a majority voice in Parliament.

As a result, the duties of a public servant have become politicised as they are often obliged to concern themselves with the political futures of, not only their individual minister, but the government as a whole. The relationship between minister and – theoretically neutral – official has become one of minister and political adviser. This has an obvious impact on the convention of political neutrality. Being loyal to a minister may now mean being loyal to that minister's political viewpoint.

Conflict arises in a multi-party political landscape as some public servants are required to answer to multiple ministers with diverging political allegiances. Obligations of loyalty and political neutrality may be difficult – even impossible – to meet in these circumstances: "the 'obedient servant' concept is becoming less persuasive as the political tasks which it covers grow more complex and controversial."³¹ Whether similar tensions would have arisen under a first-past-the-post system is unclear. Certainly, the old system with its bi-party focus made the obligations of loyalty and political neutrality easier to adhere to.

It is peculiar that more ministers have chosen to publicly undermine their officials at a time when the relationship between minister and officials – in particular the chief executive – has become more vital for the minister's continued political survival. The political consequences of internal departmental discord are substantial in the current political climate.

B *Enhanced Accountability: Changing Management Structures*

³⁰ *Christine Kathryn Rankin v A-G in respect of the State Services Commissioner* (2 August 2001) Employment Court Wellington WRC 8/01 Goddard CJ, Brief of Evidence of Sir Geoffrey Palmer, 24.

³¹ John Roberts *Politicians, Public Servants and Public Enterprise* (Victoria University Press for the Institute of Policy Studies, Wellington, 1987) 46.

A shift towards greater public service accountability is evident over the latter part of the twentieth century. This change reflects the realities of contemporary public service management:³²

[t]hese new methods of accountability replace the old and discredited system whereby the Minister was in theory responsible for everything and in practice responsible for nothing.

Parliament has indicated a clear intention to shift public service management toward a more performance-based system. A multitude of legislative and quasi-legislative changes has revised the operation of the public sector. Greater emphasis has been placed on internal and external accountability procedures in an attempt to enhance performance standards and to allow the public greater insight into the workings of the public service. Private sector initiatives have been introduced in government departments and other Crown entities in an effort to improve management structures and to foster greater accountability.

1 Internal Accountability Procedures

The State Sector Act 1988 redefined the role of the public service in New Zealand. Notably, it increased the internal responsibilities placed on public service chief executives.³³ These officials take on much of the historical role of the minister. An increase in internal responsibility has necessarily exposed many chief executives to greater public prominence.

In effect, the minister has remained responsible for determining the department's goals or outputs, but the chief executive has become responsible for ensuring these outputs are achieved.³⁴ The chief executive administers the department and utilises its resources so as to give effect to the decisions and directions of the minister. This, effectively, separates the department's political function from its administrative function, while retaining the chief executive's direct accountability to the minister.

³² Geoffrey Palmer *Unbridled Power: An Interpretation of New Zealand's Constitution and Government* (2 ed, Oxford University Press, Auckland, 1987) 89.

³³ State Sector Act 1988, ss 32 and 34.

³⁴ See s 32(a) and (d) in particular.

A consequence of these structural alterations is to remove the minister from the day-to-day functioning of the department. Some have described the new relationship between minister and chief executive as contractual; the minister contracts with the chief executive for the provision of administrative services.³⁵ In return, the chief executive is remunerated accordingly. However, this conception is arguably misleading; the chief executive is not employed by the minister but by the State Services Commissioner on behalf of the Crown. Others regard the new relationship to be closer to that of a chief executive and managing director of a private sector corporation. This description would certainly have been out of place prior to the advent of the State Sector Act, when the minister was responsible for the department as a whole. Even now, however, significant differences between government departments and private sector corporations remain. Despite the increased responsibilities of the chief executive under the new regime, the lingering presence of the convention of individual ministerial responsibility ensures that the buck still stops with the minister; in the private sector, responsibility is not filtered by a chief executive or equivalent, but is unilaterally accepted at the level at which the failure occurred.

The increased emphasis on performance is evident; in an initiative borrowed from the private sector, chief executives are appointed on renewable contracts for up to five years and the criteria for renewal is predominantly performance based.³⁶ Performance is monitored by the State Services Commissioner, who has an obligation to regularly review the performance of each chief executive.³⁷ The Commissioner also has a general discretion to undertake investigations into the inner workings of the department.³⁸ Ombudsmen have a similar investigative role.³⁹

A consequence of limited-term chief executive appointments is a greater likelihood that political concerns will affect the appointment process; because public servants are

³⁵ Jonathan Boston, John Martin, June Pallot and Pat Walsh *Public Management: The New Zealand Model* (Oxford University Press, Auckland, 1996) 46. See also Robert Gregory "Political Responsibility for Bureaucratic Incompetence: Tragedy at Cave Creek" (1998) 76(3) *Public Administration* 519, 524.

³⁶ Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand Government under MMP* (3 ed, Oxford University Press, Auckland, 1997) 81.

³⁷ State Sector Act 1988, s 43.

³⁸ State Sector Act 1988, ss 8-9.

³⁹ Ombudsmen Act 1975, s 13(1).

more directly involved in political matters it appears likely that their reappointment may be based on the political concerns of their minister and government. A political appointment will impact on the ability of the department and of the public service to remain politically neutral.⁴⁰

The Act provided for the creation of a 'senior executive service',⁴¹ the members of which were expected to answer to the chief executive. Presumably, it was anticipated that the increased standards of accountability placed on chief executives via the mechanisms created in the Act would filter down through the senior executive service into the lower echelons of the public service, and in doing so would enhance the accountability of the department as a whole. The effect of the creation of this new level within departmental hierarchy has been nominal only; the State Services Commission has not promoted the concept of the senior executive service and there is no real incentive for individual departments to create one.

Significantly, the state sector reform did not explicitly address the continuing application of the conventions of individual ministerial responsibility and public service anonymity. The State Sector Act made no mention of the conventions, the implication being that they were not affected by the legislative change. According to the Rt Hon Sir Geoffrey Palmer, the Minister mainly responsible for the state sector reforms throughout the latter part of the 1980s:⁴²

[t]he whole idea of the state sector reforms was to remove the stultifying levels of bureaucracy and to give chief executives freedom to manage, while holding them accountable for their performance. The key to the reforms was increased transparency of departmental decision-making and policy implementation. But this does not alter the basic concept of individual ministerial responsibility. In Parliament, and in the minds of members of the public, the buck stops with the Minister.

