Te Kawa Mataaho
Public Service Commission

30 January 2026

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Official Information Request
Our Ref: OIA 2025-0219

I refer to your Official Information Act 1982 (OIA) request received on 31 December 2025 for:

> *"Title: [Public Service principles, conventions and practice: guidance material. Introduction] Contributor New Zealand. State Services Commission. Publication Date 1995, Format: Online resource (285 pages), text file PDF"*

Information being released

Please find enclosed, and listed in the table below, the documents in scope of your request:

Item	Date	Document Description	Decision
1	1995	**Public Service Principles, Conventions and Practice** - An Introduction to the Guidance Series 'Public Service, Principles, Conventions and Practice' - Paper 1 – The Constitutional Setting - Paper 2 – The Public Service and Parliament - Paper 3 – The Public Service Government - Paper 4 - The Public Service and the Law - Paper 5 - The Public Service and the Public - Paper 6 - The Public Service and the Treaty of Waitangi - Paper 7 - The Public Service and Official Information - Paper 8 - The Public Service Employer - Paper 9 - The Senior Public Servant - Paper 10 – Standing Orders Relevant to Public Servants	Released in full

We have provided PDF versions of this guidance material for your use. If you prefer to access a hard-copy version, an internet search indicates that one is available through the National

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You have the right to seek an investigation and review by the Ombudsman of this decision. Information about how to make a complaint is available at www.ombudsman.parliament.nz or freephone 0800 802 602.

Please note that we intend to publish this letter (with your personal details removed) and enclosed documents on the Te Kawa Mataaho Public Service Commission's website.

Yours sincerely

Nicky Dirks
Manager – Ministerial and Executive Services
Te Kawa Mataaho Public Service Commission

An Introduction

to the

Guidance Series

'Public Service

Principles, Conventions

and Practice'

STATE SERVICES
COMMISSION

Te Komihana
O Ngā Tari Kāwanatanga

The guidance series contains the following papers:

The Constitutional Setting

The Public Service and Parliament

The Public Service and Government

The Public Service and the Law

The Public Service and the Public

The Public Service and the Treaty of Waitangi

The Public Service and Official Information

The Public Service Employer

The Senior Public Servant

Standing Orders Relevant to Public Servants

First published in September 1995
by the State Services Commission, Wellington, New Zealand.

ISBN 0-478-08903-1

"All reformers believe that the things which they change are going to improve,...but they also assume that the things they do not intend to change are going to remain as they were. That does not necessarily follow..."

Lord Callaghan[1]

1 From a submission to the Treasury and Civil Service Committee, on the *Role of the Civil Service* (May, 1993) Q.588.

Message to Public Servants

It is fitting that the Principles, Conventions and Practice Guidance Series should be published at this time. The New Zealand Public Service has changed in many ways over the past decade and, with the advent of a new electoral process, we can expect further change in matters of governance, public management, and relationships between the various parts of Executive Government and those who serve the Crown, and the public. We need to be reminded of the basis of our democratic system of governance and the shared values that support responsible government, lest we diminish a clear understanding of its purpose, or impair the trust and confidence of those to whom we are accountable. The integrity of those who work in the Public Service, and the institutions of government, is crucial to sustaining effective government.

The information and guidance contained in the various papers derive from constitutional and political foundations and principles that have stood the test of time, and, I have no doubt, will provide a sound basis for good government, and right conduct, well into the future.

I commend this publication to all of you.

Hon Paul East

Minister of State Services

Acknowledgements

The Principles, Conventions and Practice project, and the publication of the guidance material would not have been possible without the support, encouragement, contribution, and dedication of many people both within and outside the Public Service. I am indebted to members of my Mentor Group, the writers of the various papers, chief executives and staff in government departments, all those who agreed to evaluate, edit, and review the material, and to staff at the State Service Commission for their time, effort, and expertise. In particular, I would like to acknowledge and thank the following persons: Gillian Cameron; Jim Cameron; Len Cook; Sir Alan Danks; Judge Eddie Durie; Sir Brian Ellwood; Pamela Fellows; Joan Fleming; Ellen France; Wira Gardiner; Colin Hicks; Richard Hill; Michael Hobby; Dr Murray Horn; Sir Kenneth Keith; Judge Shonagh Kenderdine; Jennifer Lake; Marilyn Little; Bill Mansfield; Amelia Manson; John Martin; David McGee; John McGrath; Jas McKenzie; Donella Moss; Simon Murdoch; David Oughton; Sue Richards; Sir John Robertson; John Roseveare; Chris Ryan; Dr Graham Scott; Kerry Scott; Marie Shroff; Graham Vaughan-Jones; and Kim Workman.

Preface

When the State Services Commission issued the Public Service Code of Conduct in 1990 it was recognised that this important publication of minimum standards was not enough on its own. The Code discharged an obligation in terms of the State Sector Act 1988, section 57, and represented an important step to increase the sensitivity of employees to the observance of right conduct and to "encourage the pursuit of the ideal which gives the Public Service its greatest strength – a "spirit of service" to the community."

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. The principles, conventions and practice that had guided the conduct of officials and departments were, after all, woven into the fabric, and the ethos, of the Public Service over generations rather than contained in a consolidated and easily accessible form.

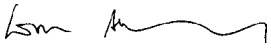
In 1991 the State Services Commission sponsored the publication *Public Service and the Public Servant: Administrative Practice in a Time of Change*.These essays, which provide a rich source of information and comment, explored the emergent relationships, roles, and practice within the new public management system, and contributed valuable insights and reflections on the duties and responsibilities of public servants in a changing world. The publication "highlighted a need to reconsider, and, where appropriate, to re-affirm the validity of what were previously thought to be the constants governing the behaviour both of public servants and those with whom they interact in their duties".

The development and publication of the Principles, Conventions and Practice Guidance Series is a further, significant step to articulate and promote those constants. For the first time the New Zealand Public Service has provided senior officials with guidance material that is not only a useful point of reference in their daily work, but is also a product of widespread consultation and contributions, particularly from chief executives, and senior Public Service managers. It represents the culmination of a considerable effort over a period of more than five years by many individuals and organisations.

Being an effective and efficient senior manager in the reformed Public Service is not easy. How a manager discharges his or her responsibilities, uses authority, or exercises decision making powers is under regular scrutiny. The business of government is now more complex and demanding than ever before, and the expectations of the public, and the requirements of the frameworks, both legal and administrative within which the manager operates, are increasing. In these circumstances instinct and intuition are not sufficient; the need for explicit guidance in matters of Public Service ethics becomes more pronounced.

The papers in this guidance series are not the final word on Public Service principles, conventions and practice, and will need to be reviewed and revised from time to time in the light of discussion, experience, and change. I expect that the contents will also need to be broadened to include issues and subject matter not fully covered in this edition, such as those likely to arise from proportional representation, which is likely to bring with it new challenges and opportunities for those who work in the service of the public.

This is your reference: it is up to you to ensure its continuance as a living document.



DK Hunn
State Services Commissioner

The aim of the guidance material is twofold: to inform senior Public Service managers, and to encourage leadership in the Public Service that will promote ethical conduct throughout departments and thereby sustain public trust in the Public Service.

The New Zealand Public Service has been subjected to and imposed upon itself extensive change in recent years, and more change may be anticipated. In a cultural sense there has been a significant shift from the values and beliefs of a bureaucratic administration to those of a new public management; from a pre-occupation with inputs to a focus on achievements; and from compliance-based systems toward enhanced and transparent responsibility and accountability.

New systems and methods have been imported or developed, and new techniques introduced. In addition, there have been many changes of personnel. The transformations, both in breadth and depth, have been effected with relative speed. Time for considered reflection has been at a premium. As new techniques, systems, and competencies have been introduced into public administration attention needs to be given to those ethical values which should endure and characterise public service, and from which Public Service principles, conventions and practice stem. In a time of change the underlying values and responsibilities of public service need to be re-stated, affirmed, and invigorated. It cannot be assumed that they will remain alive as a matter of course. This guidance material represents a stage in the quest to assist senior Public Service managers to foster and develop a capacity to think beyond the technology of administration toward its effects upon the general public – from utility to ethics; from process to purpose.

The decision to produce guidance material for senior managers in the New Zealand Public Service arose from the belief, held widely by practitioners and observers, that fresh "signposts" to good practice, and ethical conduct, needed to be erected. That is not to deny that such pointers exist. Rather, it came from a recognition that the Public Service is in a state of change: the modern public servant is not necessarily a career officer; the nature of the relationship of the Public Service with politicians is not constant; public servants have more autonomy and visibility; the introduction of proportional representation will add a new and challenging dimension; there is more transparency and openness in government than ever before; there is broader participation in decision making; and there is an enhanced accent on the policy role of officials. There is a danger of the dynamics of change out-stripping the effectiveness of the transmission of culture. It is now asserted that acculturation needs to be more explicit and deliberate if common values and standards are to be communicated effectively.

The *Public Service Code of Conduct*, published in 1990, was not intended to be more than an introduction to the standards of behaviour required of public servants. The core principles of conduct enunciated in the *Code* are minimum requirements. This compendium of guidance material has been designed to move the focus from the minima to the desirable; from working within the rules to doing what is right. The guidance material is not meant to be a substitute for a code of ethics, nor a professional code for Public Service managers, but it contains all the ingredients. Nor was it intended that it should be a set of prescriptive rules. Rather, it has been developed on a wide, consultative basis to capture the collective and institutional wisdom of many people with differing views about public service roles and relationships.

The reader is asked to consider the collection of papers as a useful reference – a resource that can assist decision making in a variety of circumstances, encourage further reading, and be a spur to serious discussion. The papers are not the last word on the principles and standards of right conduct in the administrative sphere of government. They will need revision and amendment from time to time. But, as they stand, they supplement and enlarge upon the subject matter of the *Cabinet Office Manual*, and help to consolidate statements and communications from the State Services Commission and other agencies of executive government. They also commit to paper, in some cases for the first time, many tried and true practices that have hitherto been taken for granted.

"Nothing is more dangerous to the well-being of the body politic than a public official who is technologically competent or strategically astute but ethically illiterate or unfit."

Noel Preston[2]

Public servants are not immune from the corrupting influence of power, nor the effect that the heady environment of daily contact with those in power can have on personal judgment and the observance of, or adherence to, Public Service principles, conventions and practice. Familiarity can breed not so much a contempt, but a benign disregard for right and proper ways of conducting oneself. The stimulus of being at the centre of activity, or having even a bounded autonomy, can affect discernment and objectivity. There is a constant need to guard against the use of power other than for the good of the public.

Being dedicated unreservedly to duty, in an objective and non-partisan manner, characterises the "good" public servant. The job also requires an understanding of the full import of the truism that *public office is a public trust*. Keeping a professional objectivity, and being seen to do so, is essential to generating such trust.

2 Quoted from *Ethics for the Public Sector: Education and Training*, The Federation Press, NSW (1994), Noel Preston (editor).

The term *public servant* has come to mean broadly all those who hold public office, whether elected or appointed. More specifically, a public servant in New Zealand is defined as any person employed in the Public Service. That is, employed in one of the organisations listed in the First Schedule of the State Sector Act 1988. Such a definition is restrictive. Members of the public do not make nice distinctions between those who work in the Public Service and those who work in the wider State sector. In effect, all those paid from the public purse in one form or another are public servants, or trustees of the people.

The term *civil service* was coined (1785) to describe those parts of the East India Company carried on by the covenanted servants who did not belong to either the army or the navy in India. Later, the term was borrowed more widely to mean all the non-warlike institutions of government, or the body of servants of the State employed in the services of the Crown. In New Zealand it was not until the turn of the century that the term *public servant* was preferred to *civil servant*, probably as much to signal an independence from the colonial past as for any other reason.

In both cases, however, employees are in the service of the Crown. The way this operates in our constitution means serving the government of the day through a Minister of the Crown. In carrying out this prime responsibility of serving the aims and objectives of the Minister, and the government of the day, public employees must do so in a manner that upholds the rule of law, and preserves or retains sufficient independence, impartiality, character, ability, professionalism, and experience to gain the confidence of successive administrations. Given its continuing position as an apolitical institution, the Public Service thus contributes to the stability and continuity of democratic government.

No action, whether foul or fair
Is ever done, but it leaves somewhere
A record, written by fingers ghostly,
As a blessing or a curse, and mostly
In the greater weakness or greater strength
Of the acts which follow it.

Longfellow,
The Golden Legend Pt.ii

Public servants, in whatever they do, ought to be mindful that at some stage they may have to account for their actions or inactions in a public way, and that their "authority and opportunities . . . must be used as absolutely as the public moneys for the public benefit."[3] More than ever before the public official's actions are subject to, and subjected to, public scrutiny. Conduct ought to be guided by the test of how you might feel if your behaviour was reported in the news media.

It is well to remember some of the virtues of public office, and those of the Public Service in particular, that may enhance one's position and reflect well on one's department - humility, modesty, respect, courtesy, and integrity. Without an ample display of these qualities the art and value of public service may be eroded.

3 Eaton, Dorman B (1823-1899) *The Spoils System and Civil-Service Reform.*

"For the administration of the government, like the office of a trustee, must be conducted for the benefit of those entrusted to one's care, not of those to whom it is entrusted."

Fox, Charles James – *Speech* 1788

Any system of liberal, democratic government is finely balanced among competing interests. The essence for elected representatives is to reflect the will of the people and provide leadership and direction. Public administration is the business of supporting Ministers by providing the information, advice, continuity, and institutional means for making the affairs of government work constructively so that effect can be given, through the democratic systems and processes, to the will of the people. It is about the provision of a dependable resource to translate words into deeds, and thoughts into action, for and on behalf of the government and the people it represents.

Guardianship and stewardship are central to the role of the public servant. For public servants being a guardian is to recognise a responsibility to protect, preserve, and safeguard the integrity of the institutions of democratic government in the *public interest*. No public servant can claim to be an ultimate authority on what constitutes the public interest - that is the prerogative of elected representatives (subject to the will of the people), and institutions of government such as the courts to determine. But a public servant is often confronted with the need to interpret and appreciate what may, from time to time, comprise the public interest.

Stewardship, in the context of public service, is about entrustment; of taking responsibility for the time being to manage and use public resources for the purposes intended, and to be vigilant about, and promote, the constitutional, administrative and political principles and conventions that support representative and democratic government. The proper observance of the guardianship and stewardship roles reinforces and enhances the duty of the official to the government of the day, and gives expression to the public interest.

"The administration of democratic government is special. It is not like anything else. It has, and will continue to generate its own language, its own procedures, its own constitutional methods, and its own constraints. And, it will continue to rely on its own principles, conventions, and practices and on the development of its own professional and ethical standards.[4]

The characteristics that make democratic government unique are shaped by its function as a crucial link in the system of governance; the inescapable, political context of the role of the public official, and the trust reposed in those holding public office, whether elected or appointed.

To make it work well democratic government needs to be expressed through a system based on principle, law, convention, and equity. There are no absolute formulae for the structure, organisation and management of government. In the absence of explicit guidance or procedural rules for the conduct of public business, the "ethics" of public service assume a critical importance.

As the form of governance is subject to change, its ethical values may not be passed on from one generation to the next unless they are taught, and learned, deliberately. The language of public service "ethics" needs to be

4 Ovenden Keith (1988) *Recent Developments in the Light of Democratic Theory: Constitutional Changes: Intended and Unintended*, Social Science Research Fund Committee, Wellington.

given currency in order to contribute best to the maintenance of a trustworthy, non- corruptible, and apolitical Public Service. The papers in this collection are designed to contribute to that end.

A Public Service organisation differs from most other institutions to the extent that upon its integrity and performance public confidence in governments may rest. It is special because Public Service officials are entrusted with managing public funds and resources, and may act as defenders of constitutionality and probity in governance.

As its own vision statement puts it, the New Zealand Public Service "exists to advise the government and implement government's policies and decisions to the highest possible standards of quality and with the utmost integrity in accordance with the principles of law and democracy thereby enhancing the well-being and prosperity of all New Zealanders." [5]

"The ethical responsibilities of public officials are the ethics of accountability . . . accounting for the public-interest impacts of the powers entrusted in them."

John Uhr

All public officials, whether elected or appointed, are, in a general sense, trustees of the public. Ministers are accountable to Parliament for the conduct of departments, and through the democratic channels to the public for the policies of the Government. Public servants are accountable in a formal sense through Ministers of the Crown, but this does not mean that public servants will be required to account for their stewardship only through their Minister. For instance, the decisions of chief executives are subject to judicial review, and to the constraints of common law. All their decisions, therefore, need to be informed by an appreciation of public accountability in all its forms.

