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**The Paradox of Dr. Ashley Bloomfield in the Covid-19
Pandemic**

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Abstract

One of the paradoxes of today is the phenomenon of the Director-General of Health's prominence as a public servant during the Covid-19 pandemic. His cult-like status, alongside numerous reforms' developments, has questioned the general anonymity of those working in the public service. This also impacts the vicarious responsibility of ministers and political neutrality of the public service. In this paper, I analyse how these elements are expressed for chief executives and their ministers both presently and in recent decades. I conclude that anonymity and vicarious liability adopt a residual character within our constitutional framework, whereas political neutrality remains a pillar of our constitutional system. While our current expressions have mostly deviated from traditional Westminster conceptions, the pandemic is no anomaly to recent history's expressions of these conventions. Rather, it reconfirms existing trends.

These three elements are branches that have traditionally upheld classical forms of individual ministerial responsibility. They are inextricably linked, both contributing to and reinforcing each other. With these conventions' current trajectories, the protections that traditional expositions of individual ministerial responsibility provided are no longer assured today. I analyse these risks before concluding that their status has not yet led to a vacuum in ministerial responsibility or politicisation of the public service to the extent feared by critics. Crucial underpinnings of individual ministerial responsibility have not been altered, although misunderstandings have been created over the nature of the constitutional convention. Particularly in crises, demarcations between ministers and chief executives become unrealistic, with reforms and societal shifts furthering this momentum. These risks must not be minimised nor maximised. As these trends serve as fodder for those within the political realm without a large reaction from constituents, I conclude that current trends will continue without any reduction in intensity for the foreseeable future, even as constitutional relationships and accountability lines evolve.

Key words:

“Individual Ministerial Responsibility”, “Anonymity”, “Vicarious Responsibility”, “Political Neutrality”, “Public Service”.

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I Introduction

At the forefront of the Labour Government's Covid-19 pandemic response, Director-General of Health, Dr. Ashley Bloomfield, has been in the media spotlight more than any other public servant in New Zealand history. On the one hand, this has gained him a cult following; he was raised as a beloved icon and celebrity by the public.¹ A rhino in Botswana, a kea in Dunedin and a kiwi in Taranaki are all named after him and stores began selling artwork and merchandise using his name and likeness from the start of the pandemic in New Zealand in February 2020.² On the other hand, his increased visibility left him open to continual scrutiny by the public, media and those in the political domain. Ministers were able to publicly identify as him as the person who could take responsibilities for health department failures and at times, did so. Through Bloomfield's position and the workings of his relationships with relevant ministers during the Covid-19 pandemic, I will examine our current expression of anonymity, vicarious responsibility and political neutrality as three elements within individual ministerial responsibility and the professional standards of our public service. With reforms and a societal shift towards transparency that developed well before the onset of the pandemic, I also explore whether these conventions' status in our pandemic context is an anomaly or culmination of a general trend for chief executives through analysing their expression in recent decades.

Overall, I conclude that the erosion of senior public servants' anonymity has fortified the downtrend of vicarious culpability and exerted pressure on the perception of political neutrality. Bloomfield's thrust into the limelight has transpired in the public eye with more prominence due to the pandemic's inherently political and unprecedented reach into citizens' lives and the post-reforms' accountability regime within our constitutional framework. However, the ways in which these trends are currently expressed are not limited to contexts of crisis. The trajectories of these trends also explain the divergence between traditional demands of ministerial responsibility and the current reality of chief executives' responsibility, as well as issues surrounding the concurrence of their responsibility with ministers after the reforms. The analysis in reaching these conclusions

¹ Charlotte Muru-Lanning "What the Ashley Bloomfield fandom says about us" (8 October 2021) The Spinoff <<https://thespinoff.co.nz>>.

² Nikki Macdonald "Covid-19: NZ: Ashley Bloomfield – the right man at the right time?" (9 April 2022) Stuff <<https://www.stuff.co.nz>>.

is important in renewing public attention towards these conventions and encouraging informed opinion, whether these be aligned to the importance of justifying their erosion or retaining their existence in our robust system of open government and healthy democracy.

II Anonymity

A Introduction

The practice of public service anonymity during the pandemic deviates from the convention's traditional underpinnings, which maintains public servants as faceless bureaucrats. In this section, I will highlight current expression of public service anonymity through Bloomfield's profile during the pandemic and expression in recent decades. Lastly, I will reconcile today's deviation with that of the past before concluding that Bloomfield's lack of anonymity is an exaggeration of a trend that commenced both before and outside of the pandemic context – a trend that is likely to be sustained.

The reforms of the 1980s fortified the deviation from traditional conceptions of anonymity of the public service. Its division of responsibilities between ministers and their chief executives and a shift to mixed member proportional representation and open government cumulatively countered the previous standard practice of public service anonymity and traditional expectations of such.³ However, before these changes took effect, anonymity of those working in the public service served as a central tenet to individual ministerial responsibility under Westminster theory,⁴ serving as an organizing function of responsible government alongside loyalty and neutrality.⁵ Traditionally, it required the relevant minister to be the spokesperson for every act or omission undertaken in their department to both parliament and the world in their exercise of ministerial

³ Matthew Palmer and Dean Knight *The Constitution of New Zealand: A Contextual Analysis* (Bloomsbury Publishing Plc, London, 2022) at 100.

⁴ At 99.

⁵ Thomas Klassen, Denita Cepiku and T. J. Lah *The Routledge Handbook of Global Public Policy and Administration* (Routledge, London, 2017) at 377.

responsibility.⁶ In its most rigorous form, it required ministers to defend their public servants regardless of their own personal involvement, predicated on the assumption that public servants could not be heard in their own defence.⁷ This accountability structure of ministerial responsibility - and in its train anonymity - held an important constitutional function. Public servants were seen as extensions of their minister and their relationship was likened to that of Siamese twins who move, stand or fall together.⁸ This reflected a seamless and united relationship. This also avoided perceptions that the public service would appear to hold political persuasions that were separately identifiable from their ministers, a risk immanent in the holding of an independent public profile.⁹ Thus, anonymity preserved public servants' ability to offer free and frank advice and follow successive governments' instructions, regardless of the partisan banner that they personally may hold. One person - the relevant minister - would be solely accountable for any actions complained of.¹⁰ Such practice is no longer maintained, at least for senior public servants like chief executives.

B Status

Epitomized in Bloomfield's prominent profile as Director-General of Health during the Covid-19 pandemic, the anonymity of senior public servants is clearly no longer part of constitutional convention.¹¹ Bloomfield was a central and highly visible part of the government's pandemic response; during the pandemic's lockdowns, daily media conferences were undertaken by both him and Prime Minister, Jacinda Ardern, in addition to frequent media conferences held by himself alone or alongside relevant ministers and officials.¹² Largely unknown for the first two years of his role, upon the pandemic's onset his job suddenly required him to be public-facing, make live media appearances

⁶ G Watson "Ministerial Responsibility and the Maniototo Irrigation Scheme" (1985) 8 Otago LR 158 at 169.