However, the continued application of the conventions in their traditional form has not been without complication; as Palmer recognised "... the state sector reforms have complicated ministerial responsibility by imposing a more transparent and public

⁴⁰ *Christine Kathryn Rankin v A-G in respect of the State Services Commissioner* (2 August 2001) Employment Court Wellington WRC 8/01 Goddard CJ, Brief of Evidence of Sir Geoffrey Palmer, 18.

⁴¹ State Sector Act 1988, s 46.

⁴² *Rankin* Brief of Evidence, above, 22.

accountability regime on chief executives.”⁴³ The obligation of anonymity does not reflect the increased exposure of chief executives – and to a lesser degree, other public servants – as a result of these reforms. Despite an increased public role, the continuing application of the convention may mean many chief executives are not required – or are unable – to publicly defend themselves or their department.⁴⁴ So long as the minister retains the ultimate responsibility for answering for the department’s actions to Parliament and the public, further attempts to increase chief executives’ accountability would appear to have little practical effect.

As a corollary of the State Sector Act, the State Services Commission published the Public Service Code of Conduct in 1990 in an attempt to further clarify the obligations and duties upon public servants:⁴⁵

[t]he principles [in the Code] do not specify every potential act of behaviour but rather, establish the obligations generally expected of public servants in their relationships with Government, their chief executive, colleagues, and the public.

The Code set out guidelines for members of the public service; these predominantly reflect the goals of the State Sector Act. The Code also reiterated the ongoing relevance of the convention of ministerial responsibility and noted the continued application of the conventions of loyalty, political neutrality and anonymity.⁴⁶ The Commission has recognised that the guidelines set out in the Code are not necessarily complete⁴⁷; the document itself allows for further standards of conduct to be promulgated by chief executives of specific departments or by the State Services Commission.⁴⁸

⁴³ Rankin Brief of Evidence, above, 21.

⁴⁴ An example is Christine Rankin who proposed to appear on the ‘Holmes’ show in early 2000 to explain her department’s problems with processing student loans. At a request from her Minister Steve Maharey and State Services Commissioner Michael Wintringham, she did not appear, meaning she had no way to defend herself to the public who viewed her as being substantially responsible for the problems.

⁴⁵ State Services Commission, *Public Service Code of Conduct* (Wellington, 2000) <<http://www.ssc.govt.nz/documents/codeofconduct>> (last accessed 23 September 2001) introduction.

⁴⁶ *Public Service Code of Conduct*, above, first principle.

⁴⁷ “What the Code did not do, and was not intended to do, was provide a detailed reference to, or comprehensive basis for, understanding the rationale behind the minimum standards it prescribed.” State Services Commission *The Public Service and Government* (Wellington, 2000) <<http://www.ssc.govt.nz/documents/PS-PCP/gov1.html>> (last accessed 11 July 2001).

⁴⁸ *Public Service Code of Conduct*, above, introduction.

In June 1997, the Commission published a further set of guidelines specifically for chief executives.⁴⁹ The primary goal of this paper was to deal with problematic notions of responsibility and accountability. The paper outlined the accountability structure created by statutes such as the State Sector Act, the Official Information Act 1982, and the Public Finance Act 1994. It recognised the increased exposure of chief executives as a result of this legislation. The Commission has also published a set of ten study papers detailing the major aspects of the public service and the relationships between the public service and government, ministers, Parliament, the legal community, and the public.⁵⁰

A combination of the provisions laid down by the State Sector Act, the Public Service Code of Conduct and other papers produced by the State Services Commission has created a public service with a more strictly defined set of obligations and duties and a more stringent accountability structure. A myriad of procedures now ensure public servants are internally held to account for their actions.

2 Public Accountability

In addition to these internal procedures, Parliament has taken steps to ensure a more open relationship between the public service and the wider community. Via a medley of statutes, Parliament has ensured the public has legitimate means of keeping tabs on their public servants, thereby increasing the public profile of officials.

a) Access to Information

Parliament has passed a number of statutes designed to improve the public's access to official information.

The Official Information Act was enacted in 1982 in order to "promote the accountability of Ministers of the Crown and officials... and thereby to enhance

⁴⁹ State Services Commission *Responsibility and Accountability: Standards Expected of Public Service Chief Executives* (Wellington, June 1997) <http://www.ssc.govt.nz/documents/responsibility_and_accountability.pdf> (last accessed 23 September 2001).

⁵⁰ *The Public Service and Government*, above.

respect for the law and to promote the good government of New Zealand.”⁵¹ Prior to the Official Information Act, the primary statute governing official information was the Official Secrets Act 1951. The Official Information Act represents a fundamental conceptual change regarding access to official information including documents pertaining to the public service. As a result of this Act, a minister – and his or her public servants – can no longer escape public scrutiny for the action and inaction that takes place under the auspices of the department. Combined with the Ombudsmen Act 1975, the Official Information Act “lift[ed] the veil on a lot of public servant/ministerial interchange which was previously shrouded in secrecy.”⁵²

The Act contains numerous exceptions to the principle of unrestricted public accessibility, however, one of which prohibits the provision of any information necessary to maintain the convention of individual ministerial responsibility.⁵³ This means that any official information indicating that responsibility for a departmental action may lie with someone other than the minister may remain concealed from the public. Thus, while in theory, the Act allows greater public access to departmental information, the practical effect of the legislation may prevent more vigorous examination of the activities of public servants by members of the public. The ongoing application of the convention would appear to subvert an attempt to increase the flow of information to the public.

The Public Finance Act 1994 provides for the dissemination of financial statements and reports to the public. Ministers are required to publish a notice in the Gazette notifying where the financial statements of the Crown can be purchased or viewed.⁵⁴ The Act makes chief executives responsible to their ministers and to the public for the financial security of their department.⁵⁵ It recognises the public’s right to know how their tax money is spent and how the department allocates its budget.

⁵¹ Official Information Act 1982, s 4(a)(ii).

⁵² Geoffrey Palmer *Unbridled Power: An Interpretation of New Zealand’s Constitution and Government* (2 ed, Oxford University Press, Auckland, 1987) 82. See also *Christine Kathryn Rankin v A-G in respect of the State Services Commissioner* (2 August 2001) Employment Court Wellington WRC 8/01 Goddard CJ, Brief of Evidence of Sir Geoffrey Palmer, 23.

⁵³ Official Information Act 1982, s 9(2)(f)(ii). See also ss 9(2)(f)(iii) and (iv), which protect the political neutrality of officials and the confidentiality of advice tendered by officials respectively.

⁵⁴ Public Finance Act 1994, s 26. “Crown” is defined by s 3 of this Act to include government departments.