Because the accountability of public servants is both vertical or hierarchical (to the Minister through the chief executive) and horizontal or democratic (broadly to the public, and through other government institutions like the courts) the concept of the public interest is pivotal to an understanding of what public service accountability is all about.

The notion of public interest goes to the heart of public service ethics. It is the substance for which Public Service officials are responsible, and persists beyond the terms of individual administrations. In that respect, it is unethical for the public employee to be indifferent to the public interest. That is part of being a professional public servant. It means that in everything that a public servant does in the course of their prime duty to the government of the day through a Minister of the Crown, he or she will be guided by a disinterested concern for, and appreciation of, the public good. For a public servant, in the New Zealand context, any interpretation of what constitutes the public good must take account of the aspirations of Maori, and the principles of the Treaty of Waitangi.

5 See page 8, New Zealand Public Service Vision Statement *Striving for Excellence in Serving NZ* (1993), endorsed by Cabinet (9/12/92).

The term public interest is capable of a variety of meanings. In statute law the term appears frequently, without explanation or clarification; that is left for judicial interpretation in the context of particular cases or instances. In the absence of a single definition there will always be debate and discussion about the weight that should be given to the duty of the public employee to the public interest. There is no formula for determining the issue. What is clear is that the sources of ethics for those who are employed in the Public Service derive from:

- the law
- constitutional and political conventions
- public trust
- the standards of their profession, both Public Service and otherwise
- their employment relationship.

Understanding those derivations, and using that knowledge to inform decision making, provides important clues to the responsibilities of public servants and the nature of their accountability in the wider public interest.

The various papers underscore the primacy of duty for the individual public servant to his or her employer, that is, to the Crown as represented by the government of the day, and in turn by a Minister or Ministers of the Crown.

At the same time one has to be constantly aware of the checks and balances in the system. These include effective auditing procedures, freedom of information legislation, public participation and consultation in the processes of government, public duty and disclosure requirements, and administrative law and the possibility of judicial reviews. All are designed to acknowledge the importance of the public's interest and participation in the business of government.

The concept of fiduciary trust underscores the importance of the public interest. A fiduciary or trusteeship duty exists with respect to the management of public resources. The public are right to expect that those who discharge public duties will safeguard their interests responsibly.

As New Zealand's systems of government change, and responsible government and power sharing evolve, interpretations of the role and conventions for the public employee will need to adjust accordingly. The promulgation of this guidance material is not intended to fetter or inhibit the expression of professional ethics for individuals. Indeed, it is proper that professional standards are recognised and promoted. The expectations of the public are critical in this respect.

Tensions may arise, however, in an ethical context, between the profession of "statecraft" and other professions. Understanding those potential conflicts is important. Resolving the differences requires a clear appreciation of Public Service principles, conventions and practice, and a keen sense of duty and loyalty. The expectation that those in the service of the public will act in professional and publicly responsible ways remains.

Long Title of the State Sector Act 1988

An Act –

(a) To ensure that employees in the State services are imbued with the spirit of service to the community; and

(b) To promote efficiency in the State services; and

(c) To ensure responsible management of the State services; and

(d) To maintain appropriate standards of integrity and conduct among all employees in the State services; and

(e) To ensure that every employer in the State services is a good employer; and

(f) To promote equal employment opportunities in the State services . . .

The New Zealand Public Service
STRIVING FOR EXCELLENCE IN SERVING NEW ZEALAND

Vision

The New Zealand Public Service will help New Zealand governments to achieve a higher quality of life, higher living standards, high employment, social equity and justice, a high quality natural environment and international respect as a member of the community of nations.

Purpose

The New Zealand Public Service, imbued with the spirit of service to the community, exists to advise the Government and implement the Government's policies and decisions to the highest possible standards of quality and with the utmost integrity in accordance with the principles of law and democracy thereby enhancing the well-being and prosperity of all New Zealanders.

Principles and Values

In an increasingly dynamic, diverse and technological world, the New Zealand Public Service should make a vital contribution to efficient and effective government. The New Zealand Public Service will:

Give free and frank advice to the government of the day, and inform and implement its decisions with intelligence, enthusiasm, energy, innovation and common sense

Demonstrate the qualities of leadership, sound judgment, fiscal responsibility and high ethical standards that attract the confidence and respect of the Government and the people of New Zealand

Establish and maintain an equitable and challenging working environment, both now and for the future, that is consistently able to respond to constant change, and trains, develops and motivates every public servant to perform to the highest levels of their ability

Ensure that people with professional management skills and the attributes of leaders are recruited and developed across the Public Service. This is to meet current and future Public Service-wide needs for high quality management and contribute to enhancing New Zealand's management resources overall

Ensure that every public servant demonstrates understanding of the collective interest of government and the special nature of the relationship between Parliament, the Crown and the Public Service in the need for apolitical, objective and professional policy advice and the custodianship of the nation's resources for future generations of New Zealanders

Act at all times within the true spirit of the law and work to maintain the stability and continuity required in a system with democratically elected government.

KO TE TOI O TE RANGI
TE TAUMATA WAIORANGA MŌ AOTEAROA

The Constitutional Setting

A paper in the guidance series 'Public Service Principles, Conventions and Practice'

STATE SERVICES COMMISSION

Te Komihana O Ngā Tari Kāwanatanga

First published in September 1995
by the State Services Commission, Wellington, New Zealand.

ISBN 0-478-08904-X

CONTENTS

INTRODUCTION

The purpose of this paper is to describe the basis and relevance of the New Zealand constitution within which the New Zealand Public Service operates.

- The paper outlines briefly the sources of New Zealand's constitution, and discusses issues for public servants.

A constitution defines the structures and the principal institutions of governance, the parameters of the powers vested in those institutions, and the nature of the relationships between the institutions of governance.[1]

Those departments and ministries of the New Zealand Public Service, listed in the First Schedule of the State Sector Act 1988, form part of executive government. A relatively small number of senior public servants will be involved, in the course of their duties, in day-to-day contact with Ministers, or occupy positions that are sensitive, in the context of constitutional and political activity and decision making. Yet, all public servants should understand the constitutional framework within which they all work, and the nature of democratic governance, if they are to make sense of and observe the spirit of public service principles, conventions and practice.

Terms such as *Responsible Government and Responsible Minister* are bound inextricably to our notions of democratic governance, representative government, and Public Service ethics. It is to the electorate through Parliament that a government and a Minister are responsible or answerable. And, it is to Parliament through the Responsible Minister that the public official is accountable.[2] The discretion exercised by the public official needs to be guided by a strong sense of duty and high ethical values and standards to meet the expectations and gain the trust and confidence of politicians and the public alike.

The characteristics that make public administration unique in a constitutional democracy are shaped by the role it has as a crucial link in the system of governance. The determinant factors include:

- the inescapable political nature of the environment in which the public servant works
- the trust reposed in all who hold public office, whether elected or appointed.

1 Palmer, G (1992).

2 In the context of the State sector, to be accountable is to be liable to give a reckoning of, to explain conduct or the exercise of a duty or responsibility, and to answer for the consequences of official actions, or inactions. The key elements are transparency, disclosure, and answerability. Responsibility refers to an assigned function or role, or to expectations of a person occupying a particular position.

To understand the Public Service in a constitutional setting is to recognise that it differs in significant ways from most other organisations, or set of institutions. While it is imperative that the Public Service should operate in efficient and effective ways, and be accountable for its decisions and actions, it cannot conduct itself as just any other business or series of businesses in the private sector. For a start the Public Service has duties to the public interest as a trustee of public resources. These duties vest it with special responsibilities which derive from its consititutional position and role.

The role of the Public Service has been recognised by successive governments for its constancy, reliability, relative independence, imperviousness to corruption and patronage, and the high standards of conduct displayed by generations of officials. In the constitutional scheme of things the Public Service is a key element, along with the judiciary, in the separation of powers, and the maintenance of public trust.

As collective instruments of the Crown, Public Service departments, indeed the whole of the State sector, act as important links between the Crown and the public. In particular, "the New Zealand Public Service, imbued with the spirit of service to the community, exists to advise the government and implement government's policies and decisions to the highest possible standards of quality and with the utmost integrity in accordance with the principles of law and democracy thereby enhancing the well-being and prosperity of all New Zealanders".[3]

A prime purpose of the Public Service is to contribute to the maintenance and enhancement of public confidence in the system of democratic governance, and the institutions of government. The stewardship or trusteeship role expected of the public official to serve the Crown, and its successive governments, with impartiality, integrity and probity in the best interests of the public, and to manage public resources in the public interest, is implicit in its constitutional function. From these expectations flow most of the principles, conventions and practice to guide the public official and the organisations that employ them.

SOURCES OF THE NEW ZEALAND CONSTITUTION

New Zealand's constitution reflects and acknowledges New Zealand as a constitutional monarchy, a Parliamentary system of government, and democratic state. It also acknowledges the Treaty of Waitangi as a founding document and, as such, an integral part of constitutional government in New Zealand.

3 Statement of Purpose contained in the *The New Zealand Public Service: Striving for Excellence in Serving New Zealand*, (1993).

The fragmented nature of New Zealand's constitution comes from its evolution over time. New Zealand's constitution is not embodied in one statute or legal document; it has foundations in statute, judgment or customary and common law. Although statutes provide a large part of the framework for New Zealand's constitution, conventions (unwritten or written rules developed over time) fill the gaps. The predominance of convention provides a degree of flexibility which from time to time may have contributed to an unclear distinction in the powers of government institutions.[4]

The written and unwritten conventions of constitutional government should not be seen as some menu from which certain aspects may be selected to suit particular circumstances. Rather, they are interrelated, and need to be observed, and understood in their entirety.

The sources of New Zealand's constitution are many and include:

- Constitution Act 1986
- the Prerogative Powers of the Sovereign
- New Zealand Statutes
- relevant UK Statutes
- constitutional conventions
- relevant decisions of the courts
- relevant International Conventions.

Constitution Act 1986

Until the enactment of the Constitution Act 1986, the United Kingdom was still able to enact law for New Zealand by request and consent of the New Zealand Parliament.[5]

The Constitution Act 1986 consolidated a number of statutes,[6] and defines the institutions of governance and the allocation (distribution and separation) of their powers. It is the principal formal statement recognising, in the New Zealand system of governance, the constitutional status of the:

- *Queen as Sovereign/Head of State* – the Governor-General, being the Sovereign's representative in New Zealand, can exercise the powers on behalf of the Sovereign.
- *Executive/Ministers of the Crown* – who must be drawn from members of Parliament only[7].

4 Palmer (1992) p7.

5 Palmer (1987) p2.

6 Constitution Act 1986 PtII s6.

7 Constitution Act 1986 PtII s6.

- *Legislature* consisting of the Sovereign and members of the House of Representatives. The House meets, and is formally summoned as Parliament, prorogued, and dissolved by the Governor-General. Only Parliament can make laws (subject to the Royal Assent), and no taxes may be levied, loans raised or public money spent without the consent of Parliament.
- Members of the *Judiciary* whose statutory independence is established through protections against arbitrary removal from office and against any reduction in salary whilst in office.

The Prerogative Powers of the Sovereign

The discretionary powers of the Sovereign derive from the position of the Monarch as part of common law. The Queen formally appoints or dismisses members of the Executive Council or Ministers of the Crown.

Most of the prerogative powers are exercised by the Governor-General as the Queen's local representative, although the Sovereign retains a number of powers, including the conferment of some honours. The Governor-General may, for instance, pardon or reprieve an offender, under clause XI of the Letters Patent which provides for a prerogative of mercy. Ministerial powers derive from the common law powers of the Crown (including the prerogative powers) and from statutes.

New Zealand Statutes

These establish the structures and processes of the various branches of government, the electoral system, and confirm or express key constitutional principles.[8]

Relevant English and United Kingdom Statutes

Relevant English and United Kingdom statutes concerning the basic rights and powers of the Crown, and of individuals (such as Magna Carta 1297, the Bill of Rights 1688, and the Act of Settlement 1700), have been confirmed as part of New Zealand law by the Imperial Laws Application Act 1988.[9]

Constitutional Conventions

Constitutional principles derive from the various elements of the constitution, and practices evolve in the course of making those principles work.

Conventions are understandings, either explicit or implicit, that guide conduct, and relationships. They may act to modify or override formal constitutional provisions. For instance, although the Governor-General appoints Ministers through the exercise of the Sovereign's prerogative powers, in practice and by convention appointments are made in accordance with the advice of the Prime Minister. In theory at least a

8 See Appendix 1 – New Zealand Statutes that Embody Constitutional Principles.

9 See Appendix 2 – Relevant English and UK statutes.

Governor-General's ability, or indeed their personal preference, is constrained by the convention that the Governor-General accepts the advice of Ministers. In other words, a Governor-General's powers to withhold the Royal Assent to Bills is limited or circumscribed by convention.

Relevant International Conventions

These define generally accepted international norms of behaviour in relation to the rights and freedoms of individuals, for example, the International Covenant on Civil and Political Rights (1978) to which New Zealand is a signatory.

Recent Significant Changes to the New Zealand Constitution

- The establishment of the Waitangi Tribunal under the Treaty of Waitangi Act 1975
- The enactment of the Official Information Act 1982, and the Privacy Act 1993
- The reform of Parliamentary procedures (1985)
- The enactment of the Constitution Act 1986
- The New Zealand Bill Of Rights Act 1990
- The repeal of the Economic Stabilisation Regulations 1948, the Public Safety Conservation Act 1932, and the National Development Act 1979
- The reform of the State sector, including the enactment of the State-Owned Enterprises Act 1986
- The enactment of the State Sector Act 1988, the Public Finance Act 1989, and the Fiscal Responsibility Act 1994
- The changes to the electoral process under the Electoral Act 1993.

ISSUES OF THE CONSTITUTION

The Underlying Principle of Democracy

The New Zealand constitution operates within the context of New Zealand's status as a Parliamentary democracy under a constitutional monarchy.

The formal disposition of power rests with the Sovereign and the Sovereign's representative in the appointment of Ministers, judges and certain other statutory office holders. They may summon and dissolve Parliament, and assent (or not) to Bills passed by the House and submitted to them as recommendations by the Executive Council and Ministers.[10]

10 *The Cabinet Office Manual* Ch.1/2.

The democratic character of the constitution is in turn reflected in the conventions which circumscribe the discretion of the Sovereign and Governor-General. That is, that they will act only on the advice given by the Prime Minister or Ministers having the support of Parliament, and thus of the electorate at large.

Political parties or offices such as that of the Prime Minister are not formally established in statutes. They are nevertheless vital in the organisation of how power is achieved and exercised in Parliament. Constitutional conventions, in many cases, act to provide the legal forms of governance with functional reality.

Decision Making Power

The legitimacy of the decision making power exercised by the Executive is derived by the Government having the confidence of the electorate, as reflected in the disposition of seats in the House of Representatives and the continuing support of the majority of its members.

United Kingdom statutes and common law establish the supremacy of Parliament in the making or unmaking of legislation,[11] the gathering of revenue and the disposition of public money,[12] and determining the viability of a ministry. Through its Parliamentary majority, a government has considerable powers to legislate to achieve its objectives with few checks and balances (other than the constraints imposed by the electoral cycle and the dominant constitutional conventions) on the exercise of this power.

Governments need to retain the confidence, not just of a majority of the House of Representatives, but of the public as well. This will mean ensuring that in the exercise of majority power sufficient regard for minority right, and the protection of social and constitutional values, is observed. It will also mean using power responsibily in ways that do not infringe common perceptions of social justice and fairness, or New Zealand's international obligations.

Accordingly, there is a commensurate responsibility on a government not to abuse its role as law maker, lest the legitimacy of the system of government itself is called into question. For it is in the best interests of those holding decision making power, and those who are party to decisions, to observe the conventions. It follows that public servants and politicians alike need to understand about constitutional conventions, their meaning and their purpose.

With the recent changes to the electoral process, bringing an increased likelihood of minority or coalition governments, the scrutinising and control function of Parliament may be heightened. That is, in a relative

11 *Constitution Act 1986* Part III s15.

12 *Constitution Act 1986* Part III s22.

sense, the government of the day through its Responsible Ministers may be more answerable to, or under closer examination from, the House of Representatives acting on behalf of the electorate.

Consultation and Participation

The legitimacy of the decision making process and its outcomes depends ultimately on the extent to which it is based on the informed consent or at least consultation with those immediately affected by the decisions. In a democracy legitimacy refers mainly to the respect or proper regard that might attach to the process or the outcomes.