⁷ At 169.

⁸ John R. Martin "The 'Old' Public Service" (paper presented for MCH/IPANZ Series, October 2012).

⁹ Palmer and Knight, above n 3, at 100.

¹⁰ Klassen, Cepiku and Lah, above n 5, at 377.

¹¹ Palmer and Knight, above n 3, at 100.

¹² Hayden Donnell "Coronavirus: The top 10 Covid-19 briefings of 2020" Stuff (17 November 2020) <<https://www.stuff.co.nz>>.

and field questions for the news.¹³ While he became a household name, depicted as a “superhero, love interest and sex symbol, national treasure, saviour, saint, and authority figure”,¹⁴ he was simultaneously under intense scrutiny by the public and his public profile made it easier for politicians to identify him as the person who would take the fall for department failures. This evidently strays from the anonymity traditionally expected of a public servant.¹⁵

C Practice In Recent Decades

As reforms and changing societal expectations towards open government began well before the pandemic, so too did the downward trend of public service anonymity. There were many instances of senior public servants gaining public profiles both before and outside of the pandemic context. Additionally, due to the ongoing close relationship between the public sector and political interface, each instance had a political dimension to it. Three examples are prominent.

Firstly, Chief Executive of Oranga Tamariki, Grainne Moss, faced large public criticism after Oranga Tamariki’s controversial attempt to remove a week-old baby from its mother in a Hawke’s Bay hospital in 2019.¹⁶ After the Waitangi Tribunal conducted an urgent inquiry into the organisation’s removal of Māori babies, Moss fronted to the media on the matter at the time, revealing that she would stay in her role.¹⁷ Although several politicians called for her to step down, some commended her for her work. When questioned on the matter, Minister for Children, Kelvin Davis, stated that he does not engage in discussions about his chief executive in public.¹⁸

¹³ Duncan Greive “The epic story of NZ’s communications-led fight against Covid-19” *The Spinoff* (11 May 2020) <<https://thespinoff.co.nz>>.

¹⁴ Charlotte Muru-Lanning “What the Ashley Bloomfield fandom says about us” (8 October 2021) *The Spinoff* <<https://thespinoff.co.nz>>.

¹⁵ Palmer and Knight, above n 3, at 100.

¹⁶ “Timeline: Oranga Tamariki chief executive Grainne Moss’s road to resignation” (22 January 2021) *RNZ* <<https://www.rnz.co.nz>>.

¹⁷ “Oranga Tamariki chief executive Grainne Moss steps down” (22 January 2021) *Stuff* <<https://www.stuff.co.nz>>.

¹⁸ “Oranga Tamariki chief executive Grainne Moss steps down” (22 January 2021) *Stuff* <<https://www.stuff.co.nz>>.

Secondly, Chief Executive of Canterbury Earthquake Recovery Authority, Roger Sutton, experienced increased public visibility when a staffer made formal sexual harassment complaints against him.¹⁹ State Services Commissioner, Iain Rennie, was also thrust into public criticism when he made no recommendation for Sutton to resign despite the Commission finding Sutton guilty of “serious misconduct”. This occurred in addition to his granting of a public press conference to Sutton to give the latter’s version of events, which was also an alleged breach of the confidentiality agreement between Sutton and the complainant.²⁰ Sutton announced his resignation at the conference, citing reasons pertaining to spending more time with family. Although some politicians expressed sadness at the news, some criticised the fact that Sutton was given a platform to trivialise his actions to the media,²¹ of which the trivialisation was met with some success. Rennie also faced calls to resign from politicians due to his handling of the press conference and statements throughout that made it appear that he was treating Sutton more favourably than the complainant.²² With the relevant minister in charge also stating that Rennie made the wrong decision in organising a press conference for Sutton,²³ tensions played out publicly due to the months-long investigation, public nature of the press conference and public interest in the subject matter.

Thirdly, in 1999, tensions unfolded in the public eye for Chief Executive of the Department of Work and Income, Christine Rankin, after Rankin was claimed by members of Parliament to have committed corporate excess after some lavish corporate spending came to light.²⁴ Contrary to the traditional demands of public service anonymity²⁵ and perhaps also public perception of political neutrality, the extreme strain between the two unravelled publicly as Rankin went to the Employment Court against

¹⁹ Hamish Rutherford and Georgina Stylianou “Cera boss Roger Sutton resigns over sexual harassment claims” (17 November 2014) Stuff <<https://www.stuff.co.nz>>.

²⁰ “Sutton case may have ‘chilling effect’” (20 November 2014) RNZ <<https://www.rnz.co.nz>>.

²¹ “Call for Rennie to quit over Sutton case” (23 November 2014) RNZ <<https://www.rnz.co.nz>>.

²² Philip Matthews “Will we learn from the Sutton scandal?” *The Press* (online ed, Christchurch, 22 November 2014).

²³ (26 November 2014) 702 NZPD 833.

²⁴ Malcolm Walker “Christine Rankin” *Sunday News* (online ed, Auckland, 29 June 2001); Vernon Small “Rankin will pay for Winz affair” *NZ Herald* <<https://www.nzherald.co.nz>>.

²⁵ Palmer and Knight, above n 3, at 97.

the Crown, alleging that the incoming Labour Government's dislike of her had prevented the State Services Commissioner from reappointing her as chief executive.²⁶

This illustrates that there have been numerous instances in recent decades where chief executives have lacked anonymity, which deviates from traditional conceptions of the convention that aimed to prevent such publicity.

D Analysis: Exaggeration Of A Historical Trend

Senior public servants have evidently experienced increased visibility not only before the pandemic, but also even before the turn of the 21st century. While the trend between past incidents and the current phenomenon is the same in that anonymity of senior public servants is decreasing, the large difference is that public servants who have emerged into the public sphere have done so only when something has gone wrong, mostly for personal misconduct and only for a short period. In contrast, Bloomfield's public personality has been largely positive and spanned two years and counting. Although the length of Bloomfield's prominence and the extent of his celebrity status is unprecedented, it is evident that the erosion of public service anonymity as part of the convention of individual ministerial responsibility is a downtrend that has stretched decades and its expression within this trend is not purely limited to the pandemic. Thus, Bloomfield's lack of anonymity is merely an exaggeration of the existing trend and not an exception. This exaggeration can likely be attributed to the pandemic's public nature, its scale that affects every citizen's security and its length, which is still ongoing at the time of writing. Nevertheless, Bloomfield's public profile in the pandemic has reconfirmed the absence of anonymity as a constitutional convention buttressing the public service.