⁵⁵ Public Finance Act 1994, s 37 obliges the chief executive and chief financial officer of the department to sign a statement of responsibility for the financial reports of the department.

The ongoing impact of the Public Finance Act will be interesting to monitor. The Act certainly increases the responsibilities placed on individual government departments to account for their financial position. It seems likely, however, that the Act will encourage financial accountability at the cost of quality control. More stringent accountability procedures may encourage cautious spending, as the obligation to meet budgets and explain discrepancies becomes burdensome. The public's access to resources may suffer. This is especially true as the burden of responsibility spreads throughout the department and does not remain simply with the minister. The Noble Commission Report on the Cave Creek disaster voiced a similar concern:⁵⁶

...the overwhelmingly pressing annual requirement to meet budgeted figures has displaced the need for appropriate consideration of the results of that spending.

The Commission was of the opinion that a focus on quantity over quality of outputs was a factor in the systemic failure that was blamed for the tragedy at Cave Creek.

b) Whistleblowers Legislation

The Protected Disclosures Act 2000 is designed to "promote the public interest by facilitating the disclosure and investigation of matters of serious wrongdoing in or by an organisation."⁵⁷ Commonly referred to as 'the Whistleblowers Act', the Protected Disclosures Act protects employees who wish to reveal wrongdoing by their employers or senior members of their organisation. It encourages this disclosure as a further means of ensuring accountability in upper levels of management in both the private and public sector. This Act applies to all government departments.⁵⁸

The Act dictates that initial disclosure must be along internal guidelines as developed by individual departments.⁵⁹ Where an internal disclosure is considered to be

⁵⁶ G. S. Noble *Report of the Commission of Inquiry into the collapse of a viewing platform at Cave Creek near Punakaiki on the West Coast* (GP Print for Department of Internal Affairs, Wellington, 1995) 76. See part VB below.

⁵⁷ Protected Disclosures Act 2000, s 5.

⁵⁸ Protected Disclosures Act 2000, s 3. See also Ombudsmen Act 1975, first schedule.

⁵⁹ Protected Disclosures Act 2000, s 7.

inappropriate, disclosure may be to an 'appropriate authority' – someone outside the internal structure of the organisation.⁶⁰

The protection offered by the Act does not – and was never intended to – apply to those whistleblowers who disclose wrongdoing to the media. The Minister of Justice considered that the protection offered to a whistleblower who followed internal processes was enough to discourage unprotected media disclosures.⁶¹ Nevertheless, an approach to the media remains an option, even when an initial internal disclosure has been made along the guidelines formulated by the relevant department. Where this occurs, the errant official no longer has the protection of the minister to hide behind and is exposed to public censure. The whistleblower has undermined the obligation of anonymity and the duty of loyalty to the minister.

In general terms, the lack of safeguards is likely to discourage whistleblowers from approaching the media, as intended. This means many transgressors may avoid public chastisement. It remains to be seen, therefore, whether the legislation will effectively punish errant employers; many consider protection should be offered to encourage public disclosure of wrongdoing where that disclosure would be of benefit to the general public.⁶² In many circumstances, a public disclosure may be favourable, even if it is at the cost of a public servant's anonymity.

The proposed State Sector (Disclosure of Financial Settlements) Amendment Bill, if passed, will prevent secret payouts in the public service. The Bill will require government departments to disclose the terms of any financial settlements made when an employee leaves.⁶³ The Bill does offer one protection the Protected Disclosures Act does not: the name of the person receiving the payout will remain confidential. While this Bill will certainly uncover financial corruption, its impact on accountability for everyday decisions within the public service seems likely to be limited.

⁶⁰ Protected Disclosures Act 2000, s 9. s 3 notes that "appropriate authority" may also include the chief executive of the department.

⁶¹ Hon Phil Goff (29 March 2000) 582 NZPD 1493.

⁶² "...it is important to have more legal protections in the area of [disclosure to] the media" Keith Locke (29 March 2000) 582 NZPD 1494.

⁶³ Dr Murial Newman, ACT MP "Bill to End Secret Payouts Before Parliament" (24 May 2000) Press Release.

V *DOES THE CONVENTION HAVE ANY PRACTICAL EFFECT TODAY?*

In light of the trend towards increased government accountability, this section will consider whether the convention of public service anonymity (and to some extent of individual ministerial responsibility) has any practical application today.

There have been a number of recent situations that collectively represent the problematic practical application of the convention of anonymity. These incidents fall into two main categories:

- a breach of the convention by a minister or public servant; and
- a scenario where disclosure of information by a member of the public service may be appropriate but is prevented by the convention.

The growing number of examples within the first category indicate an increasing lack of respect for the conventions.⁶⁴ The second category contains circumstances that suggest the convention is too restrictive and no longer appropriate in the current era of open and accountable government. Together, these categories indicate the difficulty of adhering to a convention with an ambit that is now imprecise and vague.

A *Breach of the Convention: Christine Rankin*

The state sector reforms of the 1980s increased the public role of chief executives. Some have assumed a more public persona than others. The most obvious recent example of a high-profile chief executive is Christine Rankin.

Rankin was appointed as chief executive of the Department of Work and Income (DWI) on July 1 1998. Her appointment followed a career spanning many years in the public service. Rankin's approach to her role as chief executive was controversial from the start; she administered her department using a private sector management

⁶⁴ Other than Lianne Dalziel and Christine Rankin, a recent example is Celia Lashlie, Nelson Special Education Service Manager, who in April 2001, spoke publicly in an attempt to make the public aware of the preventative measures necessary to reduce youth offending.

style and assumed what some have considered a 'heavy-handed approach' to decision making.⁶⁵ Counsel for the Government in Rankin's recent Employment Court case argued that Rankin's approach was to personalise the department until she "view[ed] it] as her own organisation rather than a part of the government as a whole."⁶⁶ She cultivated a notorious public profile via a combination of this management style, a vibrant – at least for the public service – wardrobe, and a gregarious, vital personality.⁶⁷

[t]here is no doubt that [Ms Rankin] relied on ... personal dynamism, high visibility, and a forceful style of leadership for the purposes of inspiring the employees for whom she was responsible.

The government department dealing with social welfare administers an area of government vitally important to a large number of New Zealanders. As a result, the affairs of that department will always be very much in the public eye. It is widely acknowledged, however, that Rankin's public persona grew beyond that which might be reasonably expected of a chief executive of New Zealand's largest government department.