The Official Information Act 1982 expresses the principle of:

> ". . . increas[ing] progressively the availability of official information to the people of New Zealand in order –
>
> (i) to enable their more effective participation in the making and administration of laws and policies; and
>
> (ii) to promote the accountability of Ministers of the Crown and officials."[13]

Consultation requires decision makers to ascertain the concerns of interested parties, and consider and weigh up those concerns before making a final decision. The Court of Appeal commented on the meaning of the term consultation (CA 23 and 73 1992):

> "If the party having the power to make a decision after consultation holds meetings with the parties that it is required to consult, provides those parties with relevant information and with such further information as they request, enters the meeting with an open mind, takes due notice of what is said, and waits until they have had their say before making a decision, then the position is properly described as having been made after consultation. It is immaterial that those parties may have other concerns which for their own reasons they chose not to put forward."

For a minority or coalition government, consultation processes are particularly relevant to achieving a high degree of consensus in the exercise of these powers.

Judicial Review

Every decision affecting others made by a statutory officer, or a chief executive of a Public Service department may be subject to review and judgment by the courts.

13 *Official Information Act 1982* s 4(a).

Judicial review is the review by a judge of the High Court, or the Employment Court, of administrative decisions. The Judicature Amendment Act 1972 [Part I] forming part of the Judicature Act 1908 is about the procedure for getting review and the available remedies. The Act is an important instrument by which the constitutional principles of procedural fairness and justice may be upheld and tested.

Any person or entity affected by a decision may seek a judicial review. The possible grounds used by an affected party for seeking a judicial review include illegality, unreasonableness, unfairness, and the application or otherwise of the laws of natural justice.

The purpose of judicial review is to define principles of administration and to safeguard individual interests from unreasonable, illegal, or administrative actions taken without following proper procedures.[14]

Executive power may be tempered by the likelihood of electoral sanction and the constraints of constitutional convention. However, judicial review ensures that decision makers are acting within the scope of the powers or discretion conferred on them.[15]

14 *The Judge Over Your Shoulder: Judicial Review of Administrative Decisions* (1989) p2.

15 *Fitzgerald vs Muldoon 1976* [NZLR 616-617] – changes to the law can only be made by the authority of Parliament, i.e. public servants cannot anticipate changes in law.

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APPENDIX 1

New Zealand Statutes that Embody Constitutional Principles

Legislature Act 1908

Judicature Act 1908

Evidence Act 1908

Official Appointments and Documents Act 1919

Acts Interpretation Act 1924

Crown Proceedings Act 1950

Electoral Act 1956

Race Relations Act 1971

Ombudsmen Act 1975

Treaty of Waitangi Act 1975 (and 1985 Amendment Act)

Human Rights Commission Act 1977

Official Information Act 1982

Letters Patent 1983

Acts Interpretation Amendment Act 1983

Constitution Act 1986

State-Owned Enterprises Act 1986

State Sector Act 1988

Imperial Laws Application Act 1988

Public Finance Act 1989

Bill of Rights Act 1990[16]

Fiscal Responsibility Act 1994

16 The NZ Bill of Rights Act 1990 was enacted to "affirm, protect and promote human rights and fundamental freedoms in New Zealand" and "affirm New Zealand's commitment to the International Covenant on Civil and Political Rights." The Act has the status only of ordinary legislation (i.e. will not override other Acts), but any inconsistency must be drawn to the attention of Parliament. The extent to which the Act will influence administrative decision making has yet to be determined, but it is clearly intended to provide a restraint in the Act to bear on the legislative process.

APPENDIX 2

Relevant English and United Kingdom Statutes

Magna Carta 1297

Habeas Corpus Acts 1640, 1679, 1816

Bill of Rights 1688

Act of Settlement 1700

Statute of Westminster 1931

The Public Service and Parliament

A paper in the guidance series 'Public Service Principles, Conventions and Practice'

STATE SERVICES COMMISSION

Te Komihana O Ngā Tari Kāwanatanga

First published in September 1995
by the State Services Commission, Wellington, New Zealand.

ISBN 0-478-08906-6

CONTENTS

INTRODUCTION

This paper is concerned with the relationship between the Public Service and Parliament. It is designed as a brief introduction and guide to public servants and their relationships with Parliament, Parliamentary select committees, members of Parliament, members of the Opposition, political parties, and caucus committees. Guidance concerning Parliamentary questions is also traversed.

The paper has been prepared in the knowledge that the consequences of the electoral process predicated by the Electoral Act 1993 have yet to impact, and that if the conventions and administrative practices of the Public Service are to change as a result, such change will derive from experience and good practice consistent with established principles. Those principles may be cited as:

- *The Supremacy of Parliament*

  The term is used to mean the institutions of the Governor-General of New Zealand and the House of Representatives who together have the supreme powers to make and unmake laws affecting all citizens, and to codify the common law. Importantly, those laws are binding upon judges and take precedence over common law.

  The expression also reflects the fact that Parliament is at the apex of our system of government, and that governments derive their legitimacy to the extent that they have the confidence of Parliament determined through the electoral process.

- *Ministerial Responsibility*[1]

  Assumes that Ministers are accountable to Parliament for the conduct of their departments, and individually and collectively accountable to the public for matters of policy and expenditure.

- *The Accountability of Chief Executives to Parliament*[2]

  Recognises that chief executives have a duty to report to Parliament through their Minister and answer for the conduct of the departments

1 See *Cabinet Office Manual*, Ch.2 G4 & G5.

2 See ss 35-39 of the Public Finance Act 1989, and s30 of the State Sector Act 1988.

and the proper expenditure, use, investment, and protection of public resources.[3,4]

- *The Political Neutrality of the Public Service*[5]

  Demands the demonstration of party political impartiality to best serve and gain the confidence of successive administrations.

- *The Professional Independence of the Public Service*

  Requires that public servants should tender free and frank advice, without fear or favour.

THE PUBLIC SERVICE AND PARLIAMENTARY PROCESS

Constitutionally, Parliament is supreme and government cannot function without the confidence of the House.[6] The role of officials in this context is therefore to assist Ministers retain the confidence of the House by ensuring that a government's policies are developed and implemented effectively.

The relationship of Public Service officials with Parliament (as distinct from its individual members of Parliament) will usually fall into one of two categories as:

- advisers to a Minister during the House's consideration of legislation and to select committees examining bills

3 Refer also to the provisions of the Fiscal Responsibility Act 1994, and the powers of the Secretary (s18).

4 The Financial Review process conducted by the Finance and Expenditure Committee (a select committee of the House of Representatives) requires that all departments, and by inference all chief executives of departments, must present themselves annually, or at other times as requested, for a review of their performance. The authority for such examinations derives from the fact that public money can be expended only under the authority of an Act of Parliament (see s22 (c) of the *Constitution Act 1986*), only Parliament can authorise a government through its departments to spend money, and only Parliament can authorise the expenditure of public money to purchase the resources used by departments, taking into account the revenue the department expects to make from other sources. Select committees have virtually unlimited powers of inquiry and may require persons to attend the committee, and to provide papers and records as requested (Refer to *Legislature Act 1908* s241(1)). See also McGee, David (1994) *Parliamentary Practice in New Zealand* (second edition) GP Publications Ltd.

5 See *Cabinet Office Manual* Ch.2 G13.

6 A government that does not have a majority in the House may govern for the time being on the basis of agreements or understandings with other parties in the House. In addition, before and after a general election continuity of government is maintained by the observance of conventions concerning the exercise of authorities, and decision making powers.

- witnesses in accounting for departmental operations before select committees.

Advising on Bills Before the House

Public servants supporting a Minister sponsoring legislation in the House, should be aware that they are "strangers" and appear in the Chamber during Parliamentary debates only as advisers to the Minister in the Chair. They are expected to conduct themselves and dress in a manner consistent with the dignity of the House.[7]

In the course of Parliamentary debates, officials present are expected to communicate with their Minister by written notes (handed directly to the Minister when in the chair or via ushers if the Minister is seated). They may converse directly with the Minister only if the Minister approaches the officials' bench. Procedures of the House make it clear that officials are not to approach the Treasury benches to converse with Ministers.[8]

Accounting for Departmental Operations

The reporting formats required of departments under the State Sector Act 1988 and Public Finance Act 1989 are intended to provide Parliament with high quality information for the scrutiny of departmental operations.

Public servants should therefore ensure accounts of departmental operations are accurate, concise, relevant, complete *and* non-controversial. Martin notes that chief executives have been sensitive in ensuring that material likely to embarrass a Minister does not appear in their reports. He suggests, however, they could take the opportunity to address controversial matters in the signed introduction to the reports. This could "... be useful in drawing attention to particular highlights of a department's activities ... [but] should not be the vehicle for ventilating public issues where the views of the department and the Minister are at variance."[9]

The essence of being non-controversial is that under no circumstances should a public servant "push a barrow" for themselves, or their departments, or otherwise advance issues in a partisan way. They should also be thoroughly aware of, and attuned to, the politics of the situation. That does not mean that a public servant should avoid defending an adopted position. On the contrary, it is appropriate that in accounting for departmental activities the chief executive or delegated official should be prepared to argue and defend a position if necessary. A distinction should be made between defending a departmental position, and

7 Refer to *Speaker's Rules for Admission to the Chamber, Lobbies and Galleries of the House of Representatives.*

8 Refer also to *Standing Orders* 431 & 432.

9 Martin, J.(1991) *Public Service and the Public Servant*, State Services Commission, Wellington.

promoting or defending Government policy. The former may be justified so long as it avoids any suggestion of criticism of the Government, a Minister, or Government policy; the latter should not happen.

Officials are required to report in accordance with the time frames set by the House or its committees. Some latitude may sometimes be arranged in the matter of departmental Estimates, and for financial review examinations, but such re-negotiation of reporting arrangements should be made with the Committee through the Clerk of the Committee as early as possible.

SELECT COMMITTEES

The Roles of Public Servants

Public servants may appear before select committees as advisers to committees (when considering Bills), as witnesses (when departmental Estimates and financial reviews are under scrutiny, when being examined in the course of an inquiry, or in the rare event that a department makes a submission on a Bill) and, on a few occasions, as individuals. They need to be conscious of the roles in which they are appearing and the expectations that go with these.

As Advisers

Officials acting as advisers to a select committee (during the consideration of legislation, for example) attend at the committee's request, not as of right; their role is to assist the committee with information on the legislation and on its implementation and administration.[10] As a general practice, the department whose Minister is responsible for draft legislation should represent the Government's view to the committee.[11]

Officials acting as advisers should remain impassive, even in the face of witnesses giving evidence apparently in conflict with the truth (it is not officials' role to debate issues openly with witnesses). However, they should make the committee aware of any discrepancies in the evidence presented as soon as discretion permits.

Officials acting as advisers to select committees (when the committees are considering draft legislation, for example) should be those best able to provide the level of advice required. They may not always be the most senior officials. But, it is the prerogative of a chief executive to determine departmental representation.

10 See *Cabinet Office Manual* Ch.5 D3.

11 *Ibid.* Ch.5 D4.

As Witnesses

Although chief executives have a duty to account for the operation of their departments, it is Ministers who are responsible to Parliament for departmental operations. Accordingly, public servants called to appear before select committees do so on behalf of their Minister, who is responsible to Parliament (unless the matter does not engage ministerial responsibility, such as an appearance of an official as a private citizen or in a specific statutory capacity).[12]

Officials are representing their Minister at select committees for the purposes of explaining policy and providing factual information. Public servants are subject to the Minister's direction as to what answers they should give and which officials shall represent the department.[13] (Conversely, select committees have the power to call before them persons, papers and records as they require.)[14]

The tension between these conventions was demonstrated particularly in 1984: a sub-committee of the Public Expenditure Committee expressed its desire to examine officials on the development of policy, when the chief executives concerned maintained the view that in the last analysis policy advice given to Ministers is of a corporate nature for which they alone are answerable. The issue was not resolved.[15]

In a similar inquiry in 1990[16] these conventions were not tested. The Public Service chief executive concerned did not object to the select committee's examination of his staff on an individual basis. In this case the examination was concerned with departmental management policy and practice rather than the provision of advice to Ministers or the government.

It is the expectation of select committees that chief executives will lead departmental delegations when committees meet to examine departmental Estimates, and to conduct financial reviews.

Current practice is that departments may initiate submissions to a select committee on a Government Bill, or any Bill, only with the prior approval of the submission by the Responsible Minister and the Cabinet Committee on Legislation and House Business.[17] Such prior approval from the Cabinet committee is required on any proposal by a department to make a submission on any Bill.

12 *Guidelines for the Chairmen of Select Committees* (1987) s5.8 p.19.

13 *Guidelines for the Chairmen of Select Committees* (1987) s5.8 p.19.

14 *Standing Order 350.*

15 Public Expenditure Committee (1984) *Report on Inquiry into Devaluation* AJHR, I.12c.

16 Finance and Expenditure Committee (1990) *Inquiry into the Investment Policies and Procedures of Departments of State and State Trading Organisations* AJHR, I.4b.

17 See *Cabinet Office Manual* ch.5 D11; CO (91) 6, of 8 February 1991; and SSC Memorandum: *Departmental Submissions to Select Committees,* of 15 January 1992.

As Individuals

Generally, public servants have the same rights of free speech and independence in the conduct of their private affairs as other members of the public. However, they also have a duty not to compromise their employer by public criticism of, or comment on, policies with which they have been professionally involved or associated. It is not possible to step outside an official's role and criticise Government policy with impugnity, or reasonable to expect that the news media will not report or exploit such a conflict. They should ensure that their contribution to any public debate or discussion on such matters maintains the discretion appropriate to the position they hold, and is compatible with the need to maintain a politically neutral Public Service.[18]

Comment as an individual should not:

- reveal advice given to the Minister
- as a general rule reveal any information gained in the course of official duties that is not already a matter of public knowledge. Although the Official Information Act 1982 does not apply in these circumstances, the spirit and intent of that Act should generally be observed on a question of non-disclosure. In any event, the public servant should proceed with caution. It is not for an individual official to decide what to reveal or not in these circumstances.
- criticise or offer alternatives to a policy with which the individual was professionally associated
- purport to express or imply a departmental, rather than a personal view
- involve personal attacks
- be of such a nature as to call into question the individual's ability to advise, implement or administer a Government policy impartially.[19]

Duty of Public Servants to the Minister

As a general practice, when select committees are considering legislation, the department whose Minister is responsible for the bill should *represent the Government's view* to the committee.[20]

Public servants should keep their Ministers fully informed of any contact with the committee; common sense dictates they would be wise to err on the side of caution before committing themselves or their Minister to a public position. (Note that advice to committees is confidential until reported[21]).

18 See also *The Senior Public Servant* in the guidance series.

19 See also *Public Service Code of Conduct* (1990).

20 *Cabinet Office Manual* Ch.5 D6.

21 This is also the case for Annual Reports, and Estimates before they are tabled in the House.

Duty of Public Servants to Select Committees

It is widely acknowledged that public servants acting as advisers have a duty of care and good faith to the select committee. It is expected they should, so far as possible, assist select committees by providing complete and accurate information in accordance with the Official Information Act principle, that information should be disclosed unless there is good reason for withholding it. Officials who give false evidence to a committee, whether or not under oath, are liable to be held in contempt by the House and will be subject to punishment accordingly. Officials giving false evidence on oath may, in addition, be liable to be charged with the crime of perjury. All officials, whether acting as advisers or witnesses, would be wise to exercise care, given the power of select committees to examine witnesses upon oath.[22]

Public servants must answer any questions posed by the select committee truthfully and to the best of their ability. They have a duty to act with "utmost good faith" in their dealings with select committees. This includes an injunction against withholding information from the committee.[23] As such they must not either directly or by silence mislead the committee and must not conceal information even if it tended to weaken the case for a Government proposal or provision. By way of contrast, public servants should be aware of possible difficulties, and not use the convention to disclose information to thwart, or to seem to undermine their Minister, or a government's position, on a particular matter. It should be remembered that *how* matters are presented is often as important as *what* is presented in these circumstances. Presentation can be crucial.

Provision of Information to Select Committees

Officials are not responsible for justifying policy or disclosing details of how policy evolved. That is the Minister's responsibility. It is essential that departmental advisers are sufficiently experienced to provide frank and correct information and to exercise good judgment.[24] They should err on the side of caution before committing themselves or their Minister to a public position. They may seek leave to withhold comment on matters of policy, and consult the Minister when that seems prudent.

Committees do not normally seek information on the policies, administration and expenditure of a previous administration although they may do so. Cabinet papers are accepted as confidential to Government (within the criteria of the Official Information Act).[25] [26]

22 Section 252 of the Legislature Act 1908 provides that a person who wilfully gives false evidence to a committee under oath is liable to the penalties of perjury. See also *Standing Order* 385.