Traditional understandings of public service anonymity have continually decreased over time, retaining little influence today. I suggest that increased visibility of the public service and senior public servants is largely inevitable in today's climate. This is not

²⁶ Joe Wallis "Evaluating Organizational Leadership in the New Zealand Public Sector in the Aftermath of the Rankin Judgement" (2002) 68 IAS 61 at 61.

necessarily unwelcome.²⁷ With any crisis, we will likely see increased publicity of senior public servants, even if not to the exact same extent associated with Bloomfield, Moss, Sutton or Rankin. Moreover, even if some may frown upon the generation of a chief executive's profile within the public domain, I suggest that this trend will continue uninterrupted for the foreseeable future. Its intrinsically subtle and technical qualities have sparked hardly any reaction from constituents.

The emergence of the senior public servant into the public eye is largely the result of the reforms, as well as its subsequent accountability regime and developments occurring thereafter. After the Ombudsmen Act 1975, which granted ombudsmen power to investigate public servants' actions, the Official Information Act 1982, which granted public access to departmental documents, decisions and any ministerial divergence from advice and the State Sector Act 1988 and Public Finance Act 1989, which contained accountability provisions for the chief executive, tensions between chief executives and their ministers unfold in more public fora than ever before.²⁸ Mechanisms provided by the reforms enable identification of the relevant chief executive. This not only exposes the latter to direct public visibility, but also accountability. Increased media and public interest in public service actions, the development of "personality politics" and "infotainment culture" in television journalism, as well as a general increased public acceptance and even expectation that those responsible for wrongdoing will be personally held accountable,²⁹ whether it be a minister or senior official, have also provided momentum to this effect. This environment has inclined ministers to push the boundaries in allowing and even requesting senior public servants to front up on controversial issues to the world outside parliament.³⁰ This consequently also affects vicarious responsibility and the perception of political neutrality.

²⁷ Michael Wintringham *State Services Commissioner's annual report on the State services* (Public Service Commission, October 2002) at 13.

²⁸ At 12-13.

²⁹ At 13.

³⁰ At 13.

III Vicarious Responsibility

A Introduction

The status of vicarious responsibility has been seriously doubted during the pandemic, with Bloomfield accepting responsibility for matters that would have previously fallen under the minister's domain of responsibility before the reforms. In this section, I will highlight how vicarious responsibility is expressed in our pandemic context through the workings of the relationship between Bloomfield and the previous Minister of Health, David Clark, and also examine the element's expression of decline in recent history. I will then analyse the difficulties in the demarcation of responsibilities between a minister and chief executive post-reforms before concluding that vicarious culpability has waned and has been waning both before and outside of the pandemic context, fortified by the downtrend of senior public service anonymity, yet without deteriorating the most constitutionally important demands of individual ministerial responsibility.

Vicarious responsibility is conceptually the most challenging and arguable aspect of individual ministerial responsibility.³¹ Classical Westminster theory required ministers to always be responsible for their subordinates' actions in terms of being accountable for them,³² and alternative interpretations of vicarious responsibility had the minister undertaking liability in addition to responsibility for both policy and operational matters, regardless of how remote their personal responsibility is and even to the point of resignation.³³ Despite the latter, ministers have traditionally "never been keen" on vicarious liability for departmental subordinates and have always held that resignation requires a level of personal culpability.³⁴ This rejection of vicarious culpability in New Zealand can be traced beyond recent decades to 1944, where when the Commission of Inquiry held that the expensive faults in the Fordell and Turakina railway tunnels were

³¹ Chris Eichbaum "Some Background Information on Individual Ministerial Responsibility" (July 2020) Institute of Public Administration New Zealand <<https://ipanz.org.nz>>.

³² John R. Martin "Better Public Services: The Advisory Group Report" (2012) 8 PQ 26 at 31.

³³ Chris Eichbaum "Some Background Information on Individual Ministerial Responsibility" (July 2020) Institute of Public Administration New Zealand <<https://ipanz.org.nz>>.

³⁴ Geoffrey Marshall *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press, Oxford, 1987) at 63.

the result of inadequate supervision, unsuitability of designs and bad workmanship, the Minister of Public Works, Bob Semple, famously articulated that while he was responsible, he was not to blame.³⁵

Doubts around the status of vicarious responsibility and what it entails were also significantly compounded by the difficulty in responsibility allocation after the reforms of the 1980s delineated separate responsibilities for ministers and chief executives into a distinction between policy and administration respectively.³⁶ For departmental actions and operational matters, chief executives were able to be directly answerable to the public, which consequently granted ministers the ability to point blame towards senior officials.³⁷ This shifted the locations of accountability within the responsibility framework for ministers and chief executives and increased the likelihoods of the latter being known to the public further. Thus, espousal of the new accountability structure and its institutional and notional changes simultaneously contributed to the decrease in senior official anonymity while also being furthered by it. We can see this expressed both within and outside of the pandemic context.

B Status

On various occasions, Bloomfield has fronted up to the media for issues that would have previously been considered within the minister's purview.³⁸ These include issues relating to Covid-19 testing and containment procedures. In 2020, calls for accountability and clarification on who it sat with rang when an error saw people leave managed isolation early without Covid-19 tests, contrary to what was required during that time.³⁹ When news media interviewed the relevant minister at the time, David Clark, asking whether he took responsibility, he responded that "responsibility for this sits at an operational level"

³⁵ Martin, above n 32, at 30.

³⁶ Richard Mulgan "Public Sector Reform in New Zealand: Issues of Public Accountability" (2008) 32 PAQ 1 at 20; Jonathan Boston "The Eighties: A retrospective View" (2013) 36 Public Sector 16 at 18.

³⁷ *Building a stronger public accountability system for New Zealanders* (Office of the Auditor-General, Discussion Paper B.29[21h], October 2021) at 23.

³⁸ Luke Malpass "Covid-19: Ashley Bloomfield goes out on top after adroitly mixing health, politics" (7 April 2022) Stuff <<https://www.stuff.co.nz>>.

³⁹ (24 June 2020) 747 NZPD 18988.

with Bloomfield and, while “Bloomfield has taken responsibility for it and is setting about fixing it”, he has the “responsibility for sorting it out”.⁴⁰ This was met with strong public backlash, with claims that Clark had thrown Bloomfield under the bus. This situation speaks to the new accountability structure birthed from the reforms, one that has an abundance of sharpened lines that atomises accountability and allows actors to avoid responsibility by instead shifting attention towards the more direct responsibility of another.⁴¹ Indeed, when interviewed on the incident two years later, Bloomfield held that he had “fronted up and accepted responsibility for that in the role that [he was] in” and “didn’t think that [Clark] was throwing [him] under the bus at all”.⁴² Nonetheless, the backlash suggests that the public may not easily allow ministers to evade accountability despite these post-reform accountability lines.