Rankin's term as chief executive was particularly notable for two incidents, both of which had, and may continue to have, significant political consequences for the Government. In June 1999, DWI spent \$235,000 of taxpayer money on a management conference in Wairakei, including \$165,000 to charter two planes to transport staff to the venue.⁶⁸ Rankin later admitted approving \$126,000 of that sum but claimed she was misled over the \$165,000. Another DWI employee was subsequently suspended for chartering the flights. The staff member resigned and later sued DWI. The dispute was settled out of court; the employee received a \$100,000 settlement and an apology from Rankin prior to the November 1999 general election. The settlement left a "general impression ... that the plaintiff had attempted to shift to a subordinate the blame for a bad decision."⁶⁹

⁶⁵ Gordon Campbell "The Naked Civil Servant" (June 23 2001) *The Listener* New Zealand 20.

⁶⁶ *Christine Kathryn Rankin v A-G in respect of the State Services Commissioner* (2 August 2001) Employment Court Wellington WRC 8/01, 37 Goddard CJ.

⁶⁷ *Rankin*, above, 18 Goddard CJ.

⁶⁸ This paper later refers to this event as the 'Wairakei charter flight incident'.

⁶⁹ *Rankin*, above, 26 Goddard CJ.

Secondly, in the early months of both 1999 and 2000, DWI faced enormous difficulties administering the student loan system. These difficulties enraged students from around the country, many of whom felt aggrieved at the lack of responsibility accepted by those at fault. Subsequently, there were a number of calls for the dismissal of both Rankin and her Minister, Steve Maharey. The incident exacerbated the general lack of public confidence in DWI and, consequently, in the Government.

Both incidents placed Rankin squarely in the public eye. The publicity associated with both, combined with her flamboyant wardrobe, meant she became instantly recognisable to the public.

Rankin's difficulties as chief executive of DWI were exacerbated by her rocky relationship with her Minister. While in opposition, Maharey had heavily criticised Rankin in the wake of the Wairakei charter flight incident. Upon assuming the role of Minister of Social Services and Employment, Maharey found he was obliged not just to work with Rankin, but to take responsibility for her. Their relationship never prospered; the fact that they could not sustain an amicable working relationship provided significant weight to the argument for her dismissal.

Allegedly, the relationship between Maharey and Rankin was tainted by the minister's difficulties with her public profile; comments made to her throughout the course of their working relationship⁷⁰ indicate he was aggrieved that she did not take her obligation of anonymity more seriously. The problems created by Rankin's public persona emphasise the advantages of the convention of anonymity. If the relationship between minister and chief executive is aggravated by the chief executive's desire for – or inability to escape – public attention, this may have a significant impact on the ability of the department to function effectively.

At the end of her term as chief executive of DWI, Rankin's contract was not renewed. Rankin objected to the basis upon which this decision was made and took a case against the Government to the Employment Court. The substance of her argument was that State Services Commissioner Michael Wintringham's decision not to

⁷⁰ Rankin, above, 33 Goddard CJ.

reappoint her constituted a breach of contract and had been tainted by political interference.⁷¹ Furthermore, she argued that Wintringham had failed to adequately protect her when her management style had come under threat from ministers, opposition Members of Parliament and the public.⁷²

In his decision of August 2 2001, Goddard CJ indicated that he considered the first argument to be the real basis upon which the case was – or should have been – advanced. The Chief Judge stated that the process by which Wintringham decided not to reappoint her as chief executive and notified her of that decision, satisfied his obligations as Commissioner. Goddard CJ stated that:⁷³

Mr Wintringham was considering not reappointing the plaintiff [Rankin] by reason of his perception of shortcomings in the discharge of the function by the department of which she was the administrative head... I am not called upon ... to determine whether those views were fair or just but only whether they were articulated and whether the plaintiff had an opportunity to refute them so far as they were unfavourable.

Goddard CJ recognised the second argument – Wintringham's alleged failure to adequately protect Rankin from public attack – as referring predominantly to criticism of her public persona and personal appearance. On this point the Chief Judge stated that he did not think that Wintringham could have taken any other reasonable steps to protect Rankin.⁷⁴

The second limb of Rankin's case relies in part on the convention of public service anonymity. However, this argument is problematic. She claimed Wintringham had a duty to protect her – a theoretically anonymous public servant – from public scrutiny, however she appeared to have courted that scrutiny to a large degree. Some argue that she:⁷⁵

seems at times to want it both ways. By asserting her right to be flamboyant and stylish, she overturns the convention of anonymity – and not before time, many would argue. Having done so, she is hardly in a strong position to invoke the old ... convention when the criticism for that flamboyance starts to arrive.

⁷¹ Rankin, above, 3 Goddard CJ.

⁷² Rankin, above, 5 Goddard CJ.

⁷³ Rankin, above, 55-56 Goddard CJ.

⁷⁴ Rankin, above, 60 Goddard CJ.

⁷⁵ Gordon Campbell "The Naked Civil Servant" (June 23 2001) *The Listener* New Zealand 22.

From the start of her tenure at DWI and throughout the case in the Employment Court, a good deal was made of Rankin's appearance. Whether the convention is designed to regulate a public servant's wardrobe is doubtful, although the public service has been characterised as 'grey and faceless' for decades; in practice, public servants' anonymity extends past their personal views to their appearance. Rankin noted in court that "she was urged to buy her ... clothes ... to look more middle-of-the-road."⁷⁶ Rankin argued and continues to argue that she should be able to dress in whatever manner she likes; she has referred to her wardrobe as her method of "defiance".⁷⁷ Rankin is, in effect, invoking the basic human right of freedom of expression, a right recognised by the Universal Declaration of Human Rights⁷⁸ and incorporated into New Zealand's domestic law by the New Zealand Bill of Rights Act.⁷⁹ These documents provide persuasive authority for the view that a right to freedom of expression outweighs an arguably antiquated convention with a basis in continued usage rather than in positive legal duty.

The controversy surrounding Rankin's tenure as chief executive of DWI indicates some confusion over the ongoing application of the obligation of anonymity. The development and maintenance of an overt public profile represents a lack of respect for the convention on Rankin's part. Similarly, the ongoing public interest in her difficulties throughout her tenure as chief executive suggests that the public no longer expects the maintenance of strict public service anonymity. On the other hand, the very fact that we are interested in Rankin's difficulties and disapprove of her public persona may indicate that we still believe in the 'grey and faceless' ideal. Goddard CJ made no comment on the suitability of Rankin's public persona and flamboyant leadership manner because he felt those issues were not legally pertinent to the case before him.⁸⁰ His unwillingness to comment may be taken as indirect acquiescence on his part to the ongoing obligation on public servants to remain anonymous. Alternatively, Goddard CJ's reticence may equally be taken as approval of Rankin's vibrant style and flamboyant personality; other public servants may be encouraged to seek public attention as a result of this judgment.