23 McGee, D. in Martin, J *Public Service and the Public Servant*, p.53.

24 *Cabinet Office Manual* Ch.5 D4.

25 See *Guidelines for the Chairmen of Select Committees* (1987) s5.7, p.18; and *The Senior Public Servant*, p.35, and *The Public Service and Government* in the guidance series.

26 See also Martin, J. (1991) *Public Service and the Public Servant*, p.32.

Although committees have not normally insisted on the production of evidence relating to interdepartmental exchanges or to advice given by officials to Ministers, there are no precisely formulated limits to define what information might be demanded by a select committee or which must be given to it.

Some of the reasons for withholding comment relate to ministerial responsibility, for instance, to explain policy, and to maintain the confidential nature of advice from public servants to Ministers and of subsequent Cabinet deliberations. Past guidance has suggested that arguments for and against a proposal must be stated, although sometimes the official should tell the committee that the information it seeks would be more appropriately sought from the Minister (e.g. when questions relate to policies still under consideration, to classified information, or to matters that are politically sensitive).

If any member of the select committee asks the official for his or her opinion or view on a policy, then the advice has been that the official should invite the chairman of the committee to redirect the question to the Minister.[27] The same sort of constraints have been held to apply to public servants appearing as witnesses before a select committee.[28]

These points are mirrored in the Parliamentary *Guidelines for Chairmen of Select Committees* as follows:

- Committees are entitled to question departmental officials on opinion or advice given to a Minister or government in confidence.
- A departmental official is entitled to refuse to disclose opinion or advice without the agreement of the Minister.
- A Minister may claim that such information is confidential state information.
- The House may order the production of such information, protecting it by having it placed before a committee in secret.[29]
- An official or Minister who refused to obey such an order of the House could be proceeded against for contempt.[30] [31]

27 *Public Service Official Circular,* 21 October 1981.

28 Originally contained in SSC Management leaflet (1983) *The Public Service and Ministers.*

29 *Speaker's Rulings* 151.5.

30 *Standing Order* 382 (1992 ed).

31 *Guidelines for the Chairmen of Select Committees* (1987) s5.8, p.19.

It is important to note:

> A refusal to answer a question cannot be treated as a contempt unless the answer is insisted on by the committee (by majority if necessary). A simple refusal to answer an individual member's question is not a contempt. If a witness refuses to reply the committee should exclude witnesses and consider the matter in private. If the committee resolves to insist on a reply, the question should be repeated to the witness by the chairman on behalf of the committee.[32]

It should also be noted that committees are entitled to seek information on statements made by departmental officials in the discharge of their duties. Therefore, if an official has made a public statement on ministerial policy, an answer to a question about that statement may be insisted on by the committee.[33]

General

Select committees expect departmental witnesses to be well briefed and to achieve a consistency of advice or evidence over time. Since select committee examinations can become vigorous from time to time, departments are advised to ensure their representatives:

- possess a good knowledge of the subject matter, and are thoroughly prepared
- do not trifle with members of the committee, and show respect to them
- avoid familiarity
- have the necessary temperament to respond well to pressure
- exercise sound judgment
- possess a good understanding of the conventions that apply to their appearance before select committees.[34]

In addition, it should be noted that divulging the proceedings of a select committee or a subcommittee not open to the public can be regarded as contempt and treated accordingly.[35]

32 *Ibid.*

33 *Ibid.*

34 See Martin, J (1991) p.4.

35 *Standing Order* 364, 365, & 366.

RELATIONSHIPS WITH MEMBERS OF PARLIAMENT

Contacts with Members of Parliament

It has generally been accepted that:

- public servants do not initiate oral or written contact with members of Parliament except as citizens in a private capacity
- no contact is initiated with members of Parliament by public servants in an official capacity without the knowledge and consent of the Minister except in relation to:
  - inquiries on behalf of, say, third parties, or constituents
  - requests for official information
- in addition, recognising the need for officials to retain the confidence of the government of the day, it has long been expected that public servants would be punctilious in maintaining the appearance as well as the reality of propriety in all dealings with members of the Opposition.

Provision of Services to Members of Parliament

Members of Parliament as individuals, of the Government party or of the Opposition, are entitled to official information on the same basis as any other person. Accordingly public servants were advised in 1984 that:

- requests made by MPs for information (other than those requests made in the form of questions in the House) should be treated by public servants as would any other request under the Official Information Act 1982. However, the Minister should be kept informed of particular requests where, in the public servant's judgment, the nature of the request makes it appropriate to do so (when information is requested by an Opposition research unit, for example). In some cases, a request may be better transferred to the Minister's office for reply in terms of the relevant provisions of the Official Information Act 1982
- requests made by MPs for information about election proposals should be referred to the Minister's office unless there is a general approval by the Minister to release the information.

Public servants are not obliged to respond to requests by MPs for services that go beyond those that would normally be provided by the department to any member of the public. Requests from members of Parliament should be met only if made through the Minister's office. Note that any requests requiring changes to departmental outputs or the reallocation of resources would need to be renegotiated with the Minister and the Minister of Finance (prior to seeking the authority of the Governor-General or Parliament for a change in the appropriations for those outputs).

There will be occasions when members of Parliament will, either in their capacity as representatives of their electorates or otherwise, make contact with Public Service offices, or public servants directly. This is particularly so in regional or local areas where members of Parliament may have established "working relationships" with particular officials. This is not wrong, but caution ought to be exercised in all such dealings to ensure that the independence and integrity of the Public Service, and the departments concerned, are maintained. It is prudent for specific rules or guidance to be established, and provision for recording and reporting requests to exist.

In accordance with prudent practice it is important that departmental head offices know of any such arrangements, or regular contacts.

CAUCUS COMMITTEES

Attendance of Officials

Caucus committees, whether of the party of the government or the opposition, have the same status as any group of citizens and constitutionally have no special powers because their members are parliamentarians. As such, caucus committees have none of the powers of the House or select committees. Unlike select committees, caucus committees do not have the power to call for persons, papers or records.

It is a long-standing practice that the attendance of officials at caucus committees will be only with the permission of the Minister (and the concurrence of the chief executive). Public servants are not responsible to caucus committees. They act as the agents or representatives of their Minister and are responsible through their chief executive to Ministers, not caucus committees. Accordingly, all requests to appear before a caucus committee should be relayed through or to the Minister and may be accepted only with the agreement of the Minister.[36] Instructions should not be taken from the caucus committee. Any instructions will emanate from the Responsible Minister only.[37]

Under no circumstances should public servants service caucus committees. The political neutrality of the Public Service relies on an independence and proper detachment from party political institutions.[38]

36 *Cabinet Office Manual* Ch.5 E2.

37 See State Services Commission CM 1986/104, July 1986. Policy on official attendance had previously been detailed in the SSC management leaflet *The Public Service and Ministers* (1983).

38 See *Report of the Government Administration Committee: Estimate of Expenditure for 1992-3 Vote: State Services Commission*, AJHR, I.19C., p.5, 3.6.

Caucus committees are, however, part of the political structure, and their importance in the political process should not be under-estimated. The call for officials to attend caucus committees, and to brief members of opposition parties will persist. The dividing line between clearly political concerns and the day-to-day business of government, and between the provision of factual information concerning matters of policy and advocacy, or the tendering of comment or opinion, will continue to create tensions and conflicts for the responsible official. The preservation of a politically neutral Public Service remains a necessary objective. That ideal should not be impugned.

Similar conventions and practice have applied as those for the appearance of public servants as witnesses before select committees; that is, that officials should endeavour to deal with all the committees' requests for information but they are not responsible for justifying policy nor should they disclose details of how the policy evolved (the Minister's responsibility). However, as Ministers may request officials to brief caucus committees on the evolution of policy from time to time it has been accepted that the departmental advisers should be (as with select committees) sufficiently experienced to provide correct information and to exercise good judgment.[39] At the same time, it has been accepted that public servants should err on the side of caution before committing themselves or their Minister to a public position: they should seek leave to withhold comment and consult the Minister when that seems prudent. As the State Services Commission noted in 1984, in general, agreed policy should not be attacked, but a constructive contribution to policy development or to the review of policy is helpful.

In the environment of proportional representation the advice to err on the side of caution, by limiting contributions to factual matters and the provision of good information to caucus committees, may be even more pertinent.

Attendance of Individuals

For appearances of officials in a *personal* capacity the Commission's advice has been:

- public servants requested to attend a caucus committee meeting in a non-official capacity, or intending to do so, must advise their chief executive beforehand
- a chief executive will advise the Minister and may withhold approval to attend or alternatively request through the Minister that officials also attend the meeting.

39 *Cabinet Office Manual* Ch.5 D3-4.

Caucus committees have been urged to consult with the Responsible Minister before any person who is known to be a public servant is approached.[40]

PARLIAMENTARY QUESTIONS

Replies to Parliamentary Questions should enable the Minister to provide concise, accurate, and informed responses that are confined to the subject-matter of the question asked, and shall not contain:

- statements of facts and the names of any persons unless they are strictly necessary to answer the question
- arguments, inferences, imputations, epithets, or ironical expressions
- discreditable references to the House or any member thereof or any offensive or unparliamentary expression [41]
- reference to debates held in the current calendar year in the same session, proceedings held in committee not open to the public that have not been reported to the House, or matters that are subjudice.[42]

Officials are not expected as part of their official duties to draft questions to be asked by members of Parliament from either side of the House. That is entirely a political matter. But, officials may be asked by Ministers to provide information which allow parliamentary questions *to be drafted* Officials are expected to meet such a request.[43]

40 *SSC Circular Memorandum* 1986/104 July 1986.

41 *Standing Order* 87(1).

42 *Standing Order* 87(2).

43 See also comments by McGee, David in Martin, J. (1991) p53, and p44.

The Public Service and Government

A paper in the guidance series 'Public Service Principles, Conventions and Practice'

STATE SERVICES COMMISSION
Te Komihana O Ngā Tari Kāwanatanga

First published in September 1995
by the State Services Commission, Wellington, New Zealand.

ISBN 0-478-08905-8

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INTRODUCTION

This paper is concerned with the relationship between the Public Service and government. That is, how those in the Public Service should relate to and serve those who hold office in the government of the day.

The paper discusses the nature of the official's relationships with Ministers, and Cabinet; the concept of the collective interests of government; the conventions and practice related to changes of government; the responsibility for advocacy of policy; and the contestability of advice. The main principles, conventions and practice that public servants and Ministers ought to observe in their interactions are identified.

It was not intended that the paper should be a comprehensive study. Rather, it has been designed to provide a basic reference, or guide to understanding the essence and importance of the relationship between the Public Service and government. The hope is that the information might also be a spur to further inquiry, study, and discussion for the student of public service ethics.

The paper has been prepared in the knowledge that the consequences of the electoral process established by the Electoral Act 1993 have yet to impact, but in the expectation that if the conventions and administrative practices of the Public Service are to change as a result, such change will derive from experience and good practice consistent with established principles.

While many changes have occurred, and will continue to occur, the principles governing behaviour and conduct that ought to be observed do not change in substance. They are not important so much for their own sake, but because in their proper observance they contribute to good and orderly governance. In the context of this paper those key principles, which form part of the matrix of experience, formalities, and practices that distinguish and characterise the special nature of working in the service of the public, are:

- **Ministerial Responsibility**
  That Ministers are responsible and politically accountable or answerable, to Parliament for the conduct of their departments in carrying out their functions, and individually and collectively accountable to the public for matters of policy.

- **Accountability**
  That chief executives must, in return for their powers and autonomy, account to their Minister and through their Responsible Minister to Parliament for the custodianship and management of public resources, and the exercise of their powers, and be answerable for their actions to their employer.

- **Political Neutrality**
  That officials scrupulously observe party political impartiality to retain the confidence of successive administrations, and to sustain good government.

- **Integrity**
  That public servants will, in the conduct of their service, duties and responsibilities, act honourably and honestly, displaying personal values, ethics and behaviour of the highest standard.

- **Professional Duty**
  That Public Service officials not only have a general duty to the Crown, to Parliament, to the government of the day, to the public and the public interest, and to the law, but also a professional duty to their colleagues past and present. Professional duty requires that the public servant, in whatever capacity, should reflect appropriate societal values and act to promote and enhance the virtues of fairness, equity, efficiency, and effectiveness.

RELATIONSHIPS WITH MINISTERS

Chief Executives and Ministers

Chief executives are appointed by the State Services Commissioner in accordance with the provisions of section 35 of the State Sector Act 1988. As the administrative head of a department, and the designated employer of all staff, a chief executive is responsible to the appropriate Minister and accountable to the State Services Commissioner for:

- carrying out the functions and duties of the department (including those imposed by Act or by the policies of the Government)
- tendering advice to the appropriate Minister and other Ministers of the Crown
- the general conduct of the department
- the efficient, effective and economical management of the activities of the department.[1]

Chief executives are also responsible to their Minister for:

- the financial management and financial performance of the department, and for compliance with any lawful financial actions required by the Minister or Responsible Minister.[2]

1 S32 State Sector Act 1988.

2 S33 Public Finance Act 1989. The term Responsible Minister has a specific meaning in the Public Finance Act 1989 as "the Minister or Ministers for the time being responsible for the financial performance of the department or Crown agency, and in the case of an Officer of Parliament, the Speaker:" More generally, the term Responsible Minister means the Minister in charge, or the Minister responsible for the conduct of a particular department.

The chief executive is bound to obey any lawful instruction given by the Responsible Minister. It should be noted:

> ". . . in matters relating to decisions on individual employees (whether matters relating to the appointment, promotion, demotion, transfer, disciplining, or the cessation of the employment of any employee, or other matters), the chief executive of a department shall not be responsible to the appropriate Minister but shall act independently."[3, 4]

Ministerial Responsibility

The principle of ministerial responsibility is described sometimes as consisting of four levels:

- *Personal:* How Ministers conduct themselves in their private and public lives.
- *Primary:* Concerning the policy decisions they make within the purview of their portfolio.
- *Vicarious:* Related to the activities and conduct of their department for which they are the Responsible Minister.
- *Collective:* The obligation to preserve unanimity, and confidentiality, within Cabinet, in the interests of confidence.[5]

The concept of *ministerial responsibility* is bound inextricably to the notion of *responsible government*. Both derive from the function of the House of Representatives in providing a control or influence upon the powers of the State as exercised by the government of the day and its Ministers.

In both cases the purpose is to assure the electors through their representatives that the powers and responsibilities of governance vested in the government and its Ministers, and in the departments administering portfolios, are carried out responsibly, lawfully, and in the public interest. The foundation of *ministerial responsibility* is that Ministers are politically accountable to Parliament and to the public for their portfolios.

If the reporting and disclosures do not satisfy the majority of the House, confidence in a government or its Ministers may be eroded or lost. For their legitimacy and right to exercise their powers, governments and Ministers require continuing support from members of the House.

Although not *directly* responsible for the actions of their departments, (chief executives are, however), Ministers must answer for those actions and provide assurance that their departments are being administered and

3 S33 State Sector Act 1988.

4 It is an offence under section 85 of the State Sector Act 1988 for any person to attempt to influence the chief executive as employer.

5 See also *Cabinet Office Manual* Ch.3, A4-5.

managed appropriately.[6] As political heads of their departments Ministers must explain what their departments are doing, and how public resources are being managed to implement policies and deliver services. On occasion this may require a Minister to provide answers to specific questions about the performance of departments even though the Minister may have no prior knowledge of the matter. Chief executives may also be required to account publicly for the performance of their departments, to the extent that they have administrative responsibility or control.

Decisions of Cabinet, or a Cabinet Committee are usually reached by consensus and are deemed to be binding on all members, except where a member has resigned his or her portfolio or position in Cabinet in order to disassociate himself or herself publicly from the collective decision. The proceedings of Cabinet are confidential. These conventions of collective responsibility support the function of Cabinet, and Cabinet Government to oversee the implementation of Government's policy mandate from the electorate.[7]

A Matter of Duty

The key **duties of public servants to Ministers** , are to:

- obey any lawful instructions given by the Minister, and faithfully and diligently abide by and carry out ministerial decisions, once made
- keep the Minister informed of all relevant portfolio developments and aspects of departmental operations, enabling the Minister to set priorities, taking into account the Government's objectives and the resources available to the department[8]
- advise and warn the Minister of any issue or situation that is likely to be controversial, or provide appropriate information to the Minister to avoid surprises, or to anticipate issues related to the affairs of the department
- provide the Minister with competent, balanced, free and frank advice regarding policy options, whether or not such advice accords with the Minister's views.