C Practice In Recent Decades

It is useful to bring to the fore well-known incidents in recent history outside of the pandemic context where calls for liability have questioned the status of vicarious responsibility within individual ministerial responsibility. Such can show vicarious responsibility’s downtrend, particularly in terms of culpability and the political dimensions to such elements. Two examples are prominent.

Firstly, during the Maniototo irrigation scheme failures of the 1970s and 1980s, the relevant ministry released an internal report in 1984 that publicly accused its public servants of negligence.⁴³ This act contrasted with classical expectations of ministerial responsibility that would have entailed the minister to take full public responsibility for the errors and discipline the relevant officials privately to protect the latter from public

⁴⁰ Interview with David Clark, Health Minister (Lisa Owen, Checkpoint, RNZ, 24 June 2020).

⁴¹ Palmer and Knight, above n 3, at 166.

⁴² Interview with Dr. Ashley Bloomfield, Director-General of Health (Ryan Bridge, AM, Newshub, 28 July 2022).

⁴³ G Watson “Ministerial Responsibility and the Maniototo Irrigation Scheme” (1985) 8 Otago LR 158 at 168.

disrepute.⁴⁴ While naming in the report was withheld, a handful of senior officials were transferred in a publicised manner that was an obvious open rebuke.⁴⁵

The Cave Creek tragedy of 1995 serves as the second example. There, 14 lives were lost after a poorly built public viewing platform collapsed.⁴⁶ Issues existed as to who would take the fall for the collective failure and whether the errors were brought about due to a failure of policy, for which the Minister of Conservation is responsible, or a failure to deliver on outputs, for which the Chief Executive of the Department of Conservation is responsible. Answers to this issue were extremely political. Forward-mapping interpretations of ministerial responsibility reasserted the reforms' policy and administration dichotomy and so attributed blame away from the minister who consequently therefore could not be held responsible for the chief executive and staff's failure to guarantee the platform was built correctly. On the other hand, backward-mapping interpretations emphasised that while the minister was accountable to both Parliament and the public for their subordinates' actions, he must also accept responsibility for the tragedy, even if only for his department's insufficient funding and culture.⁴⁷ While the chief executive took full departmental responsibility, neither he nor the minister resigned at the time, both arguing that ministerial responsibility required them to stay in their jobs to improve the systems to prevent another disaster.⁴⁸ The minister also stated that he "gave a commitment to implement ministerial responsibility rather than shrink from it by resigning".⁴⁹ This has been suggested to have invented a new convention.⁵⁰ It also perhaps indicates that rectification, rather than resignation, is the primary responsibility of ministers exercising vicarious responsibility for

⁴⁴ At 168.

⁴⁵ At 168.

⁴⁶ Robert Gregory "Political Responsibility For Bureaucratic Incompetence: Tragedy at Cave Creek" (1998) 76 *Public Administration* 619 at 519.

⁴⁷ At 522-523.

⁴⁸ At 523.

⁴⁹ R.A.W. Rhodes and John Wanna "Bringing the Politics Back In: Public Value in Westminster Parliamentary Government" (2009) 87 *Public Administration* 161 at 179.

⁵⁰ At 179.

subordinates' actions or omissions, even in interpretations that stress the separate responsibilities between chief executives and ministers.⁵¹

Semple's "responsible but not to blame" concept continues to be encapsulated throughout incidents in recent history, demonstrating that vicarious responsibility, particularly in terms of culpability, has been lacking even before the pandemic. It is also evident that this trend has been enabled by increasing visibility of chief executives, as well as confusions over allocations of responsibility. This is particularly so where responsibility for policy in complex organisations is shared. Finding who is responsible is a correspondingly difficult task, as in the latter example. There is seemingly little evidence to support the once ascendant concept of divided responsibility nor the more modern concepts of inclusive responsibility.⁵²

D Analysis: Continuation Of A Historical Trend

The downtrend of vicarious responsibility within the convention of individual ministerial responsibility, particularly vicarious culpability, was present well before the 21st century. However, as traditional understandings of vicarious responsibility have not been informed by a minister resigning for everything occurring in their department, traditional underpinnings of the convention have therefore not been experienced significantly differently in the pandemic compared to before. Under individual ministerial responsibility, responsibility primarily entails an obligation to explain to parliament and make effort to remedy the arising issues.⁵³ Connected to this, but secondary in nature, lies culpability,⁵⁴ which can be primary or vicarious.⁵⁵ Consequently, any focus on culpability, especially for maladministration, is secondary. Yet, there has been and remains a misplaced focus on whether vicarious responsibility includes a minister shouldering liability to the extent of resignation. This may stem from perceptions of the united relationship between a minister and their chief executive from Westminster

⁵¹ Gregory, above n 46, at 523.

⁵² Boston, above n 36, at 9-10.

⁵³ Palmer and Knight, above n 3, at 37.

⁵⁴ At 8.

⁵⁵ Chris Eichbaum "Some Background Information on Individual Ministerial Responsibility" (July 2020) Institute of Public Administration New Zealand <<https://ipanz.org.nz>>.

traditions. However, this diverts attention from the actual components of the convention, with scholarship holding that satisfaction of the explanatory and remedial aspects fully discharge the convention's obligations.⁵⁶ These aspects have not been largely affected. The responsibility for ministers to account to parliament for their portfolio matters must be distinguished from their responsibility to accept blame for mistakes occurring in their administration. While the latter culpability element has diminished with the increased visibility of senior officials, the former has not. Thus, ministers have not been able to completely avoid the two most functionally and constitutionally important elements of the convention, which remain deep-rooted.⁵⁷ While the narrowing of vicarious culpability's scope has resulted in our current practice of ministerial acceptance of personal blame being a matter of political judgement and not expected unless the minister shares direct personal responsibility,⁵⁸ this has not significantly affected individual ministerial responsibility. It does not automatically translate to a decrease in culpability in general, nor does it impact ministers' responsibility to account to parliament for administrative matters.

The exposure of chief executives to direct public visibility and accountability over departmental actions has added impetus to this difficulty.⁵⁹ The phenomena of senior officials gaining a personality in the public domain removes the previous assumption that public servants cannot be heard in their own defence, dissolving the need and arguably also the expectation for ministers to defend their officials or be directly accountable for them. This has diluted the practice of ministerial responsibility on a vicarious basis and has also been intensified after the reforms separated policy and administrative responsibilities between ministers and chief executives. Ministers' constitutional responsibility, separate from their engagement with the management of their departments, became subsumed in improving their departments' performances, laying the foundation for ministers to evade responsibility by transferring accountability for "operational matters" to chief executives.⁶⁰ The latter is now expected to front up directly to the public

⁵⁶ Palmer and Knight, above n 3, at 8.

⁵⁷ Richard Mulgan *Have New Zealand's Political Experiments Increased Public Accountability I* (Australian National University, Discussion Paper No.59, January 1999).

⁵⁸ Palmer and Knight, above n 3, at 90.