⁷⁶ Rosemary Mcleod "Fashion Victim" (July 1 2001) *Sunday Star Times* New Zealand C1.

⁷⁷ Joanne Black "I Will Survive" (August 3 2001) *The Evening Post* Wellington 2.

⁷⁸ Universal Declaration of Human Rights 1948, art 19.

⁷⁹ New Zealand Bill of Rights Act 1990, s 14.

B Limits of the Convention: Cave Creek

On Friday 28 April 1995, fourteen people were killed when a Department of Conservation (DOC) viewing platform plunged into a ravine at Cave Creek. The Department immediately and collectively accepted responsibility for its role in the tragedy. However, no individual or individuals were named as responsible. Despite finding that DOC acted unlawfully and incompetently, the inquiry that followed the disaster also found that “no individual or particular collection of individuals was singly or jointly responsible for the Cave Creek tragedy.”⁸¹ Instead, the Noble Commission found that the tragedy was due to ‘systemic failure’⁸²; that the management system put in place by DOC was ultimately responsible for the building of the platform, its failure, and for the fourteen deaths that followed.

The only immediate recognition of individual responsibility was the resignation of Bruce Watson, a West Coast conservator, who, in fact, played little part in the build-up to the disaster. Denis Marshall, Minister of Conservation, resigned over a year after the tragedy and Bob Mansfield, Director General of DOC, almost two years afterwards.

The Noble Commission report exemplifies the problems associated with ascribing blame for a disaster, for which no individual – whether public or private – can be said to be at fault. The circumstances leading up to the disaster indicate that there was no one person responsible for the tragedy; there were a variety of events, which cumulatively caused the disaster. The platform was designed by motor mechanic Les van Dijk who had no specialist building or engineering experience⁸³; DOC did not obtain building consent as required by the Building Act 1991; the platform was built by four men with no adequate carpentry experience; the builders did not have access to the plans created by the designer; there was no drill so the builders used nails

⁸⁰ *Christine Kathryn Rankin v A-G in respect of the State Services Commissioner* (2 August 2001) Employment Court Wellington WRC 8/01, 23 Goddard CJ.

⁸¹ G.S. Noble *Report of the Commission of Inquiry into the collapse of a viewing platform at Cave Creek near Punakaiki on the West Coast* (GP Print for Department of Internal Affairs, Wellington, 1995) 73.

⁸² Noble, above, 72.

⁸³ Nevertheless, there was evidence to the effect that had the platform been built along the design created by Les van Dijk, the platform would have been safer and the disaster might have been averted.

instead; the platform was not attached to the counter weight properly; the weight of the counterweight was not mathematically calculated and there was no safety check after the platform was completed. It is plainly possible to point the finger of blame at a number of individuals, whose cumulative action or inaction resulted in tragedy. Yet the Noble Commission refused to do so. Furthermore, despite their concept of 'systemic failure', the Commission did not consider that the individuals responsible for initially putting the system in place were liable for that which occurred as a direct consequence of that system. The effect of the report was to allow those public servants whose actions contributed to the tragedy to maintain their anonymity and hide behind their minister and chief executive.

The public response to the Noble Commission theory of 'systemic failure' indicated dissatisfaction with such a vague means of ascribing blame. Many suggested that individuals further down the public service hierarchy should have been held publicly responsible for their part to play in the tragedy. Graham Hunt, author of "Scandal at Cave Creek",⁸⁴ states that "there is no such thing as systemic failure; systems only fail when people err."⁸⁵ Similarly, Robert Gregory, Associate Professor of the School of Business and Public Management at Victoria University, considers that the deaths at Cave Creek were caused as "a direct consequence of the incompetence of government officials."⁸⁶ Many thought that if the disaster were due to systemic failure, the individuals responsible for creating and maintaining the system should have accepted their liability. Virginia Pawsey, mother of one of the victims at Cave Creek, stated in 1998 that she felt that there should be some kind of censure for a person who works for an organisation and does not perform a delegated task adequately. She argued that punishment of some kind would almost certainly follow if the employee was working in the private sector.⁸⁷

There are problems associated with holding those responsible for the implementation of a system accountable for its failure. The implementation process may take many years and be added to by different administrations. Even where systems have been

⁸⁴ Graham Hunt *Scandal At Cave Creek* (Waddington Publications in association with the National Business Review, Auckland, 1996).

⁸⁵ Inside New Zealand Documentary "Cave Creek" (14 April 1998) TV3.

⁸⁶ Inside New Zealand Documentary "Cave Creek" (14 April 1998) TV3.

⁸⁷ Inside New Zealand Documentary "Cave Creek" (14 April 1998) TV3.

put in place by ascertainable individuals, time may have passed and those individuals may no longer work for the department. In such instances do we continue to hold those who implemented the system to account? Alternatively, do we hold their successors responsible for the ongoing effects of the system they administer?

Furthermore, in a hierarchical management structure it may be difficult – if not impossible – to blame one individual for departmental failure, especially where complex systems are involved. The aftermath of the tragedy at Cave Creek indicate the problems that arise where the cause of a tragedy can be traced to both management and politics. Despite recent attempts to indicate more precise divisions of responsibility throughout the public service, it seems likely that further situations will arise where we cannot find a single person to blame. Where the areas of responsibility overlap, how can we determine who should be held accountable?

Other considerations arise when the group of people responsible for a system is a large one; there appears to be limited public benefit in holding the whole group responsible, especially if the appropriate sanction is resignation. Those responsible may hold a significant portion of the senior positions in the department and thus may be difficult to replace.

At the time of the inquiry, it was not possible to prosecute government departments. In April 2001, Hon Phil Goff, Minister of Justice, announced that the Government would introduce a Bill to implement the Noble Commission recommendation to extend criminal liability to Government departments for breaches of the Building Act 1991 and the Health and Safety in Employment Act 1992. The Crown Organisations (Criminal Liability) Bill "...will significantly increase the incentives for Government departments to comply with the legislation and provide greater accountability if a breach does occur."⁸⁸ The new law will not, however, make public servants personally liable. The department as a whole will be treated as having committed the offence and the department will be fined accordingly. It remains to be seen what the practical effect of this legislation will be; because they face no threat of individual punishment, officials may dismiss the burdens created by the new law as having no

⁸⁸ Hon Phil Goff, Minister of Justice in John Armstrong "New law closes book on Cave Creek" (11 April 2001) *The New Zealand Herald* Auckland 3.

substantial impact on them. Furthermore, given the reaction to 'systemic failure' it is dubious whether, if faced with a similar scenario, the public will be satisfied with the prosecution of a faceless department.