Ministers' Relationships with Departments

Since the passage of the State Sector Act 1988 relationships between Ministers and chief executives have developed in two ways. Some chief executives have become more visible, publicly asserting responsibility for the management of resources and defending actions which, in the past, would have been dealt with by Ministers. Equally, some Ministers have exercised a more direct control over departments, particularly (but not always) where issues have become "political" in character.[9]

6 Refer to Martin, J. (1991) p.28.

7 *Cabinet Office Manual* Ch.3/1 A 4 – 5.

8 *Cabinet Office Manual* Ch.2/6 G6.

9 Martin (1991) op cit. p.33.

Though the reforms embodied in the State Sector Act 1988 can be said to have established (or even confirmed) an *agency relationship* between Ministers and their departments or chief executives for the specification of social or political outcomes and the delivery of contributory outputs, in practice the relationship is not clear cut. Martin notes that "while it is constitutionally proper for the Minister to be in charge; it is managerially unsound for Ministers to *run their departments*. The ideal relationship is one of *trust* between two people linked inextricably at least for a time . . ."[10]

Thus, "Ministers should not have operational responsibility for the routine performance of departments. They must have some form of early warning system so that they are alerted to potentially controversial matters very quickly."[11]

The State Sector Act 1988 envisages that Ministers will not normally involve themselves in the day-to-day management of their departments. The general relationship between Minister and chief executive should be characterised as:

- departments being extensions of the Minister acting in the Minister's name and in accordance with the Minister's wishes and direction
- chief executives under the Public Finance Act 1989 having a delegated authority to enable the production of contracted outputs in the most efficient and effective manner and being accountable for the exercise of this authority.[12]

Communications

Where a Minister needs to make direct contact with particular officials, the chief executive should be informed of any instruction or comment passed directly from the Minister to officials so that lines of communication are clear, and accountability of officials to the chief executive preserved.[13] This general counsel needs to be tempered by an appreciation of any particular arrangements that exist or might be contemplated. What is appropriate in practice may qualify what may be sound guidance in theory.

A chief executive or staff of the department are bound to obey any lawful instruction given them by the Responsible Minister, but the Minister may not instruct their departments to act in an unlawful manner.[14]

Public servants should ensure that the attention of Ministers is at all times

10 Martin, J *Remaking the State Services* in Holland, M and Boston, J (1990) p.130. Cited in Martin (1991) op cit. p.34.

11 *Cabinet Office Manual* Ch.2/6 G6.

12 See also *The Senior Public Servant* in the guidance series.

13 *Cabinet Office Manual* Ch.2/6 G6.

14 *Cabinet Office Manual* Ch.2/6 G6.

drawn to potential conflict between Cabinet decisions and portfolio policy. Where a Minister wishes to act in ways that might be contrary to a Cabinet decision or outside its boundaries it is the public servant's duty to draw the matter to the Minister's attention, orally or in writing. Before such action is taken an official must be satisfied, or it can be reasonably established, that a Minister intends to act in a contrary way. If the Minister persists, the public servant should inform the chief executive of the situation. As a last resort he or she in turn may, through the State Services Commissioner, decide to advise the Prime Minister.[15]

In cases where ministerial instructions are known to conflict with Cabinet directions or regulations on public expenditure (or in awarding a contract), breach Cabinet rules, or the Public Finance Act 1989, or where Ministers direct officials to implement decisions which the officials believe to be contrary to the expressed collective view or known collective opinion of the Cabinet, the following options are available:

- proceed on the basis of a confirmed ministerial directive knowing that the political consequences of this are matters for which the Minister accepts responsibility, or
- discuss the issue first with the Minister, and if necessary then inform or seek the counsel of the State Services Commissioner. In extreme cases a matter that cannot otherwise be resolved may be referred jointly by the chief executive concerned and the State Services Commissioner to the Prime Minister.

In most cases, Martin notes, the Minister will be acting under delegated authority from Cabinet and the presumption, in cases of conflict, is that Cabinet's decision overrides the Minister's. If the Minister persists in "reinterpreting" a Cabinet minute with the consequence that public servants would be acting *without proper financial authority*, Martin suggests the matter be reported to the Minister of Finance via the Treasury. If the matter cannot be resolved, reference to the Prime Minister, or Cabinet itself, may be necessary.[16]

In all cases where a Minister's authority, or action, is questioned there is an onus on the chief executive to inform the Minister of such a doubt, and, where it is intended to refer matters to a third party, the Minister should be informed in advance.

Responding to the Public

The key to understanding the proper role of the public servant in public is to be found in the distinction between *explaining* Government policy or actions (an acceptable role for public servants) and *promoting* or *defending* them (the Minister's responsibility).[17] (See also *Advocacy* page 16.)

15 Martin (1991) op cit. p.24.

16 Ibid.

17 Martin (1991) op cit. p.30 see also *Cabinet Office Manual* Ch.2/6 G5.

The principle that the senior public servant should remain anonymous followed from the concept of ministerial responsibility and the proposition that Ministers are publicly answerable for the actions of their departments. Today the principle of anonymity has undergone considerable modification. The idea of the anonymous public servant is less relevant than it was. What persists is a "grey area" requiring the circumstances of each case to be evaluated carefully to determine appropriate responses. The effect of the Public Service reforms means that the chief executive of a department can no longer remain silent in matters related to his or her official responsibilities. Ministers will not necessarily feel bound to make public statements concerning the conduct of their departments.

A related convention is that of the avoidance by members of Parliament or Ministers of publicly "naming" individual officials, either generally or in the House. Again, this derives largely from the principle of ministerial responsibility. Traditionally there has been an implicit understanding that Ministers take the credit for policy successes and individual public servants remain in the background when policy failures are the subject of public criticism,[18] (though in practice adherence to the convention has not been absolute).

The point is not so much whether a response is necessary in a particular situation, but the manner of the response, and to whom the response might be directed. For instance, the response may be to a select, or Cabinet committee, rather than to the public through the news media services. In most cases a response by a chief executive can be warranted without in any way infringing ministerial prerogative. It is prudent, however, to give prior notice to the Minister of any such communication.

The principal argument for the convention has been that should the practice of "naming" become commonplace, the non-partisan nature of the Public Service (and the confidence placed in it by Ministers) would be weakened through officials being encouraged to protect their positions publicly and engaging in open disputes with politicians.

Where public concern for policy implementation or administrative failure is aired the convention of vicarious ministerial responsibility usually applies. That is, a Minister may account or answer for the shortcoming, but not necessarily accept primary responsibility. In cases of unacceptable conduct by individual officials, it is the responsibility of the chief executive as employer to make any public comment, although the Responsible Minister may also wish to do so.[19]

18 Martin (1991) op cit p.36.

19 Martin (1991) op cit p.36.

RELATIONSHIPS WITH CABINET

The Cabinet is the "unifying force" of our system of government. The collective responsibility of Ministers is underpinned by conventions of:

- *Collective decision-making and unanimity* – that is, the collective Cabinet solidarity binding on individual Ministers once a decision has been taken,[20] and
- *Confidentiality* – the convention that the formal proceedings of Cabinet are secret (subject to the Official Information Act 1982) and that actual discussions at Cabinet and Cabinet committees are not formally recorded and are regarded as confidential.[21]

The position of the Cabinet as the central decision making body is also confirmed by the rule that Ministers and departments must not action Cabinet committee decisions prior to their ratification by the Cabinet, unless Cabinet has directed the committee to decide the issue, or officials to do further work.[22]

In providing advice to Cabinet or Cabinet committees the role of officials is to represent Ministers' interests, but also those of the government as a whole, and to assist effective decision making by Ministers through the provision of clear, concise and comprehensive analysis.

Officials have a responsibility to attempt to resolve conflicting or inconsistent policy advice through effective consultation prior to making submissions to Ministers. However, where this is not possible clear explanations must be provided to Ministers. In all cases free and frank advice should be tendered, and officials should avoid promoting their own views or interests, and they should present Ministers with practical alternatives on which to take decisions.[23]

Where decisions are taken by Ministers and ratified by Cabinet they are final and may not be altered or amended except by Cabinet itself.

20 *Cabinet Office Manual* Ch.3/1 A4 & Ch.3/2 A5.

21 *Cabinet Office Manual* Ch.3/1 A3.

22 *Cabinet Office Manual* Ch.3/3 C3-5.

23 *Cabinet Office Manual* Ch.4/4 A26.

COLLECTIVE INTEREST

Governments expect that chief executives and departments will ensure that the collective or corporate interests of government are represented both in the general process of policy development and in specific departmental activities.[24]

The term, *collective interests of government*, has been described variously as:

- the need for a joint commitment by Ministers and officials to the overall goals of government, and the need for good communication
- the constitutional responsibilities of Cabinet and Ministers to provide leadership and strategy, and the shared responsibility between Ministers and officials for realising the overall interests of government, and maintaining the advisory and consultative processes which underpin good government
- the collegial interpretation of accountability required to ensure that the objectives of cabinet government are served.[25]

The collective interests of government may be expressed as common elements or standards in respect of systems, procedures and behaviours required of the institutions of government, or how the administrative arms of government ought to go about their business as part of a coherent, executive government.

Consultation and good co-ordination are key to ensuring that the wider interests of government are not overlooked in the policy making process. Accordingly, departments preparing submissions to Cabinet or Cabinet committees are required to ensure they have considered all the implications for other government agencies and consulted them at the earliest possible stage.[26]

In matters of policy advice it is important to note that co-ordination of the process, or consensus between departments, may not produce common sense, or be consistent with good policy advice. Departmental interests and policies may sometimes have to be set aside to accommodate courses of action that reflect broader interests.

Current procedures require departments to certify to the satisfaction of their Minister that they have consulted all government agencies that have an interest in the issue and that the views of those organisations are reflected in submissions or in separate attached reports.[27] However, the

24 Refer to Appendix 1.

25 *Report of the Steering Group, Review of State Sector Reforms* (SSC) 1991, pp.45-46.

26 *Cabinet Office Manual* Ch.4/2 A11.

27 *Cabinet Office Manual* Ch.4/3 A14.

attachment of separate reports is generally discouraged, single joint reports being preferred.[28]

In similar vein, where officials' submissions to Cabinet or Cabinet committees result from consideration of an issue by an interdepartmental working group, the submission of an additional separate report by a department represented on the working group is not considered acceptable.[29]

CHANGE OF GOVERNMENT[30]

Election of a New Government

Where an Opposition party, or parties, gain a majority of seats and are thus elected as a new government, Ministers of the outgoing government continue to hold office and to be responsible for their portfolios until they have resigned and new Ministers have been sworn in. The timing and handling of an actual transition will depend on consultation between the leaders of the incoming and outgoing governments. Given the practical matters to be decided in forming a new government – particularly the allocation of portfolios – a period of some days or weeks may elapse before a new ministry takes office, although in theory a new government can be sworn in immediately.

The two-part convention of government that prevails in the interval between the election and swearing in of the new government, requires that the outgoing government:

- undertakes no new policy initiatives
- acts on the advice of the incoming government on any matter of significance that cannot be delayed until the new government formally takes office – even if the outgoing government disagrees with the course of action proposed.

Subject to that convention, a Minister who holds a current portfolio for a particular area of responsibility continues to be the Minister responsible until replaced by a new Minister.

28 *Cabinet Office Manual* Ch.4/3 A15.

29 *Cabinet Office Manual* Ch.4/3 A16.

30 See Letter from Secretary of the Cabinet to State Services Commissioner dated 18 October 1990: *Constitutional Procedures following a General Election* (forwarded to all chief executives). See also *Constitutional Reform: Reports of an Officials Committee*, Department of Justice, February 1986.

The Caretaker Period

The conventions cited above apply during periods of *Caretaker Government*. They are based on the principles that the Governor-General must not be left without responsible advisers; the day-to-day business of government must continue; an out-going government is still the legitimate executive authority (but does not have the mandate to implement new policies); and an in-coming government has the confidence of the House of Representatives to govern, and the support of the House to act.[32]

Re-election of a Government

Where a Government party retains a majority of seats in a general election and is thus re-elected, Ministers continue to hold office unless a current Minister resigns and a new Minister is sworn in. A retiring Minister or one who failed to be re-elected continues in office until replaced by a new Minister or on the expiry of 28 days from the date (ie the close of polling day) on which the Minister ceases to be an MP. The Prime Minister will recommend to the Governor-General who to appoint as Ministers and to which portfolios (in the case of a Labour Government, after caucus has elected the pool of Ministers).

Preparation of Briefing Papers[32]

When a new Minister is appointed, it is expected that chief executives will be prepared to brief the Minister on his or her portfolio responsibilities, immediately. Subject to any specific requests, the Minister can at least expect to receive from the department:

- a written brief covering the organisation and responsibilities of the department, ministry or agency concerned
- an account of major outstanding policy issues
- terms of reference, membership and terms of office for all boards, commissions, tribunals, Crown entities, etc, for which the Minister has responsibility
- details of pending decisions or actions that will be required by the Minister, including recommendations of draft legislation (taking into account the Government's election manifesto).

When a general election is called, or can be anticipated, departments should have in preparation Post-Election Briefing Papers for the incoming administration. These documents should at least include material and information that would be provided to a Minister as outlined above. Such documents should remain confidential until the new Minister has been sworn in, and released more widely only when the Government or the Minister so authorises.

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31 See Cabinet Office Circular CO (93) 18, *Decision-Making by Cabinet and Ministers in the Immediate Post-Election Period,* 9 November 1993; and CO (93) 19, *Handling of Official Information Requests in the Immediate Post-Election Period, 17 November 1993.*

32 *Cabinet Office Manual* Ch.2/7 G8-9.

Post-Election Briefing Papers should remain confidential, and locked away, until the Minister has been sworn in. Only then should they be presented to the relevant Minister. At that point the material may be regarded as part of the free and frank advice to the Responsible Minister, be subject to possible release under provisions of the Official Information Act 1982, and be ready for wider release as determined by the Minister.

It is prudent for departments to be alert constantly to the need to prepare briefing papers, either for new Ministers, or new governments. The information for this purpose should be updated regularly.

Political Neutrality

Generally, the Minister, as constitutionally appointed political and administrative head of the department, may request any information held by the department in fulfilment of this role.[33] Public servants are bound to carry out the lawful directions and requests of their Minister and all reasonable efforts must be made to fulfil them.

However, public servants must act in such a way that their department maintains the confidence of its present Minister and also of future Ministers. Therefore, while officials must provide any factual or statistical material requested, they should not be required to offer comment or opinion on clearly "political" topics, such as policies mooted by the parliamentary Opposition.[34]

To provide public comment or opinion on party political or election proposals would be inconsistent with the role of a politically neutral Public Service. Good practice dictates that where employees feel that their political neutrality may be compromised by a request to supply such comment or opinion, their wish not to be compromised should be respected, without this reflecting adversely on the individual concerned or any reference to the matter being recorded.[35]

Comments On Election Proposals

In 1981 the State Services Commission issued the following guidance: "The dividing line between clearly political concerns and the day-to-day business of Government is not always easy to determine. Nevertheless, whatever the nature of requests emanating from a Minister's office, particularly in the run-up to a general election, the following considerations should be borne in mind:

33 Except where to do so would contravene the Provisions of the Privacy Act 1993, and subject to conventions about access to papers of previous governments.

34 *Cabinet Office Manual* Ch.2/8 G13-14, and *Public Service Official Circular:* notice of 21 Oct 1981 (SSC) attached as Appendix 2.

35 See Appendix 2.

(a) *Requests for Information – Election Proposals*

(i) *From the Minister:* The Minister, as the constitutionally appointed political and administrative head of the department, may request information held by the department in fulfilment of his (sic) role. In this respect employees are bound to carry out the directions and requests of their Minister and all reasonable efforts should be made to fulfil them. If a request is not clear, clarification should be sought immediately from the Minister's office. If employees have any doubts as to whether or not it is appropriate to respond to a request for information from the Minister, they should clear the matter through the permanent head (sic) or other senior officer.

(ii) *From Members of Parliament:* When a request for information is made directly to a department from a member of Parliament, the request is to be referred to the Minister's office unless there is a general approval by the Minister to release the information. If the request is cleared by the Minister's office, a reply should be sent through the Minister's office. The guidelines in paragraph (a) (i) apply equally to these communications.

(iii) Requests for information from other sources concerning election proposals should not be accepted.[36]"

Costing Policies of Political Parties

In the lead-up to the 1993 general election the Minister of Finance requested that the Treasury cost a range of policies announced by various political parties. On a complaint that political bias influenced the preparation of the costings a review was initiated by the State Services Commission. In March 1994 a report prepared by an independent person was published which found that although appropriate rules existed for costing the policies of political parties those rules had not been followed in several instances reviewed, and that the failure to follow rules was a serious matter. The review did not substantiate that the breaches of the rules were intentional or that the costings reflected a political bias.