⁵⁹ Mulgan, above n 36, at 15.

⁶⁰ Martin, above n 32, at 30.

for matters previously under the relevant minister's realm of responsibility. However, it must be noted that while ministers' accountability may decrease with chief executives' increasing identifiability, the public does not necessarily allow ministers to escape responsibility easily.⁶¹

Ministers still receive public backlash when they avoid accountability for politically unpopular departmental decisions. When Bloomfield was fronting up to the public during contentious incidents, he did so alone and news media made sure to question where Clark was during this time.⁶² There was also public outcry in response to a viral video where Clark stated that Bloomfield took responsibility for the managed isolation incidents as Bloomfield stood behind him. Social media described the video as "heartbreaking", "like kicking a puppy" and "an awful way to treat someone".⁶³ This is although there is technically no expectation that a minister will assume responsibility for departmental operational matters post-reforms. However, there is evidently difficulty in determining the boundaries between political and administrative responsibility, particularly in times of crisis, despite the reforms' attempts to neatly demarcate respective roles for ministers and chief executives. These blurred accountability lines can be seen in differing perceptions over whether certain failures are derivative of policy or administration and whom the public will be satisfied with to be answerable to them, as with the testing and isolation failures during the pandemic or during the Cave Creek tragedy. This also suggests that the reforms may not be in accord with the complexity of our constitutional arrangements, as well as possible confusion in the limits of ministerial responsibility.⁶⁴

Today's ministers explain and amend, they do not automatically resign. As the latter practice also did not inform traditional understandings, it can be concluded that the pandemic context is no exception to the overall vicarious responsibility trend. This was seen outside of the pandemic context but emphasised even more so during the pandemic due to its scale and increased technology that can share public opinion and news media

⁶¹ Mulgan, above n 56.

⁶² Luke Malpass "Covid-19: Ashley Bloomfield fronts over failure, no minister to be seen" (2 March 2022) Stuff <<https://www.stuff.co.nz>>.

⁶³ Charlotte Graham-McLay "'Like kicking a puppy': outcry as New Zealand minister picks on health chief in Covid-19 blame game (25 June 2020) The Guardian <<https://www.theguardian.com>>.

⁶⁴ Boston, above n 36, at 18.

at a prolific rate. While there is misplaced focus within vicarious responsibility on culpability, particularly to the point of resignation or dismissal, there is no large disagreement that ministers must resign for personal misconduct. Moreover, they will surely still be invited to resign for administrative programme failures for which they were closely involved, if not by the media and public, then by opposing parties.

IV Political Neutrality

A Introduction

Political neutrality is indisputably a foundational feature of New Zealand's constitutional system and its status has been so from 1912,⁶⁵ although doubts have been casted upon its expression during certain incidents within the pandemic. In this section, I will highlight the convention's current status during the pandemic through concerns that Bloomfield has forayed into the political forum, as well as examining earlier perceptions of political neutrality in eyebrow-raising events in recent history. Following such analysis, I conclude that political neutrality's status has not changed, although perception of its preservation has become more contentious because of increasing senior official identifiability and the close relationship between the public and political interface after the reforms. I also conclude that individual ministerial responsibility remains intact because the ability to provide free and frank advice has not been impacted.

Political neutrality is a long-established constitutional convention, supporting both individual ministerial responsibility and the provision of free and frank advice.⁶⁶ Legislation regulating the public service has acknowledged the importance of partisan neutrality since 2013,⁶⁷ and it is also codified in the Cabinet Manual.⁶⁸ Under this convention, all New Zealand public servants are theoretically apolitical.⁶⁹ This maintains

⁶⁵ Palmer and Knight, above n 33, at 96.

⁶⁶ Palmer and Knight, above n 33, at 8.

⁶⁷ Palmer and Knight, above n 33, at 96.

⁶⁸ Cabinet Office *Cabinet Manual 2017* at [3.58].

⁶⁹ *Understanding the code of conduct – Guidance for State Servants* (State Services Commission, April 2010) at 10.

the permanence of the public service.⁷⁰ Similar to the justifications for public service anonymity, maintaining appropriate independence from ministers disconnects public servants' employment from any particular government, preserving their ability to be consistent in their standard of advice and policy implementation to any government holding office, regardless of their partisan beliefs.⁷¹ These traditional conceptions have continued throughout time. However, with the erosion of public service anonymity, there is the risk that political neutrality may be compromised. Nonetheless, anonymity of the public service is absent in the Public Service Act 2020 while political neutrality remains.⁷² This likely indicates that its absence has little impact on political neutrality or the other professional standards expected of today's public service.

B Status

Allegations that Bloomfield has encroached onto political territory have accompanied his increased prominence. Indeed, Stuff New Zealand awarded him the Unelected Politician of the Year in 2020.⁷³ Bloomfield was described as an unintentional “third rail” of New Zealand politics and critics complained that it was often he, rather than ministers, who was seen to explain, justify or arguably defend policy.⁷⁴ Unprecedented for a public servant, Bloomfield has also taken part in Cabinet meetings, although only when Covid-19 is being discussed.⁷⁵ Critics online have argued that these actions, in combination with his public profile, are the “antithesis of good public service practice”, of which such practice entails “providing advice and support to the government but doing so largely in the background. This way leaves responsibility clearly...with the elected government, not unelected officials”.⁷⁶ They have also labelled the lockdowns' media conferences

⁷⁰ At 10.

⁷¹ Klassen, Cepiku and Lah, above n 5, at 377.

⁷² Public Service Act 2020, s 12.

⁷³ “The best and the rest: Stuff's 2020 political awards” (19 December 2020) Stuff <<https://www.stuff.co.nz>>.

⁷⁴ Luke Malpass “Covid-19: Ashley Bloomfield goes out on top after adroitly mixing health, politics” (7 April 2022) Stuff <<https://www.stuff.co.nz>>.

⁷⁵ Peter Dunne “The director-general of New Zealand” (8 October 2021) Newsroom <<https://www.newsroom.co.nz>>.

⁷⁶ Peter Dunne “The danger when impartial public servants are seen as political apparatchiks” (25 Feb, 2022) Newsroom <<https://www.newsroom.co.nz>>.

undertaken by both the Prime Minister and Bloomfield as a “double-act” that inevitably politicizes the latter’s role because Bloomfield thus becomes the defender of government decisions rather than the impartial public servant who provides advice independent to the government.⁷⁷ Consequently, these critics have held it “difficult to see [Bloomfield] as anything but a Labour Party apparatchik [and] the de facto Minister of Health”, making it hard to imagine how he could work with successive governments due to him being “brought into much more direct conflict with the Opposition than what would normally be the case”.⁷⁸ In clear contrast, supporters have asserted that despite there being a fine line between the public and political sphere, Bloomfield has stayed on the right side of that line. According to the Public Service Commissioner, Peter Hughes, Bloomfield has also achieved this despite the “highly volatile, rapidly changing pandemic and political environment”.⁷⁹ Furthermore, there are obvious and legitimate bases as to why Bloomfield was enlisted to help communicate facts about the pandemic and health practices, with the range of questions asked by the media to address being very wide and requiring his expertise as a health professional.