The impact of the disaster at Cave Creek and its aftermath on the convention of anonymity was indirect. Regardless of whether it was expressly invoked or not, the convention was upheld as those actually responsible let their minister and chief executive accept the public fall out for the tragedy. The public had to be content with the resignation of departmental figureheads instead of the people actually at fault. The need for greater accountability at the lower levels of the public service was acknowledged by DOC, which underwent internal restructuring in the aftermath of Cave Creek. Simply redefining internal accountability structures may not be enough to satisfy the public, however; the implementation of more stringent accountability standards throughout the public service may not necessarily translate into greater public accountability.

Where the direct result of departmental failure is the death of citizens, there would appear to be strong arguments for requiring those responsible to account for their actions to the public, not merely via an internal accountability regime. In the case of Cave Creek, the families of the victims and the public in general deserved some answers to what was an intensely public affair – the entire nation stopped as people waited for an outcome to the inquiry.⁸⁹ Even where the human cost is less onerous, a public servant who has made a significant contribution to a failure that has impacted on the lives of citizens should receive public censure for their actions. This public censure would require regulation, however; errant public servants should not be exposed to the wrath of the justice-seeking public without some protection.

The public demand for answers following Cave Creek may in itself indicate the demise of the convention of anonymity, at least in comparably tragic situations. The traditional conventions which place blame upon the responsible minister and allow public servants to escape censure, clearly no longer satisfy the public, who consider

⁸⁹ The Commission recognised the impact of the tragedy and inquiry on the general public: G.S. Noble *Report of the Commission of Inquiry into the collapse of a viewing platform at Cave Creek near Punakaiki on the West Coast* (GP Print for Department of Internal Affairs, Wellington, 1995) 1.

obligations of individual responsibility and accountability to outweigh the traditional conventions defining our public service.

VI THE FUTURE OF THE CONVENTION: REFORM?

A number of recent statements indicate ongoing support for the conventions. A United New Zealand party press release in February 2000 reminded the Minister of Social Services and Employment of his responsibility for what was termed the “student loan fiasco”.⁹⁰

Mr Maharey is right to say the buck stops at the top. He seems to be missing the point, however, that as Minister he is the one at the top. He has every reason to hold Mrs Rankin accountable, and he should do so – but he should never forget he is the one ultimately responsible.

Other comments, such as Dr Mark Prebble’s belief that public servants should “speak up in private and shut up in public”⁹¹ reiterate the continuing importance of the convention of public service anonymity. In the Employment Court in August 2001, Goddard CJ noted that evidence given to the court by the Rt Hon Sir Geoffrey Palmer:⁹²

coincides with much that was said on the subject in 1962 by the Royal Commission into the State Services, showing that its observations to the same effect were still current in the 1980s when Sir Geoffrey’s Government was occupying the Treasury benches and can, I think, be taken as still current today.

Palmer explicitly noted the continuing importance of both conventions in maintaining the vital relationship between minister and chief executive.⁹³ The Royal Commission of 1962 had outlined the relationship between the conventions and had noted the fundamental relevance of both to government in this country.⁹⁴

⁹⁰ Peter Dunne, United New Zealand MP “WINZ Buck Stops with Maharey – United NZ” (18 February 2000) Press Release. See part V A above for an explanation of this event.

⁹¹ “Prebble sets out CEO guidelines” (6 July 2001) *The Evening Post* Wellington 11.

⁹² *Christine Kathryn Rankin v A-G in respect of the State Services Commissioner* (2 August 2001) Employment Court Wellington WRC 8/01 21 Goddard CJ.

⁹³ *Rankin* Brief of Evidence, above, 23.

⁹⁴ *The State Services in New Zealand; Report of the Royal Commission of Inquiry* (R E Owen Government Printer, Wellington, 1962) 26.

Clearly, despite the effects of the public sector reforms, many members of Parliament and senior officials within the upper echelons of government consider the convention to be not wholly obsolete. Others disagree. Political scientist John Roberts considers the new management system to completely undermine the traditional conventions: “[t]he management concept implies a corporate commitment at odds with [the duty of individual ministerial responsibility].”⁹⁵

Recognition that some reformulation of the conventions of anonymity and individual ministerial responsibility may be necessary is not particularly revolutionary. As early as 1979, Sir Geoffrey Palmer himself recognised that:⁹⁶

[t]he real issue which will have to be faced in the future is whether the orthodox theories either of ministerial responsibility or the duties of public servants are sufficient. Better administration and a better public service will require new methods of accountability to be developed ... for the core public service.

More recently, amid a variety of events including those outlined in part V above, the current formulation of the convention has again been called into question. According to State Services Commissioner Michael Wintringham, the Wairakei charter flight incident:⁹⁷

provoked widespread media and public comment about public service integrity and performance. It is leading to a broader discussion about the effectiveness of the current provisions of the State Sector Act, and even reopening discussion on whether our model of a politically neutral public service needs revisiting.

Wintringham considered “much of the debate [to be] ill-informed”, however he was amazed at the extent of the public interest in the issue.⁹⁸

These comments indicate some confusion as to the continued relevance of the conventions. Some clarification of their ongoing application is necessary.

⁹⁵ John Roberts *Politicians, Public Servants and Public Enterprise* (Victoria University Press for the Institute of Policy Studies, Wellington, 1987) 36.

⁹⁶ Geoffrey Palmer *Unbridled Power: An Interpretation of New Zealand's Constitution and Government* (2 ed, Oxford University Press, Auckland, 1987) 82.

⁹⁷ Letter from Michael Wintringham, State Services Commissioner to Christine Rankin, chief executive of WINZ, in *Christine Kathryn Rankin v A-G in respect of the State Services Commissioner* (2 August 2001) Employment Court Wellington WRC 8/01, 28 Goddard CJ.

⁹⁸ Note also comments by Matthew S R Palmer “Ministerial Responsibility versus Chief Executive Accountability: Conflict or Complement?” (Paper presented to the Institute for International Research conference on “Analysing and Understanding Crucial Developments in Public Law”, Wellington, 4 April 2001) 15-16.