In the light of this experience the rules have been reviewed and, in order to preserve the non-partisan, apolitical nature of the Public Service as well as its reputation, the following rules are confirmed:

Requests for costings of policies of any political party should be provided only on the written request of the Minister of Finance, or a Responsible Minister. A request from a member of a Minister's staff is not sufficient authority in itself.

36 See Appendix 2.

The chief executive is responsible for receiving any request, assigning any tasks, and seeing that the costings and any accompanying material conform with the rules, and that any response is released in writing (under the signature of the chief executive, or appropriate, authorised senior officer) to the Minister who made the request.

If a request for costings is made to a government department other than the Treasury, the request is to be referred to Treasury in the first instance. In any event the departments concerned need to be absolutely clear about the allocation of tasks to coordinate effort and resources, and work in close co-operation with each other. The procedures to be followed should be conveyed in writing.

All requests for costings of policies or proposals of political parties are to be documented in full, and all workings, correspondence, sources, procedures, and decisions recorded. Only those persons directly involved in the actual costings should be privy to the exercise.

Costings should be limited to factual data readily available in the Treasury or other departments and should contain:

- no additional commentary, such as the merits or otherwise of the policy or proposal
- no value judgments, or subjective assumptions
- no unsubstantiated or unreasonable technical assumptions – it should be clearly stated if the assumptions could lead to more than one possible costing –
- a clear explanation of all sources, and of any assumptions used.

If there is any doubt as to the nature or basis of any request, clarification must be sought from the Minister of Finance, or Responsible Minister concerned.

All responses should be drafted on the understanding that they will be discoverable on request under the Official Information Act 1982.

In some instance it may be appropriate to meet the Minister's request by having the costings done by a qualified expert outside the Public Service. If so, this should be made clear in reporting to the Minister concerned.

The convention between Ministers and departments in these circumstances is that Ministers will use the information in ways which do not compromise the apolitical standing of their departments, and thus, their ability to serve successive governments.

Retention of and Access to Records

Martin (1991) notes that smooth transfers of power and orderly government over the long term have been assisted by the so-called "doctrine of reticence". Although there have been exceptions, generally Ministers have not sought papers relating to the previous administration nor pressed public servants to comment on the advice given to Ministers of the outgoing government.

Where such a lawful request is made, the consent of those to whom the papers were originally addressed should, desirably, be sought.[37] However, public servants cannot refuse the request. Whilst Martin notes that these understandings do not of themselves constitute a convention, there does exist a convention on the handling of Cabinet papers dating from 1957, where successive Prime Ministers and Leaders of the Opposition have exchanged letters on the use of Cabinet records of previous governments.

The current *Cabinet Office Manual* states the convention as presently understood and in light of the provisions of the Official Information Act 1982.[38] There are two elements to the convention:

Access to Papers

Ministers of an incoming government have access to all Cabinet records on the understanding that their confidentiality will be respected. Ministers of the outgoing government are allowed access to papers that came before Cabinet or relevant Cabinet Committees while they were Ministers.

Use of Papers

Where Ministers of an incoming government are contemplating the release of any Cabinet records of a previous government, the following constraints apply:

- Ministers should consult the Secretary to the Cabinet who will treat such requests in the spirit and intent of the Official Information Act 1982, whether they were made under that Act or not.
- If there are no grounds to withhold, release of the material will be recommended to the Prime Minister, and the Leader or Leaders of the Opposition will be informed before release is made.
- If there appear to be reasonable grounds to withhold, the Secretary of the Cabinet will obtain and report the views of the Leader or Leaders of the Opposition to the Prime Minister with recommendations on the action to be taken.

37 Martin (1991) op cit p.32.

38 *Cabinet Office Manual* Ch.6/8 C1-11. See also Cabinet Office Circular CO(91)19 of 12 July 1991 *Access to Cabinet Records of Previous Governments.*

ADVOCACY

It is the convention that while officials may be called upon to explain particular policies, it is for Ministers alone to advocate or defend them.[39] This convention relies on the constitutional principle that Ministers are responsible for making decisions, and accountable to the electorate, through Parliament and the democratic processes, for their policy choices – officials are not. Ministers may rely on officials for information and advice. But, if the independence and party-political neutrality of officials is seen to be compromised in any way, trust in the Public Service and its ability to enhance continuity and good government, may be called into question.

A number of issues derive from this convention. First, public servants have a recognised role in assisting with the development as well as the implementation of policy. They therefore have a responsibility to:

- provide honest, impartial and comprehensive advice to Ministers, without allowing particular personal views or sectoral interests to bias their recommendations
- alert Ministers to the consequences of following particular policies, whether or not such advice accords with Ministers' views.

The duties here are essentially those of the provision of balanced, neutral and comprehensive advice which provides all relevant information, and makes explicit the options and trade-offs involved.[40]

The second issue lies in the implementation and administration of policy. Public servants have a duty to serve the government of the day. The final decision on policy is the prerogative of the Minister, or of Ministers collectively. The primary duty here is to carry out agreed policy faithfully and efficiently, neither by action nor inaction frustrating its intent.[41]

In some cases conflicts of duty may arise between statutory functions and Government or Ministerial policy. For instance, the Conservation Act 1987, section 6(b), provides that a function of the Department of Conservation is "to advocate the conservation of natural and historic resources generally ... " There may be circumstances where the advocacy role of the department may be at variance, or seem to be at variance, with its role to provide free and frank advice, and not to be seen to be publicly at odds with Government or Ministerial policy or positions. Each case must be considered on its merits, and any potential difficulties discussed first with the Minister or Ministers concerned.

39 *Cabinet Office Manual* Ch.2/6 G5.

40 These precepts are contained in the *Public Service Code of Conduct* (State Services Commission, Wellington 1990) pp 11-12. The responsibility to provide balanced policy advice, and not solely that which serves departmental interests or promotes particular "lines" or agendas also features in the Cabinet Office Manual Ch.4/4 A26.

41 *Public Service Code of Conduct* op cit pp.11-12.

In addition, the convention of political neutrality requires that public servants must act in such a way as to maintain the confidence both of current and future Ministers. Public servants are required to implement scrupulously the decisions of government. A clear line can and should be made between enthusiastic administration or explanation of government policies by public servants, and activities that might suggest the partisan advocacy of particular policies without undermining perceptions of the political neutrality and impartiality of officials.

CONTESTABILITY OF ADVICE

Ministers are entitled to require public servants to co-operate with other parties in providing, developing or assessing policy advice. For instance where private sector consultants are engaged to provide policy advice, or act as purchase advisers, public servants are expected, and ought to co-operate with them in a manner consistent with the collective interests of government.

If Ministers wish to involve their private staff, consultants or other parties in policy development or other areas of work which might otherwise be performed by their departments, a clear understanding needs to be established between the Minister and the chief executive. This is particularly so with respect to purchase advisers used by the Minister. Departmental officials should know the extent of the authority on which ministerial staff or others are speaking in order to ensure proper accountability for results and for financial requirements under the Public Finance Act 1989.[42]

Where no clear understanding or procedures are in place, public servants are entitled to seek written confirmation of any decision purporting to come from a Minister through a third party whether from a member of the Minister's own staff or not.[43]

42 *Cabinet Office Manual* Ch.2/6 G6.

43 Martin (1991) op cit p.39.

APPENDIX 1

Pertinent References to the Collective Interests of Government

CAB(91) M11/17 *Reporting Procedures*, Cabinet Office Circulars CO(91)32 *Amended Consultation Process for Cabinet and Cabinet Committee Submissions* and CO(91)25 *Reflecting the Collective Interests of Government in Performance Agreements between Ministers and Chief Executives*. See also Chief Executive *Performance Agreements - Guidelines & Proforma* 1993/94 (State Services Commission, Wellington 1993) and *A Guide to Corporate Planning and Annual Reporting* (State Services Commission, Wellington 1992).

For specific issues see:

State Sector Superannuation (CAB(92) M13/13); *Property Management* (Taskforce Property Management Guide, CO(91)21); *Purchasing* (PMs letter to CEs of 21 December 1990); *Computing* (CAB(92)M9/25, STA(91)M42/18), *Getting the Bits Right* (State Services Commission/PA Consultants 1992); *Payfixing* (SSC letter of delegation to CEs 18 November 1991), *SES* (CEO 89)(M12/2).

APPENDIX 2

SSC Guidelines for Handling Requests from Parliament

In the course of their duties public servants may be asked to provide information for members of Parliament, including of course, the Minister responsible for the different departments. Consistent with the principle of a politically neutral Public Service, rules, conventions, and procedures for handling such requests have been established over the years for the guidance of staff. These rules have been reviewed in consultation with the New Zealand Public Service Association and although not all staff will have occasion to refer to them they are likely to be of general interest and are set out below.

Comments On Election Proposals

The dividing line between clearly political concerns and the day-to-day business of Government is not always easy to determine. Nevertheless, whatever the nature of requests emanating from a Minister's office, particularly in the run-up to a general election, the following considerations should be borne in mind:

(a) Requests for Information – Election Proposals

(i) *From the Minister:* The Minister, as the constitutionally appointed political and administrative head of the department, may request information held by the department in fulfilment of his (sic) role. In this respect employees are bound to carry out the directions and requests of their Minister and all reasonable efforts should be made to fulfill them. If a request is not clear, clarification should be sought immediately from the Minister's office. If employees have any doubts as to whether or not it is appropriate to respond to a request for information from the Minister, they should clear the matter through the permanent head (sic) or other senior officer.

(ii) *From Members of Parliament:* When a request for information is made directly to a department from a member of Parliament, the request is to be referred to the Minister's office unless there is a general approval by the Minister to release the information. If the request is cleared by the Minister's office, a reply should be sent through the Minister's office. The guidelines in paragraph (a) (i) apply equally to these communications.

(iii) Requests for information from other sources concerning election proposals should not be accepted.

(b) Political Neutrality

Requests for information have been dealt with in (a) above. Giving comment or opinion on party/election proposals can be seen as being inconsistent with the role of a politically neutral Public Service. Where an employee feels that his or her Public Service ethic (in terms of political neutrality) may be compromised by a request to supply such comment or opinion, then controlling officers should respect the wishes of the employee. This should not reflect adversely on the staff member concerned and no reference to the matter is to be recorded.

Questions in the House

Employees are not expected as part of their official duties to draft questions to be asked by members of Parliament from either side of the House. That is entirely a political matter.

Draft replies to questions are to be prepared in the normal way, i.e., to enable the Minister to give concise, accurate, and informative replies.

Appearances Before Parliamentary Select Committees

Employees appearing before a parliamentary select committee are representing their Minister and attend for the purposes of explaining policy and providing factual information. If any members of the committee ask an employee for his or her opinion or view on a policy then the employee should invite the chairman of the committee to redirect the question to the Minister.

Attendance at Caucus Committees

Public servants are not responsible to caucus committees. These committees are nevertheless part of the parliamentary structure and it is not unusual for staff to be asked to attend. Employees requested to attend a Government caucus committee may do so only with the consent of the Minister and the concurrence of the permanent head.

Similarly, attendance at caucus committees of opposition parties requires the consent of the Minister and the concurrence of the permanent head.

If any points of concern arise which need further clarification, please contact the Commission's office.

(SSC 14/0/0)
21 October 1981

The Public Service and the Law

A paper in the guidance series 'Public Service Principles, Conventions and Practice'

STATE SERVICES COMMISSION

Te Komihana O Ngā Tari Kāwanatanga

First published in September 1995
by the State Services Commission, Wellington, New Zealand.

ISBN 0-478-08907-4

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INTRODUCTION

This paper is concerned with the law *as it is*. It does not purport to be anything more than an introduction to the subject matter and a guide to further study.

The Public Service has a unique place in New Zealand's constitution. It occupies a central position in the system of government of the country, and provides support for Ministers of the Crown and staff for the executive.

The Public Service has the potential to be a stabilising influence and a source of information and advice, through the collective knowledge of the law and the processes of government that transcend the terms of particular government administrations.

The first duty of a public servant is to the law. Public servants cannot accede to any request or proposal that would be outside the law, or contravene the law. This paper provides an overview of the legal framework within which public servants operate, and offers guidance to an appropriate appreciation of that framework.

THE CONSTITUTIONAL SETTING

The role of the Public Service, constitutionally, is to serve the Crown – the Crown being a term used to denote the functions of central government, including the representative of the Sovereign Head of State (the Governor-General), Ministers of the Crown, the Executive Council and government departments.

The executive powers of the Crown are exercised by Ministers who must be elected members of Parliament.

Public Service employees are therefore responsible for carrying out the *lawful* instructions of Ministers – who are themselves accountable ultimately to the electorate.

The key word here is lawful. Although the Public Service is responsible to Ministers, it is constrained to observe the democratic norms that govern executive action (i.e. Ministers and the Public Service).

These norms are:

- *the constitutional principles established under the "rule of law"*, namely that:
  - the powers of Ministers and officials must be authorised by law[1]

1 Refer to Joseph P A, (1993) p.183.

  - Ministers and officials are bound to act according to the law

- *the principles of natural justice* are developed by the courts through the process of judicial review and recognised in the New Zealand Bill of Rights Act 1990, section 27. The principle of "fairness" is sometimes used instead of the term "natural justice". For the administrator the exercise of "natural justice" means, in the words of Sir Robin Cooke, President of the Court of Appeal, acting "fairly, reasonably, and according to the law".

These principles are fundamental to democratic government. They provide a check against abuse by the Crown of its extensive powers and are embodied in the rights of individual citizens and groups to fair treatment and freedom from arbitrary decision making and rule. *The Constitutional Setting* in the guidance series also covers this issue.

For a discussion of the Treaty of Waitangi in the constitution of New Zealand refer to *The Public Service and the Treaty of Waitangi* in the guidance series.

THE LETTER AND THE SPIRIT OF THE LAW

Because of the government's involvement in both the administration and the reform of the law, the government (and the Public Service) must be scrupulous in complying with the letter and spirit of the law if respect for the system of government is to be preserved.

Under the process of judicial review (which is covered later in the paper), executive decisions can be challenged if they have been made outside the purpose of the primary legislation. In deciding what that purpose is the courts will look at the Act (or primary legislation) as a whole.

As part of their general duty to advise Ministers, officials should ensure that the attention of Ministers is drawn at all times to any conflicts between ministerial preferences or decisions and the law.

Where a Minister wishes to act in a manner that would be contrary to the law, Public Service employees have a duty to draw this to the attention of their chief executive. Then, it may also be appropriate to seek an opinion from any in-house legal advisers, the Crown Law Office and/or consult with the State Services Commissioner.

The chief executive should then inform the Minister of any legal impediment to action and suggest alternative and lawful means by which the Minister's objective might be achieved. In the light of the Minister's response, if there are still matters of serious concern, the issue may need to be determined by Cabinet, probably after reference to the Prime Minister.

Where an instruction is known to be illegal or unlawful the chief executive must decline to follow the instruction. The reasons for such a refusal should be stated in writing to the Minister concerned.[2] An unlawful instruction in these circumstances may be one which is prohibited by, or expressly against the law, or offends against laws. An illegal instruction may be contrary to the law, or made where no authority exists.

THE LAW

In exercising executive powers, the Public Service must act in accordance with domestic law, in particular:

- Primary (statute) and secondary (regulations)[3] legislation
- Case law.

It should also have regard to any international obligations or treaties to which New Zealand is a party.[4]

Legislation

It is basic constitutional law that Parliament is sovereign.[5] That is, Parliament alone has the power to make, amend and repeal statutes, and to impose or authorise taxes and the raising of loans or loan expenditure by the Crown.[6] (See also the paper in the guidance series *The Public Service and Parliament*.)

Bills are not law until enacted by Parliament, that is, until passed by the House of Representatives and assented to by the Governor-General. Ministers and officials may not act in a manner contrary to existing legislation. Care needs to be taken in this regard to ensure that changes to legislation are not acted upon improperly before the changes are actually made by Parliament. (See, for example, *Fitzgerald v Muldoon* (1976). In December 1975, the Prime Minister of the newly elected National Government announced that certain compulsory provisions in the New Zealand Superannuation Act 1974, would no longer be applied in advance of Parliament being assembled and repealing the provisions. The announcement was declared illegal – only Parliament has the right to make and repeal Acts of Parliament.)

2 Adapted from *Guidelines on Official Conduct for Commonwealth Public Servants*, Public Service Board, Canberra 1987. Refer also to *Cabinet Office Manual*, Ch.2/6 G6.

3 Usually, but not limited to regulations. There are other forms, such as Orders in Council, Orders, and Proclamations, that are not regulations. Secondary law is sometimes referred to as "delegated", or "subordinated" law.