There was particular backlash pertaining to issues of political neutrality when a Labour Party video in 2020 featured Bloomfield for three seconds alongside other public servants.⁸⁰ Numerous opposing parties publicly claimed that the public service was being politicised and made formal complaints to the State Services Commission.⁸¹ While Labour took the video down after the complaints, they held that the video was an update on the Government’s Covid-19 response and so believed it to be within the rules as it had no party branding.⁸² After investigation, the State Services Commissioner held that there is “on balance the potential for questions to be raised regarding the participation of the

⁷⁷ Peter Dunne “The director-general of New Zealand” (8 October 2021) Newsroom <<https://www.newsroom.co.nz>>.

⁷⁸ Peter Dunne “The danger when impartial public servants are seen as political apparatchiks” (25 Feb, 2022) Newsroom <<https://www.newsroom.co.nz>>.

⁷⁹ Peter Hughes “What Peter Dunne has wrong on ‘bias’ in the public service” (4 March 2022) Newsroom <<https://www.newsroom.co.nz>>.

⁸⁰ Zane Small “NZ Election 2020: State Services Commissioner on how Ashley Bloomfield’s Labour cameo ‘could create confusion’” (4 September 2020) Newshub <<https://www.newshub.co.nz>>.

⁸¹ Zane Small “NZ Election 2020: State Services Commissioner on how Ashley Bloomfield’s Labour cameo ‘could create confusion’” (4 September 2020) Newshub <<https://www.newshub.co.nz>>.

⁸² Zane Small “Ashley Bloomfield on public servants featuring in Labour Party video: Staff ‘thrilled’ to see Jacinda Ardern” (24 August 2020) Newshub <<https://www.newshub.co.nz>>.

public servants in the video”, holding also that Bloomfield’s appearance “could create confusion on the motivations and political neutrality of the public servants concerned”.⁸³ The video itself showed the Prime Minister visiting the national contact tracing centre and featured Bloomfield in the background in one of the shots.⁸⁴ While he was not speaking, endorsing the party or even aware the footage of him would be used in that particular video, the backlash nonetheless indicates how tightly political neutrality is held at the heart of our system, as well as that the obligation on a minister to ensure that the public service does not act in a way that conflicts with their apolitical obligations remains strong in force.

C Practice In Recent Decades

With differences of opinion between public servants and ministers now open to public scrutiny through the official information reforms, in addition to the ability to hold chief executives directly and publicly accountable, the potential undermining of public perception of public service neutrality has accompanied the wane of public service anonymity. Three examples are prominent.

The first example is when Rankin sued the State Services Commission in the Employment Court. Rankin claimed that political interference had been exerted in influencing the Commission to not reappoint her after the State Services Commissioner did not renew her contract following statements made by the incoming Labour Government that had made it clear that they would refuse a recommendation to reappoint her.⁸⁵

Secondly, during Sutton’s press conference in which he presented his version of events in relation to a claim made against him of sexual assault in 2014, the presence of the Chief Executive of the Department of Prime Minister and Cabinet, Andrew Kibblewhite, as

⁸³ Zane Small “NZ Election 2020: State Services Commissioner on how Ashley Bloomfield’s Labour cameo ‘could create confusion’” (4 September 2020) Newshub <<https://www.newshub.co.nz>>.

⁸⁴ Zane Small “Ashley Bloomfield on public servants featuring in Labour Party video: Staff ‘thrilled’ to see Jacinda Ardern” (24 August 2020) Newshub <<https://www.newshub.co.nz>>.

⁸⁵ Janet Mclean “New Public Management New Zealand Style” in Paul Craig and Adam Tomkins (eds) *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford University Press, Oxford, 2005) 124 at 156.

well as his actions of hugging Sutton and sitting beside Sutton's wife throughout the conference, were perceived as tacit endorsement of Sutton's version of events and so gave rise to concerns over the erosion of political neutrality.⁸⁶ These concerns also bled into issues of neutrality for Commissioner Rennie, who organized the conference for Sutton despite the confidentiality agreement or the facts claimed by the complainant.⁸⁷ The resulting perception of favouritism led to public calls asking Rennie to resign,⁸⁸ in addition to a later apology by Kibblewhite.⁸⁹

A more recent instance serves as the third example. In 2022, the Public Service Commissioner found that Crown housing agency, Kāinga Ora, had failed standards of political neutrality when they published an advert in May 2020 featuring Arena Williams, a then Labour Party candidate, throughout the election campaign.⁹⁰ The use of public funds to give positive exposure to a political candidate raised issues of neutrality because, as the Commissioner held, government advertising "must always be impartial and free from partisan promotion of government policy and political argument".⁹¹ The investigation was done at the Minister of Housing's instruction and the Commissioner held that while Kāinga Ora's Chief Executive fell short on the standards expected of political neutrality, he was satisfied the latter had "owned it, fixed it and learned from it".⁹²

Political neutrality has been contested in numerous instances involving highly publicized senior public officials outside of the pandemic context. Preservation of the convention is regarded with significant importance and this remains today. However, although these

⁸⁶ Philip Matthews "Will we learn from the Sutton scandal?" *The Press* (online ed, Christchurch, 22 November 2014).

⁸⁷ "Sutton case may have 'chilling effect'" (20 November 2014) RNZ <<https://www.rnz.co.nz>>.

⁸⁸ "Call for Rennie to quit over Sutton case" (23 November 2014) RNZ <<https://www.rnz.co.nz>>.

⁸⁹ "Andrew Kibblewhite apologises for Roger Sutton 'hug'" (24 November 2014) Newshub <<https://www.newshub.co.nz>>.

⁹⁰ Public Service Commission "Public Service Commissioner announces findings of Kāinga Ora review" (Media Statement, 3 March 2022).

⁹¹ Public Service Commission "Public Service Commissioner announces findings of Kāinga Ora review" (Media Statement, 3 March 2022).

⁹² Public Service Commission "Public Service Commissioner announces findings of Kāinga Ora review" (Media Statement, 3 March 2022).

past incidents highlight the serious yet fine line between the public and political domain, they have not seemed to raise doubts as to the neutrality of the public service as a whole.