A *Reform: How?*

The transient nature of constitutional conventions means any development is ongoing and is evidenced by practice and common usage. Words such as 'modification' or 'amendment' are often inappropriate to a discussion of the altering ambit of a convention, as both imply a positive change. Thus, a concrete conclusion as to the ideal direction for the convention of public service anonymity is unlikely to be attainable or appropriate. Nevertheless, a set of workable recommendations may be helpful.

I *Objectives*

Any reformulation must address a variety of issues. If we are to extend the convention to allow officials to speak publicly, will there be any limits to the subjects they may discuss? What sanctions will be imposed for a breach of the ambit of the convention? Which public servants will receive an increased profile? Most importantly, an appropriate reform option must reconcile the basic rationale and difficulties associated with the convention.

a) External accountability at the cost of an effective public service?

The new system of public service management was designed to increase government accountability. Theoretically, areas of responsibility are clearly defined, roles within the department precisely demarcated, and chief executives and other officials have strong incentives to perform. Any reform of the convention should reflect the goals of this new accountability structure.

Any attempt to make public servants more externally accountable must also address the obvious need to maintain the relationship between minister and official especially given increased political uncertainty resulting from MMP.⁹⁹ In this new environment "a governing party can less easily afford to carry a politically damaged Minister."¹⁰⁰ Implementing a reform that maintains this relationship must be a focus; this may be

⁹⁹ "It is crucial that the shape of the reciprocal relationship of trust between Ministers and the public service be re-examined and redefined." Matthew Palmer, above, 16.

¹⁰⁰ Matthew Palmer, above, 12.

no easy task as the nature of the relationship will certainly depend on the personalities involved.

Some areas of responsibility require clarification to remove any potential conflict between minister and officials. The precise nature of the responsibilities of chief executives to the public must be clarified. At a basic level, a chief executive is now internally accountable for any undertakings, decisions, failures or successes by the management sector of the department. Arguably, their obligation extends to answering publicly for those areas as well. On a practical level, however, the extent of this obligation is unclear and will be subject to the individual relationship between minister and official. In the absence of any guidelines indicating the precise nature of their public role, a chief executive would appear to have little basis to claim a greater public profile than that granted them by their minister. This may mean the public receives greater exposure to some chief executives but not to others. An inconsistent system of public accountability would appear to have as many problems as no system at all. The acrimonious relationship between Christine Rankin and Steve Maharey is an obvious example of the difficulties that may arise between minister and chief executive when the duties of each remain undefined.

Similarly, guidance is required for those public servants who find themselves caught between their duty to the minister and their duty to the public; in such circumstances which should prevail? When a tension of this kind occurs, the importance of effective management should not be allowed to mask the identity of the people for whom the public service ultimately operates.

Furthermore, the benefits associated with asking public servants to publicly account for their actions must be balanced against the prospect that doing so might encourage excessive caution amongst public servants who are likely to focus on protecting their own careers and reputations ahead of the interests of the public.

b) Rights of the public

Much of the encouragement for a rethink of the convention comes from the increasing public appetite for information. The ever-increasing ability to garner information

from a myriad of different sources has fuelled the public's desire for information on any and every subject. This has created market for instant and informative material. This market is justifiable; the public has a basic right to clear, comprehensive and accurate information about their individual and collective concerns. Any reformulation of the convention must take this basic right into account.

However, finding a workable means of reconciling the twin demands of clarity and completeness may be difficult. A single message from the minister clearly no longer satisfies the public. A comprehensive miscellany of information from all levels of a department may ensure the public is better-informed, however this may come at the cost of clarity. A variety of opinions may also indicate divisions within the department.

c) Rights of public servants: mob-justice?

The rights of the public must be balanced against the difficulties associated with disseminating too much information to them. Exposing the public service to increased scrutiny may give the public too much power over officials. Systems are in place for reviewing the performance of public servants; it is not the public's responsibility to set standards or to evaluate the performance of officials.

d) Sanction

In the wake of the tragedy at Cave Creek, the Noble Commission commented that "[f]or the future, it needs to be clearly understood that failure to be accountable will result in some real and tangible sanction."¹⁰¹ The Commission indicated that the creation of a clear set of penalties for breach of responsibilities was necessary to encourage higher performance standards, and to create a more effective and efficient public service in which disasters such as Cave Creek would not recur.

Any reform option should impose sanctions on an official who fails to meet their obligation to account publicly for their actions. Further sanction should be imposed

¹⁰¹ G.S. Noble *Report of the Commission of Inquiry into the collapse of a viewing platform at Cave Creek near Punakaiki on the West Coast* (GP Print for Department of Internal Affairs, Wellington, 1995) 75.

on those public servants who have no right to speak publicly but who do so, thereby breaching the convention. The imposition of such sanctions will make a public servant's obligation under the convention akin to a positive legal duty.

Currently, if departmental failure is serious enough, the convention of individual ministerial responsibility requires the responsible minister to resign.¹⁰² Should the same obligation be placed on a senior official who fails to account to the public for his or her actions? The State Services Commission has suggested that chief executives might elect to resign in cases of 'performance failure,' even where they themselves are not at fault.¹⁰³ The pay packet of a chief executive reflects this possible sanction; for a senior official to accept a job that includes such an obligation, the requisite degree of remuneration would presumably be required.

e) Certainty

Public servants currently take guidance from a variety of documents, none of which adequately indicate the ongoing application of the convention in light of the state sector reforms and subsequent legislation. It appears that public servants are now reluctant to adhere to a convention whose ambit is vague, application arbitrary, and sanction negligible. With this in mind, the reform should implement one clear set of guidelines for the behaviour of public servants. This should be accompanied by a clear set of sanctions to ensure these new guidelines are adhered to. This ensures an official's public duties are consistent with the public duties of an official of similar rank in a different department. The rules regulating an official's public persona would no longer be applied on an ad hoc basis according to the whims of the individual minister or the public. A clear set of guidelines benefits public servants who are conscious of the extent and nature of their obligations, and the public who are aware of the extent to which they are entitled to hold their officials to account.

2 Proposed Reform

¹⁰² This rarely happens in practice, however.

¹⁰³ State Services Commission *Responsibility and Accountability: Standards Expected of Public Service Chief Executives* (Wellington, June 1997) <http://www.ssc.govt.nz/documents/responsibility_

This paper proposes to remove chief executives and designated senior officials from the ambit of the convention. The obligation of anonymity would only apply to junior public servants. Chief executives and senior officials would be required to account for their actions to the wider community and, where necessary, to Parliament.

As a result, a large degree of public responsibility would be taken away from the minister and given to the chief executive and senior officials. In general, the division of responsibility between minister and officials would mirror the division of functions under the State Sector Act; the chief executive and senior officials would be internally and externally accountable for the administration and management of the department while the minister would retain political responsibility for the department.