4 In addition, there is a growing use of so-called "tertiary" legislation, such as codes of practice, and rules within public administration.

5 The Bill of Rights 1688, Article 1, provides that "The pretended power of suspending of laws or the execution of laws by regal authority without consent of Parliament is illegal."

6 Constitution Act 1986, ss 15 & 22. However, those powers (s 22) may from time to time be delegated "under an Act", for instance, Public Finance Act, 1989, s 47.

In certain circumstances, however, administrative and policy decisions may, and ought to, be made in anticipation of new legislation in order to ensure an orderly transition to the new legislation. An example of legitimate anticipatory action is the setting up of the establishment board for a body to be determined by future statute.

Care needs to be taken and legal advice sought as there can be grey areas, particularly in relation to the need to comply with existing legislation until it is repealed and until the new legislation comes into effect.

Laws enacted by Parliament are known as *primary legislation*

While Parliament has full powers to make law, Parliament may also delegate or confer this power on other bodies to make law by way of regulation.

Regulations are referred to as *secondary or delegated legislation*

The effective distinction, in action, between *primary* and *secondary* legislation can be generally described as the difference between principle and detail, or between policy and its detailed implementation.

The provisions contained in regulations are subject to judicial review on the grounds that they may exceed the statutory authority for the making of regulations as contained in the primary legislation (primary legislation is not, in New Zealand, subject to review on this ground). They are also subject to review on the legal tests of, for instance, reasonableness and repugnancy. The Regulations Review Committee plays an important role both in the scrutiny of regulations, and in providing effective remedy.

It is important for Public Service employees to be very familiar with legislation affecting their areas of responsibility and decision making. This includes legislation addressing matters specific to their department as well as more general legislation that applies across the service, such as the Public Finance Act 1989.

The main pieces of general legislation affecting the Public Service as a whole are listed in Appendix 1, together with a brief outline of the essential elements of the legislation concerned.

In addition to legislation itself, Public Service employees should also be aware of related case law, that is, how the courts have interpreted, or are likely to interpret, statutory provisions.

Case Law

Case law comprises the principles and rules of law developed by the courts (common law and equity) and includes rulings on the interpretation of legislation. An important part of case law affecting the Public Service is the decisions of the courts relating to judicial review.

Statutory Interpretation

In interpreting legislation the courts look at the purpose of the primary legislation, and may refer to the secondary legislation.

In determining the meaning of statutory provisions requiring interpretation, the courts are required to examine specific words having regard to the purpose of the Act (Acts Interpretation Act 1924, section (5)(j)).

There is now less need for the courts to resort to certain common law presumptions designed for the protection of basic rights in the light of the provisions contained in the New Zealand Bill of Rights Act 1990. Under section 6 of that Act whenever an enactment can be given meaning that is inconsistent with the rights and freedoms contained in the Bill of Rights Act 1990, that meaning (in the Bill of Rights Act 1990) shall be preferred to any other meaning.

A number of statutes make reference to the Treaty of Waitangi or to the principles of the Treaty. A list of the relevant statutes and an outline of the associated case law is contained in *The Public Service and the Treaty of Waitangi*in the guidance series.

The courts also uphold the principles of legal policy, that is, that *adverse* laws should not hold retrospectively, and that individual liberty and security should not be interfered with by exercise of State power *except under clear authority of law*

Judicial Review

Most actions of the Public Service are capable of being reviewed by the courts through the process of judicial review. The principal grounds for review – illegality, unreasonableness and procedural unfairness – are dealt with in this paper under the section *External and Independent Review of Executive Action*

International Law

The Public Service also needs to take into account when making decisions any international treaties or covenants to which New Zealand is a party.

Although international law cannot override domestic law, the courts presume that, *unless clearly and expressly provided for in primary legislation*[7] Parliament does not intend to legislate in breach of international law or treaty obligations,[8] including the Treaty of Waitangi.

7 This is a canon of statutory interpretation; not a test of all executive action.

8 Joseph, P A (1993) p.453.

EXTERNAL AND INDEPENDENT REVIEW OF EXECUTIVE ACTION

Executive action is subject to external and independent review by the courts (judicial review), by the Officers of Parliament (the Ombudsman and the Parliamentary Commissioner for the Environment), by the Privacy Commissioner, and by the Controller and Auditor-General. Parliamentary select committees also play an increasingly important part in the process.

- As part of that process, the activities of government departments are subject to legitimate and ongoing scrutiny by Officers of Parliament (the Ombudsman, and the Parliamentary Commissioner for the Environment) and its committees, the Controller and Auditor-General and the Privacy Commissioner, Ministers, the courts, the Human Rights Commission, the Race Relations Conciliator, various "watchdogs", the media, interested lobby groups and members of the public. The House audit committees are also an important external check.

Judicial Review

Judicial review is the review by a judge of the High Court (or on specific employment matters, by a judge of the Employment Court) of almost any decision made by a public official affecting individual interests. The purpose of judicial review is to help define the principles governing public administration, and safeguard individual interests against unreasonable administrative action *taken without following proper procedures*.

Judicial review is not the same as an appeal. It is concerned with the *process* by which a decision is made and *not the merits* or otherwise of the ultimate decision. The principal grounds of review are illegality (acting outside the scope of the power conferred), unreasonableness, and unfairness (both procedural and substantive or actual).

A brief explanation of these grounds follows. The Crown Law Office publication *The Judge Over Your Shoulder* (and from which the following material has been summarised) provides a fuller discussion of the issues involved. It also provides guidance on preparing recommendations (including a checklist) and the adequate documentation of decisions.

Illegality

There are a number of bases upon which the court might find that actions or decisions have been made illegally. Decision makers act outside the scope of their power if a decision:

- is made for an improper purpose (one not contemplated by the legislation) or outside the purpose of the primary legislation, or secondary legislation

- fails to take into account relevant matters or, conversely, takes into account matters which are irrelevant or to which regard should not be had
- is influenced by some factual error.

Or if a decision maker:

- applies rigidly a pre-determined policy without regard to the particular merits of the case
- acts under dictation from someone else without exercising the degree of independence the office may require
- has delegated a power invalidly that they ought to exercise to another person, or is acting pursuant to an invalid delegation.

Unreasonableness

Unreasonable decisions are those which no sensible decision maker, acting with due appreciation of their responsibilities, would have arrived at. A classic example often cited is the dismissal of a teacher solely because she had red hair.

In practice the courts very rarely make a finding of unreasonableness. They are more likely to find that the decision maker has taken into account an irrelevant consideration or failed to take into account a relevant consideration or otherwise has asked the wrong questions. Where it is not clear what questions the decision maker has addressed, the courts may say that they must have addressed the wrong questions because if they had addressed the right questions and still reached the same conclusion the decision would have been "unreasonable".

Procedural Unfairness

The basis for a review under this ground is that the procedures followed are unfair and breach the rules of natural justice.

The two main principles of natural justice are that the parties are given adequate notice and opportunity to make representations and that the decision maker be disinterested and unbiased. Where individual interests are affected, there is a duty to disclose all relevant information and to enable the person affected to correct any material at issue. The importance of consultation and the consultation process are discussed in *The Public Service and the Public* published in the guidance series.

Another form of procedural unfairness is bias. Here it is the appearance or suspicion of bias that counts. Generally speaking, a decision maker *must not have*

- a direct or other financial interest in the outcome of the decision
- some relationship to a party or witness
- any personal prejudice or attitude towards a party or a party's case
- pre-determined the issue.

For instance, an appearance that "friendly terms" had been secured could suggest bias.

The duty to act fairly may also include an obligation to act consistently, especially where there has been some previous contract or representation or legitimate expectation.

Finally the court will take a broad view of fairness. That is, even when the decision making process is procedurally correct, the court will look at the fairness of the case as a whole and may find grounds for "substantive unfairness".

Officers of Parliament

The Officers of Parliament are the Parliamentary Commissioner for the Environment, and the Ombudsman. They have been created by Parliament to provide a check on the use of power by the Executive. The Controller and Auditor-General is also designated an Officer under Standing Orders.

The functions of the Parliamentary Commissioner for the Environment are to:

- review the "systems of agencies and processes" established by government to manage physical and natural resources
- investigate the effectiveness of environmental planning and management carried out by public authorities and advise them on any remedial action to take
- investigate any matter adversely affecting the environment.

The Parliamentary Commissioner's findings may be reported to the House of Representatives.

The introduction of the Ombudsman in 1962 was a major innovation in bringing the public sector under greater scrutiny. As the first Ombudsman, Sir Guy Powles, noted at the time: "The Ombudsman is Parliament's man – put there for the protection of the individual."

An Ombudsman's[9] role is to investigate complaints against decisions or recommendations made by central and local government agencies, and to make recommendations on those complaints and also on requests referred to them under the Official Information Act 1982.

The Office provides an informal and effective means of investigating complaints through its powers of reporting and making recommendations to Ministers. Because of its minimal cost and informal manner of review, it provides a more accessible alternative to complainants than judicial review through the courts.

The Ombudsman may review the merits of administrative decisions as well as the process of decision making, and may report and make recommendations where an administrative decision has breached principles that might be taken into account in a judicial review. Although an Ombudsman has no power to reverse administrative decisions, they are empowered to suggest remedial action to departments and, if necessary, to take matters of concern to Ministers. If, within a reasonable time, no action has been taken which seems to the Ombudsman to be adequate and appropriate, they may send a copy of the report to the Prime Minister, and thereafter to the House of Representatives as they think fit.

Controller and Auditor-General

The Audit Department is part of the Public Service, and is an Office of Parliament for the purposes of its appropriations.[10]

Essentially, the role of the Controller and Auditor-General is to monitor the lawful and efficient use of public monies and financial accountability in the public sector and to report findings to Parliament. This is done principally in four ways through:

- the annual financial audits and audits of statements of service performance
- special studies and investigations (otherwise known as "value for money" audits or performance audits)
- the authorisation of release of public money, in the Auditor-General's capacity as Controller acting on behalf of Parliament. The Controller must be satisfied that the release of funds is in compliance with the law, that is, there is a warrant signed by the Governor-General, there is an appropriation and the money is to be applied lawfully. The Controller has power to prevent the release of monies to the Crown if the above criteria have not been met, and has done so on occasions.[11]

9 The Ombudsmen Act 1975 provides for a Chief Ombudsman and more than one Ombudsman. Since 1983 the work of the Ombudsman increased as a result of the enactment of official information legislation.

10 Public Finance Act 1989, s.21 (1).

11 See Appendix 2, for a list of legal principles to be considered by all departments in determining the legality of expenditure.

- providing briefing assistance to select committees for Estimates and financial reviews. As a matter of practice the Office of the Auditor-General takes care to ensure that information provided to select committees is information of which the executive (that is, the chief executive and appropriate Minister) is already aware.

Privacy Commissioner

An important function of the Commissioner is to investigate any action by any public or private sector agency that is, or appears to be, an interference with the privacy of the individual, and to mediate to try to achieve a settlement.

The Privacy Commissioner also has powers to issue codes of practice in respect of particular sectors or particular types of personal information.

The Privacy Act 1993 provides for access to personal information by the individual concerned. (The provisions relating to access to personal information under the Official Information Act 1982 have been subsumed in the Privacy Act 1993. The rights of access by a body corporate to personal information under the Official Information Act 1982 remain.)

There is a degree of concurrent jurisdiction with the Ombudsman in respect of official information complaints. The Act therefore provides for the Commissioner to consult with the Chief Ombudsman on how to deal most appropriately with such complaints.

STATUTORY RESPONSIBILITIES

Some Public Service positions have statutory responsibilities that are required to be exercised independently (or in some cases semi-independently) of Ministers and other officials. These positions are often referred to as *statutory officers*.[12]

Although statutory officers must act independently in the exercise of their special statutory duties and functions, as far as administrative matters go they are like other Public Service employees and subject to direction by Ministers, the chief executive, or other officials of their department.

The decisions of statutory officers may be the subject of an appeal, either to a court or to a specialist tribunal if statutory provision has been made for an appeal. In such cases, the court or specialist tribunal may look at the merits of the administrative decision.

As with the rest of the Public Service, statutory officers' decisions are subject to judicial review and to investigations by the Ombudsman. However, where an alternative appeal body exists, the Ombudsman may decide not to investigate.

12 Examples include, The Public Trustee, the Comptroller and Collector of Customs, the Registrar of Electors, and the Registrar-General of Lands. In the first two examples the holders are also chief executives.

CONDUCT OF CROWN LEGAL BUSINESS

Cabinet (1993) issued *Cabinet Directions for the Conduct of Crown Legal Business*. These directions are contained in the *Cabinet Office Manual*, Chapter 5/15, Section I, and include instructions on:

- the avenues of legal advice that are available to Ministers and to departments (including directions on when departments are required to refer matters to the Solicitor-General)
- appealing court or tribunal decisions
- legal action being taken against an employee
- Crown ownership of Crown Law Office opinions.

EXAMPLES OF THE EFFECT OF THE LAW ON PUBLIC SERVICE DECISION MAKING

In this section some examples are given of situations where Public Service employees need to have regard to the law and how this impacts on their decision making.

Example 1:

The Primacy of Statute over Administrative Arrangements

A chief executive or senior manager may be required in terms of his or her performance agreement to implement certain policies where there may be some doubt whether or not there is any Parliamentary appropriation for the year.

Question:

How should an employee react to any possible difference between the performance agreement (or administrative arrangement) and the provisions relating to the appropriation of public monies?

Answer:

What government can spend is set out in the annual Appropriation Acts and associated Estimates.

Unappropriated expenditure and costs may only be incurred in one of two ways:

- in terms of section 12 of the Public Finance Act 1989 (i.e. limited expenditure and costs for the last three months of the financial year)

- section 13 of the Public Finance Act 1989, (national emergencies).

Assuming sections 12 and 13 of the Public Finance Act 1989 do not apply, the employee must decline to implement those policies in the performance agreement for which there is no appropriation. This is because a performance agreement is only an administrative arrangement and does not have the power to override statute. Any action inconsistent with statute (in this case the Appropriation Act) is unlawful and may not therefore be carried out.[13]

Example 2: Validity of Appointments

The situation may arise where a department has to arrange the appointment of a person to a position where the procedures for appointment to the position are specified in statute. The procedures for such appointments vary from statute to statute. For example, in some cases appointments are made by the Governor-General, others by the Governor-General by Order in Council and others still by the Minister.

Question:

What are the effects if the procedures as specified in statute are not strictly followed? What would happen, for example, if the Governor-General confirmed an appointment instead of the Governor-General by Order in Council as laid down in the relevant statute?

Answer:

If the correct procedures are not strictly followed, there is a real risk that the appointment could be held to be invalid. Furthermore, any decisions made by the appointee may also be held to be invalid as he or she will have acted pursuant to an invalid delegation of powers. (See section on *Illegality,* in *Judicial Review* page 6.)

Example 3: Scope for Acting in Anticipation of New Legislation

The situation may arise where a new public authority is created under new legislation to replace an existing authority acting under existing legislation but where the new legislation has been enacted to come into force at some later date. Until that date the new public authority has no formal legal basis. The existing public authority will continue to be responsible for its existing statutory responsibilities and will function until the existing legislation is replaced by the new legislation.[14]

13 See Appendix 2.

14 Regulations and Orders in Council must be made after the assent to the empowering Act has been confirmed.

Question:

To what extent can action be taken to prepare for the new organisation prior to the new legislation taking effect, for example, decisions on organisation, appointments, company name, printed forms, and the like?

Answer:

The important principle to remember here is the need to comply with the existing legislation until it is repealed.

Generally speaking, planning to allow for the new organisation to begin its operations on the date specified in the legislation can be undertaken prior to the new legislation coming into effect. The new organisation will have limited legal authority in the period between the passing of the legislation and the date that it comes into effect. Its legal powers are limited to the exercise of those powers that may be necessary or expedient for the purpose of bringing the Act into operation on its commencement date (Acts Interpretation Act 1924, section 12).

A common practice is to set up, at an early stage and often in advance of any legislation, an establishment unit to undertake the necessary planning, with staff seconded from another department or other public authority or appointed on contract by Crown prerogative.

In this planning phase, there are a number of administrative arrangements not dependent upon the new legislation being in place that can be made in advance, such as obtaining a company name, designing and printing new letterheads and forms, and advertising positions. An establishment unit may also assist with the preparation of the new legislation. It is important during this phase that the establishment unit not take any actions that could be seen to be inconsistent with or prejudging the outcome of the proposed legislation. All matters should be properly authorised. This may mean obtaining the approval of the Minister to significant matters.