D Analysis: Continuation Of A Historical Trend

The traditional importance placed on political neutrality and its status as an entrenched tenet of responsible government has been a constant throughout recent history and into the pandemic. However, while traditional expositions of individual ministerial responsibility ensured that anonymous public servants were insulated from partisan political confrontations and so also issues of political neutrality, this is no longer assured today. The risk that public servants can be drawn into policy disputes does currently exist. This is especially so after the downtrend of chief executives' anonymity, as well as the change in their institutional and constitutional position post-reforms. The official information regime after the reforms has the potential to undermine public perception of public servants' neutrality because it exposes public servants' advice and differences of opinion between them and their ministers to be open to public scrutiny.⁹³ Additionally, the state sector reforms places pressure upon public servants because opposing parties gained the ability to attack governing parties through them, with some politicians also identifying and criticising public servants and shifting responsibility onto the latter. This was illustrated during the testing incident between Clark and Bloomfield during the pandemic, but also in incidents outside of the pandemic context, such as the failures surrounding the Fordell and Turakina railway tunnels, Maniototo irrigation scheme and Cave Creek tragedy. It is also enabled by the outsourcing of the perception of responsibility to the public service, such as that which occurs when Bloomfield's name is used to announce pandemic-related government decisions.⁹⁴ Consequently, there is also the potential to undermine individual ministerial responsibility, which can be seen in the increased frequency of ministers dismissing politically controversial decisions as "operational matters" not within their field of responsibility.⁹⁵ This correspondingly

⁹³ Wintringham, above n 27, at 12.

⁹⁴ Ben Thomas "Why we should be concerned that public service neutrality is eroding" (30 September 2021) Stuff <<https://www.stuff.co.nz>>.

⁹⁵ Ben Thomas "Why we should be concerned that public service neutrality is eroding" (30 September 2021) Stuff <<https://www.stuff.co.nz>>.

undermines public service anonymity and increases the risk of politicisation of officials. However, this risk must not be overstated. While it is increasingly less exceptional for a senior official to establish a public profile, which comes with it doubts upon perceptions of political neutrality or ministerial responsibility, these incidents both before and during the pandemic have not seemed to cast any realised doubts upon the neutrality of the entire public service or sector. I suggest this stems from the vigorous response from those in the political field when anything appears to put neutrality at risk, which also shows how central political neutrality is to the workings of our system and our interest in maintaining that.

The political dimension that is intrinsic to the role of our apolitical public sector has been exacerbated in the pandemic, which I suggest has led to the questioning of Bloomfield's neutrality, or at least the perception of such. I suggest this has largely occurred due to two reasons. Firstly, the emergence of identifiable senior officials into the public eye and direct accountability, accompanied by the wane of vicarious culpability post-reforms, has intensified the already inherently political nature of Bloomfield's role as a public servant. The public sector is one that operates very closely to the political interface and it is inevitable in today's climate for a chief executive's role to include being public-facing and therefore navigate this interface publicly or be prepared to do so if so required. Indeed, it has been held that Bloomfield's prominence, "communication skills and connection to the public... helped him weather storms (like the scandal surrounding testing in managed isolation units) that would have sunk a more anonymous chief".⁹⁶ Secondly, the public nature of the pandemic and its extensive reach into every citizen's lives means that the response to something so large, of which Bloomfield was a very visible part of, also inevitably includes a political dimension. There are intrinsically political qualities in both the design and implementation of public policy that affects life to the extent that it does in a pandemic, as well as in the explaining of such policy to the media and public in frequent media conferences.⁹⁷ However, despite the increased political qualities within the public sector and its servants' role in the pandemic, I do not suggest that this has risked Bloomfield's political neutrality.

⁹⁶ "The best and the rest: Stuff's 2020 political awards" (19 December 2020) Stuff <<https://www.stuff.co.nz>>.

⁹⁷ "The best and the rest: Stuff's 2020 political awards" (19 December 2020) Stuff <<https://www.stuff.co.nz>>.

During his exit interview held on 24 July 2022, Bloomfield stated that he has not felt unfairly or unnecessarily politicized as an individual, although he was, being in the spotlight, subject to careful interrogation by both the media and politicians of his advice, which he accepts comes with his role as part of accountability in our democratic system.⁹⁸ When asked if he felt that he and the government were perceived as being too close at any point, Bloomfield explained that governments include the executive that is ruling and the public sector, of which the latter's apolitical, independent nature is one of its strengths and additionally, he "worked really hard to continue to tread that line even in a response that's had such public visibility".⁹⁹ This contrasts to the Rankin case. When Rankin sued the State Services Commissioner, it implied that she did not see the Department of Work and Income as part of the government generally or that she had lost the confidence of her minister. This wrong view also indicates the policy and administration separation difficulties in both managerial and political senses.¹⁰⁰ Moreover, Bloomfield emphasised that the public's trust in the public sector had increased from 50% to 69% in 2020, levelling to around 62% in 2022.¹⁰¹ Such a significant increase would not occur if the public thought that the public sector's role had been politicized.¹⁰² Thus, while Bloomfield's visibility, undertaking of responsibility for certain failures and receiving of direct criticism from politicians and political labels by critics was more than what would be traditionally experienced by a public servant, this can be attributed to the position he was put in within the nature and size of the pandemic and the consequent heightened public and political interface. Notwithstanding such factors, I suggest that he was an exemplar of neutrality in the unprecedented environment of a pandemic. Additionally, his position and perceptions of his position is an exemplification of how pandemic management has blended under our post-reforms accountability structure whereby the division between policy and administration proves blurred in times of crisis.

⁹⁸ Interview with Dr. Ashley Bloomfield, Director-General of Health (Jack Tame, Q + A, TVNZ, 24 July 2022).

⁹⁹ Interview with Dr. Ashley Bloomfield, Director-General of Health (Jack Tame, Q + A, TVNZ, 24 July 2022).

¹⁰⁰ Mclean, above n 84, at 156.

¹⁰¹ Interview with Dr. Ashley Bloomfield, Director-General of Health (Jack Tame, Q + A, TVNZ, 24 July 2022).

¹⁰² Interview with Dr. Ashley Bloomfield, Director-General of Health (Jack Tame, Q + A, TVNZ, 24 July 2022).

The changes and trends within this convention have not in fact or reality risked political neutrality, nor individual ministerial responsibility, particularly when it comes to the ability of the public service to provide free and frank advice. However, these trends may have altered public perception of political neutrality, which I suggest also holds serious importance as to the convention's legitimacy. There are evidently difficulties in applying conception standards for political neutrality. Some of these standards lack reality. Credence must not be given to unjustified claims, particularly those with incentives to unduly politicise, such as that of politicians from opposing parties. They are also not necessarily reflective of the ordinary citizen. This begs the question: to what extent is political neutrality a function of perception? Subsequently, to what extent does the convention involve public servants avoiding activities that may be seen to impair their neutrality even if it is not doing so? Nonetheless, the primary consideration for a chief executive is retaining their minister's confidence.¹⁰³ It is most often the ability to deliver the government's programme, rather than party politics, that affects this,¹⁰⁴ and this should be so.