The chief executive would ensure the department carried out the minister's policy decisions. He or she would take responsibility for financial management and for the allocation of resources within the department. The chief executive would also take ultimate responsibility for the employees of the department.

Senior officials would account to the public for their specific area of the department and for those employees directly answerable to them. They would provide public explanation and comment on any administrative issue pertinent to their area and of interest to the public.

If a particular administrative issue carried greater public significance, the chief executive may consider it appropriate to address the public on behalf of the senior official and employees concerned; in general terms, the chief executive would be able to step in and address the public whenever he or she saw fit. The minister would have limited right to prevent the chief executive speaking publicly on administrative issues.

Neither the chief executive nor senior public servants, however, would have any right to address the public on political issues. The minister would retain full political responsibility for any acts or omissions by the department: "[t]he move to managerial accountability of public servants for operational decisions cannot mask the political

accountability of ministers.”¹⁰⁴ He or she would continue to be the major player in the determination of departmental policy.

Because ministers would be removed from the functioning of the department, a system would be required to ensure ministers are informed of likely political issues at an early stage: “[ministers] must have... some kind of ‘early warning system’ so that they are alerted to potentially controversial matters very quickly.”¹⁰⁵

In order to reduce uncertainty, an internal set of guidelines would comprehensively outline the internal and external duties and obligations of the members of the department so as to ensure all parties are aware of the ambit of their responsibilities.¹⁰⁶ Finding a way to comprehensively redefine the duties of all public servants may be no easy task. An appropriate approach may be to define the duties of minister, chief executive and senior public servants and add the proviso that the responsibility for any action outside the ambit of those delegated areas falls on the minister. In this way, the minister retains a sense of ultimate accountability.

A similar default option should apply where the duties of minister and chief executive overlap. Often, political issues will arise as a result of administrative failure. When this occurs the minister will address the public in conjunction with the senior official responsible for the administration of the relevant area of the department. The minister will take full responsibility, although the official will be required to provide explanation for the administrative failure, thereby ensuring the public receives a comprehensive account of the circumstances. Thus, this approach does not totally remove the convention of individual ministerial responsibility; the minister remains the ultimate scapegoat in circumstances where responsibility cannot be linked to a single individual. The advantage with this approach, however, is that the errant official cannot hide behind the minister; he or she is obliged to provide a detailed explanation to the public to support the minister’s account. Thus, in effect, while the

¹⁰⁴ Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand’s Government under MMP* (3 ed, Oxford University Press, Auckland, 1997) 83.

¹⁰⁵ Geoffrey Palmer and Matthew Palmer, above, 83.

¹⁰⁶ This would include the creation of a mechanism whereby chief executives and senior public servants would account for their actions to Parliament.

minister theoretically retains ultimate responsibility, the actual burden of accountability is spread more evenly throughout the department.

Although admittedly not without its difficulties, this option represents a workable solution which reflects internal accountability procedures and the increased responsibilities of chief executive as a result of the state sector reforms. Moreover, the reform option has the dual advantage of encouraging performance without forsaking caution. Holding senior officials responsible for their actions and those of their subordinates will encourage a results-based focus. Chief executive and senior officials will be encouraged to work closely together to ensure the department functions smoothly. In addition, more circumspect spending and policy-making from within the department is required as those in senior roles can no longer rely on the minister to accept full responsibility. However, because the minister continues to take responsibility for the political concerns of the department, public servants will still feel free to provide free and frank policy advice to that minister. Thus, greater accountability is achieved but not at the cost of the effectiveness of the department.

Furthermore, the retention of the convention of individual ministerial responsibility is likely to satisfy the electorate, who will prefer that the minister remains the default option where responsibility cannot be ascertained.

The main problem with this reform option is the possible impact it might have on the relationship between minister and official. The minister is only obliged to protect their chief executive or senior public servants from public attack on political grounds. The lack of protection by the minister, combined with the obligation on senior public servants to account for their actions to the public, may encourage officials to become self-interested and hence diminish their loyalty to the minister. A public servant may be unwilling to implement a minister's policy decision if they later may be required to explain the implementation of that decision to the public. The relationship may sour as the minister becomes reluctant to trust an official whose priority is protecting their own reputation. There is some danger that a fractious minister and official might choose to air their grievances publicly.

This possibility may be mitigated – at least for the minister – by the political consequences of a public spat. Moreover, the ongoing supervisory role of the State Services Commissioner ought to deter an official from undermining a minister in public;¹⁰⁷ if the Commissioner detects difficulties in the relationship between minister and official as a result of the official's diminished loyalty to the minister he may discourage the further promotion of that employee or recommend termination of that official's employment. Faced with this threat, a public servant must recognise their primary duty to the minister ahead of their need to protect their own reputation in the face of public scrutiny.

A secondary problem is that the proposed reform draws another arbitrary line through the hierarchy of the department. In some instances the ultimate responsibility for departmental failure might lie in junior levels of the department. In such circumstances the onus would fall on the senior members of the department to publicly shoulder blame for their junior colleagues. Consequently, those responsible can hide and the public is again deceived. This reform option may simply substitute the responsibility of a senior group of officials for that of the minister.

Despite these problems, this reform option appears to have significant advantages. It reflects the internal accountability structure of the public service. It satisfies the public's demand for appropriate accountability without removing entirely the obligations of our elected representatives. Significantly, given the profile established by Christine Rankin and other public servants, this option appears to predict and preempt the likely future direction of the convention in any case.

VII CONCLUSION

Given the significant political and administrative changes to our government over the last two decades, the convention represents an impractical and artificial constraint on public service conduct. It seems inevitable that, with or without our express guidance, the conventions governing the public service will develop so as to reflect the recent drive towards greater public service accountability. Despite the difficulties associated

¹⁰⁷ State Sector Act 1988, s 6.

with allowing officials to represent the department publicly, increased publicity for chief executives and senior public servants is a practical reality and something any reformulation of the convention must reflect. Requiring senior officials to shoulder public responsibility encourages accountability at a lower level of the department. In turn, performance levels and, hence, outputs are improved and the public is better informed. A public service that runs efficiently and generates public support is an obvious asset to the government of the day.

1 New Zealand

New Zealand Bill of Rights Act 1990

Official Information Act 1982

Official Secrets Act 1951

Ombudsman Act 1975

Protected Disclosures Act 2000

Public Finance Act 1994

State Sector Act 1988

2 Overseas

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