Political neutrality can be defined by whether the same public servant could work under different governments. While the same could not be held for the likes of Rankin, I suggest that Bloomfield would satisfy this definition. Bloomfield has not disclosed his personal, political view and it is unlikely that any of his contentious incidents or actions, largely pragmatic and stemming from opposing parties' current or retired politicians, would impact his overall ability to work with successive governments of a different partisan banner. The few instances during the pandemic where Bloomfield's neutrality or the perception of his neutrality were contested do not have sufficient foundation. His fame is also disconnected from any party affiliation. Citizen discontent on these points seem little, which perhaps indicates that we will see more of this trend in the foreseeable future. This is particularly so in times of crisis where chief executives become more publicly identifiable and the line between the public and political domain becomes more blurred and precarious than usual. Nonetheless, political neutrality is a convention that there is

¹⁰³ Peter Hughes "What Peter Dunne has wrong on 'bias' in the public service" (4 March 2022) Newsroom <<https://www.newsroom.co.nz>>.

¹⁰⁴ Peter Hughes "What Peter Dunne has wrong on 'bias' in the public service" (4 March 2022) Newsroom <<https://www.newsroom.co.nz>>.

clear reason to protect. While New Zealand's public service is renowned domestically and internationally for its strength and professional standards of integrity and independence,¹⁰⁵ it is paramount that trust and confidence in the public sector's neutrality, and therefore its legitimacy, should not be taken as a given, nor for granted.

V Conclusion

Overall, ministers and chief executives are two elements within the same phenomenon arising from shifting balances of power within our constitutional, political framework. During times of tension, whether it be during the current pandemic, Cave Creek tragedy, Maniototo irrigation scheme fiasco, or high-profiled instances of personal misconduct, senior officials burst more prominently into the public eye, which is also enabled by their post-reforms' visibility and exposure to direct accountability to the public. Despite statutory codifications, the overlapping nature of the roles and relationships between ministers and their chief executives makes efforts to insert a precise wedge between the two a practical unreality.¹⁰⁶ Increased visibility of senior public officials is inevitable, as are its flow-on effects. This is not necessarily unwelcome, as public trust in government institutions depends upon transparency of process and open government.

The independence and distance between the public service and minister, previously established to protect the anonymous public servant and maintain the ability to grant free and frank advice, is currently used to hold the now-identifiable public servant accountable. With identifiable senior officials that can directly account to the public for departmental issues with or without their relevant ministers, issues surrounding vicarious responsibility and political neutrality perceptions arise. The three elements of anonymity, vicarious responsibility and political neutrality are inextricably linked, both contributing to and reinforcing each other's trends. While I suggest that political neutrality of the public service has not been impacted generally from these conventions' trends, public perception and therefore legitimacy may have been impacted. This requires attention because political neutrality remains at the heart of our constitutional system. On the other hand,

¹⁰⁵ "Trust and confidence in the Public Service" (13 July 2022) Public Service Commission <<https://www.publicservice.govt.nz>>.

¹⁰⁶ Mulgan, above n 36, at 16.

senior public servant anonymity and vicarious culpability have taken on a residual character, if any, within the convention of individual ministerial responsibility. They are also untenable in today's socio-political climate post-reforms. Consequently, there is less constitutional significance when they are not upheld compared to when political neutrality is contested.

General minor deviations from constitutional practice have sparked less outcry over time, which may indicate a shift in the conventions within New Zealand's flexible unwritten constitution. It also perhaps suggests that constituents do not expect expression of the conventions in the way that rigorous forms of ministerial responsibility have traditionally demanded. Thus, it may be more practical to regard a minister's action of, for example, publicly assuming responsibility for a departmental action, rather than identifying and calling out the chief executive, as merely ministerial etiquette stemming from Westminster traditions. Any deviation from such, while being an undignified contravention, may no longer be held as constitutionally improper. On the other hand, conventions supporting individual ministerial responsibility may be so ingrained in our political culture that they cannot be countered, even by the changing of the formal, legal relationships between ministers and chief executives.¹⁰⁷ It is unlikely the public and media will relinquish mechanisms that can hold the government publicly accountable, at least not without effort. This is evident in practice.

There is generally more benefit for ministers to explain and remedy situations of which they were not personally responsible to the media and public, in addition to parliament, rather than pointing to the more direct responsibility of an official.¹⁰⁸ This was exemplified in the backlash following Clark's statement that Bloomfield took responsibility for the testing and isolation failures in the pandemic. Thus, there is a balancing act at play. Legal modifications are competing with traditional fundamentals, which consequently places pressure upon the policy and administration dichotomy that is key to our current accountability structure. Indeed, a primary field where responsibility rules have not been sufficiently modified for current practice pertains to the assessment of whether a failure falls under policy or administration and whose head will roll for

¹⁰⁷ At 28.

¹⁰⁸ At 16.

collective failure, if any. While it is increasingly recognised that the notion of everything in a minister's department being done personally by the minister is fiction and that it is patently unfair for a minister to be culpable for something they did not know or ought to have known about, it is equally unfair for the minister to be able to subjectively assess whether to accept personal blame or only political responsibility. Both would dilute the original purpose of individual ministerial responsibility. It is even more dangerous if the minister chooses to deny both personal blame and political responsibility. "Operational matters" must not equate to a get-out-of-jail-free card. Nonetheless, current practice has shown that judgements exercised to balance responsibilities between ministers and chief executives cannot be easily translated to prescribed rules in our complex system, despite reforms' attempts to do so.

Bloomfield's position during the pandemic serves as a primary example as to the result of the numerous reforms and societal shifts that have worked against the faceless of the senior official, which have also reinforced the wane in vicarious liability and pressured the perception of political neutrality. As a matter of evaluation, the pandemic was no anomaly to the trajectory of the conventions' trends, which began and can be seen well before our current context. However, the trends' expressions are more protuberantly expressed during the pandemic because of its unprecedented intervention into citizens' lives and the intensified political component that is inherent to something so large in scale and public in nature. Public opinion likely plays an important role in how tightly we hold onto conventions and the way in which they are preserved. Trends can largely be influenced by the public reaction in light of the socio-economic, political and cultural circumstances at the time an issue arises, which can influence the discretion of the relevant decision-maker and subsequent practice. This requires public understanding of the constitutional framework, conventions and statutory obligations that are underlying the relationship between ministers and chief executives. As governments rotate in and out of power and the dividing line between policy and administration continues to evolve, it is the clarification of such trends that holds longer-term importance for our operations of government. Such may also prevent criticism of drifting into each other's domains. The trends in these conventions have elicited attention from scholars and those in the political field but evoked little reaction from the public, perhaps due to the conventions' nuanced, technical natures. I suggest that these trends will therefore continue unabated for the

predicted future. Nonetheless, the final comment lies with New Zealand constituents through elections.

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises 7,886 approximately words.

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