Apart from the areas covered in the preceding paragraph, it is not lawful for the new organisation to enter into any other legal commitments until the legislation comes into effect. The exact limitations of what would be "necessary or expedient" will vary according to the circumstances. The appointment of a board, and of the chief executive designate and other key staff to take up duties before the new legislation comes into effect would generally be permitted.

Care needs to be taken and legal advice sought, as there can be a number of grey areas during this transitional period. Whatever action is taken it is important to ensure that it is legally valid and cannot be negated or nullified.

CONCLUSION

In compiling this paper, the intention has been to draw to the attention of Public Service employees a number of aspects of their position and responsibilities. In doing so, this paper does not pretend to offer a complete encyclopaedia of the numerous statutory and other functions of the Public Service. Rather it conveys the message that public servants need to be aware of the legal and administrative environment in which they function.

For further reading a short reference list has been provided.

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APPENDIX 1

Acts applying to the whole of the Public Service

State Sector Act 1988

As set out in the Long Title to the State Sector Act 1988, the main purposes of the Act in respect of the State services are to:

- ensure that employees are imbued with the spirit of service to the community
- promote efficiency
- ensure responsible management
- maintain appropriate standards of integrity and conduct among employees
- ensure that every employer in the State services is a good employer
- promote equal employment opportunities
- provide for the negotiation of conditions of employment.

The State Sector Act 1988:

- creates the statutory positions of State Services Commissioner and Deputy State Services Commissioner
- details the appointment procedures for chief executives in the Public Service
- provides for a Senior Executive Service
- details the procedures to be followed in determining the conditions of employment of chief executives, members of the Senior Executive Service and other employees of the Public Service
- contains personnel provisions to apply across the Public Service
- lists the departments that comprise the Public Service.

Each chief executive is responsible to the appropriate Minister for:

- carrying out the functions and duties of the department (including those imposed by Act or by government policy)
- providing advice to Ministers
- the good conduct of the department
- the efficient, effective and economical management of the activities of the department (s32).

The Act devolves most employer responsibilities to individual chief executives. By and large the same bargaining and pay-fixing arrangements that apply to the private sector, apply also in the Public Service.

The personnel responsibilities of chief executives, include "good employer" and EEO responsibilities, and the duty to act independently of Ministers in "matters relating to decisions on individual employees" (s33, ss56-63).

The Act details the statutory responsibilities of the State Services Commissioner in respect of:

- the appointment and review of performance of chief executives
- the constitution and management of the Senior Executive Service
- public Service pay-fixing and personnel management
- advice to government on machinery of government issues.

Section 57 provides for the issuing of a code of conduct by the Commissioner covering minimum standards of integrity and conduct in the Public Service. The first such Code of Conduct was issued in 1990.

Public Finance Act 1989

The stated purposes of this Act are to:

- provide a framework for Parliamentary scrutiny of the government's management of Crown assets and liabilities
- establish lines of responsibility and financial management incentives for the effective and efficient use of public financial resources
- specify financial reporting requirements
- safeguard public assets.

The Act establishes controls over the financial activity of government. This includes prohibiting the spending of public money except in terms of an appropriation or as otherwise provided for in terms of section 12 and section 13 (cases of national emergency).[15]

The Act details the external reporting requirements of Officers of Parliament, Crown entities, and departments to Parliament.

It requires departments to specify in the Estimates their objectives and proposed expenditure for the year so as to enable decisions to be made on how best to achieve government outcomes (e.g. by purchasing services from the public or private sector).

15 Enacted by sections 13 and 14 of Public Finance Amendment Act 1992, which amended the principal Act.

Departments are required to report annually on their achievement against these objectives and proposed expenditure.

The functions, duties and powers of the Controller and Auditor-General and the Audit Office are set out in Part II of the Public Finance Act 1977 and Sections 30, 38 and 43 of the Public Finance Act 1989.

Environment Act 1986

The Long Title of the Environment Act 1986 states that it is an Act to:

- provide for the establishment of the Office of the Parliamentary Commissioner for the Environment
- provide for the establishment of the Ministry for the Environment
- ensure that, in the management of natural and physical resources, full and balanced account is taken of:
    - i) the intrinsic value of ecosystems
    - ii) all values which are placed by individuals and groups on the quality of the environment
    - iii) the principles of the Treaty of Waitangi
    - iv) the sustainability of natural and physical resources
    - v) the needs of future generations.

In carrying out these responsibilities, the Commissioner may review government processes and systems, and the environmental planning and management processes used by public authorities, as well as any other matter adversely affecting the environment.

The Commissioner's findings may be reported to Parliament.

Ombudsmen Act 1975

This Act provides for the office and functions of the Ombudsman.

Under the Act the function of the Ombudsman is to " investigate any decision or recommendation made, or any act done or omitted . . . relating to a matter of administration and affecting any person or body of persons in his or its personal capacity."

This includes any action by government departments and any other organisation as set out in the Schedules to the Act.

The Ombudsman may report and make recommendations on complaints – in the first instance to the department concerned. Following this, and if

no action takes place within a reasonable time, the Ombudsman may send a report to the Prime Minister and Parliament.

Privacy Act 1993

The main purposes of the Privacy Act 1993 are to:

- establish principles governing the collection, use and disclosure of personal information, and the access by individuals to personal information concerning them
- provide for the appointment of a Privacy Commissioner to investigate complaints about interferences with individual privacy. The Privacy Commissioner is not an Officer of Parliament.

The Act establishes 12 Information Privacy Principles governing:

- the collection of information
- the source of personal information
- the manner of collection
- the storage and security of information
- access to personal information
- correction of personal information
- accuracy of data
- length of storage
- limits on use and disclosure
- use of unique identifiers.

The Office of the Privacy Commissioner is an independent Crown entity, with the right to report to the Prime Minister on matters affecting the privacy of the individual. In addition to the investigation of complaints, the Commissioner has a number of other functions including monitoring legislation, making statements on a range of privacy issues and issuing codes of practice.

The Act applies to both private and public sector agencies.

Official Information Act 1982

The main purposes of this Act are to:

- make official information more freely available in order to facilitate better public participation in "the making and administration of laws and policies" and promote executive accountability (s4a)
- provide for proper access to official information (s4b)
- protect official information to the extent consistent with the public interest and the preservation of personal privacy (s4c).

The main principle governing release of official information is that "information shall be made available unless there is good reason for withholding it". The grounds or "conclusive reasons for withholding official information" are defined in sections 6 and 9 of the Act.

The Act provides for lawful access to information held by government departments and certain other agencies of State and establishes definitions, procedures and criteria for the release of official information, as well as providing mechanisms for the review of decisions to withhold information that has been requested.

With the enactment of the Privacy Act 1993, requests made by or on behalf of a *natural person* for access to information about that person now fall within the provisions of the Privacy Act 1993.

New Zealand Bill of Rights Act 1990

The purpose of this Act is to affirm, protect and promote human rights and fundamental freedoms in New Zealand and to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

The Act affirms the following rights to:

- life and security of the person not to be deprived of life or subjected to torture or medical experimentation, and the like
- democratic and civil rights to vote, to freedom of thought, conscience, religion and belief, freedom of expression, freedom of assembly and association, freedom of movement
- freedom from discrimination on ground of colour, race, ethnic or national origins, sex, marital status, religious or ethical beliefs; rights of minorities
- be secure against unreasonable search or seizure, arbitrary arrest or detention; minimum standards of criminal procedure; retroactive penalties and double jeopardy
- observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of a person's rights, obligations or interests protected or recognised by law; right to apply in accordance with the law for judicial review of determination; right to bring proceedings against the Crown.

Human Rights Act 1993

This Act consolidates and amends the provisions of the Race Relations Act 1971, and the Human Rights Commission Act, 1977. The Human Rights Act 1993 came into force on 1 February 1994.

The purpose of this Act is to establish a Human Rights Commission and to promote the advancement of human rights in New Zealand in accordance with the UN International Covenants on Human Rights.

Under this Act it is unlawful to discriminate on the grounds of sex, religious belief, ethical belief, colour, race, ethnic or national origin, disability, age, political opinion, employment status, marital status, family status, and sexual orientation – in each case as defined in the legislation – in matters of access to public places, vehicles, and facilities; provision of goods and services; education; and accommodation.

Employment Contracts Act 1991

The Employment Contracts Act 1991 establishes the industrial relations framework for employment in New Zealand. By and large the provisions of the Employment Contracts Act 1991 apply equally in both the private and public sectors.

A framework is established under the Act for the negotiation of employment contracts. Matters such as determining the authority to represent employees or employers in negotiations, the right of access to employees by bargaining agents, and the process for determining how a settlement is to be ratified, all form a part of the framework. Beyond these process matters there is a wide freedom to negotiate virtually any matters for inclusion in the employment contract itself.

The Act provides for freedom of association and allows employees and employers to determine who should represent their interests in relation to employment issues. It makes membership of employee organisations/unions voluntary and outlaws compulsory membership or non-membership or discrimination on these grounds.

Under the Act, the number, type (individual or collective) and mix of employment contracts to apply in a particular workplace are negotiable. The Act places considerable emphasis on the sanctity of the arrangements made between the employees and the employer. The terms of any contract can only be varied by mutual agreement during the term of the contract. Strikes or lockouts are unlawful during the term of a collective employment contract except on the limited grounds of safety or health, again reinforcing the sanctity of the contractual arrangements. Strikes and lockouts are also unlawful where they are concerned with the issue of whether a collective employment contract will bind more than one employer.

The Act requires all employment contracts to provide effective procedures for the settlement of personal grievances, and disputes about interpretation, application, or operation of the contract.

The Act also prescribes the jurisdictions, powers and functions of the Employment Tribunal and the Employment Court. These are specialist institutions with exclusive jurisdiction to deal with employment matters. The Employment Tribunal has both a mediation and an adjudication role, with the emphasis being on providing a speedy, fair and just resolution of employment issues. The Employment Court provides a formal means of resolving issues of a legal nature or those matters that cannot be resolved by the Tribunal.

APPENDIX 2

Legal Principles

Extract from Report of the Controller and Auditor-General on The Audit of the Crown and Government Departments for the Year Ended 30 June 1990, pp 21-22.

Legal Principles

From the Solicitor-General's advice, the following legal principles applying to departmental activities can be drawn:

1. The lawful authority for an activity may depend upon statute or upon the Crown's inherent legal rights, or perhaps upon some combination of both. Where there is a statute affecting a department's activities, it is a matter of legal interpretation whether, and to what extent, the statute modifies, or takes the place of, or prohibits, the exercise by the Crown of rights otherwise available to it.

2. The Minister must have the power to deal with the subject matter of any contract. In the absence of specific legislation, this is the power of a natural person. If there is specific legislation, the power may be limited to what the legislation prescribes.

3. Departments are not legal entities separate from the Crown and have no legal capacity in their own right, nor do departments have the legal capacity to acquire and hold property. The Crown, acting through the Minister, is to be the first party in any ownership contract, not the department.

4. Executive policy decisions or directives cannot be interpreted or implemented without regard for the department's legal ability to do so. If there is a conflict, the law must prevail.

5. Officers entering into contracts must be able to demonstrate that they have *formal delegated* power to do so if they are to bind the Crown in any contract.

6. The Crown has no right to contract in anticipation of a power to be conferred by statute when that power is not otherwise available to it.

7. All public money, by whomever it is collected, is to be lodged in a departmental or Crown bank account, unless there is express statutory exception.

8. All public money spent must be appropriated by an Act of Parliament.

Conclusion

The power to withhold funding through the Controller function, although rarely invoked, has extremely serious consequences for a department. I advise all Ministers and Chief Executives to thoroughly familiarise themselves with the principles set out in this article and the terms of the particular legislation governing the departments. Notwithstanding the imperatives for engaging upon an activity, and the fact that it is undertaken with the best of intentions . . . every activity should be closely scrutinised to ensure compliance with these principles of lawful authority.

The Public Service and the Public

A paper in the guidance series 'Public Service Principles, Conventions and Practice'

STATE SERVICES COMMISSION
Te Komihana O Ngā Tari Kāwanatanga

First published in September 1995
by the State Services Commission, Wellington, New Zealand.

ISBN 0-478-08908-2

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"For the administration of the government, like the office of a trustee, must be conducted for the benefit of those entrusted to one's care, not for those to whom it is entrusted."

Cicero, De Officiis. Bk.i, ch.25, s.85

INTRODUCTION[1]

There is a long standing perception of public servants as servants of the public. This is implicit in the title **Public Service** introduced in the Public Service Act 1912, and retained in the State Sector Act 1988. The perception is reinforced by reference in the objectives of both the State Services Act 1962 and the State Sector Act 1988 that Public Service employees be imbued with a "spirit of service to the community". But that is not the whole story.

The public servant gives expression to the "the spirit of service to the community" in two main ways:

- by being responsive to Ministers, and to the public
- by acting responsibly, that is, by acting in the *public interest*.[2]

The notion of public interest is the substance for which Public Service officials are responsible, and persists beyond the terms of individual administrations. Public employees cannot be indifferent to the public interest but must be careful not to determine what constitutes the public interest. It means, however, that in everything that public servants do in the course of their prime duty to the government of the day through Ministers of the Crown, they will be guided by a disinterested concern for, and appreciation of, the public good.

The Public Service is an integral and enduring part of executive government, and, as such, public servants are constitutionally servants of the Crown. They fulfil this role as servants at the direction of the government of the day through a Responsible Minister. Public servants are paid solely from "the public purse" and should not, without prior approval (and then only if no conflicts of interest are apparent) accept payment for their services from any other source. Their loyalty must be undivided. Upon taking office, at whatever level, public servants assume a fiduciary duty or stewardship role. That is, in carrying out their various duties and responsibilities, they are entrusted with managing funds and resources with all due care, impairing neither the public estate, nor the common good. This fiduciary trust is an important element in the complex web of democratic accountability.

The twin notions of service to the Crown, and trusteeship or stewardship of public interests and resources, are balanced by various duties or obligations (sometimes referred to as loyalties). Public servants, first and foremost, have a duty to the law – to uphold the law, and the principles of justice and

1 This paper should be read as a companion to *The Public Service and the Treaty of Waitangi* in the guidance series.

2 See also the section on *The Relationship of the Public Service to the Public*, page 6.

fairness according to the law. (Ministers of the Crown also have that duty.) But, this duty to the law must be understood in the context of the principal duty of public servants to their Minister, and to the government of the day. That hierarchical accountability shapes and pervades the everyday activities of public servants.

Public servants have a principal, though not exclusive duty to a Responsible Minister and the government of the day. In some extreme cases the onus of service may conflict with duty to the law. Such tensions are not easily resolved. In some instances the solution may seem clear-cut – in others, not determined easily. Whatever the case the decisions that are made will involve the application of ethical standards and values. They will necessitate understanding what ought to be done in a given situation. The decision will involve the exercise of integrity.

It is worth reflecting on a recent US Federal Government publication on ethical conduct:

"Integrity requires of you the courage to insist in what you believe to be right and to refuse to go along with what you believe to be ethically wrong. You can never be sure what is right or what is wrong, however, until you have listened to the views of others, weighed the relevant interests and values, and taken the trouble to understand the facts. All hard questions involve making choices between competing claims. These claims involve loyalty to one's organisation, respect for authority, recognition of the policy role of the political appointee,[3] regard for technical expertise in the institutional memory, respect for the public's right to know, and sensitivity to the needs of confidentiality. How good a public servant you are depends on how well, and how honourably you balance these claims."

The duties to the law, and to the government of the day through the Minister are supplemented by other responsibilities or obligations. These include responsibilities or obligations to:

- the public interest
- the public
- Maori aspirations, and the Treaty of Waitangi principles
- groups outside the Public Service
- efficiency
- equity and justice
- colleagues and former public servants
- one's profession.[4]

3 This has particular meaning in the US where all the top layers of government more or less are replaced with each successive administration and are therefore regarded as political appointments.

4 For an account of such duties refer to Martin J. (1991).

This paper examines the responsibility of the Public Service to the public and makes a distinction between that and the more specific duty to a Minister of the Crown and to the government of the day. It is recognised that these subjects will always attract debate and discussion, and that the balance between duties, obligations, and responsibilities is not found by the application of some simple formula. Yet, it is important that the issues, and the weightings given to each, are exposed to scrutiny and informed discussion. This paper, it is hoped, will both stimulate such discussion, and offer guidance in striking the right balance.

THE RELATIONSHIP OF THE PUBLIC SERVICE TO THE CROWN AND MINISTERS

Constitutionally, the role of the Public Service is to serve the Crown. The term Crown is used to denote the organs of central government, comprising the representative of the Sovereign Head of State (represented in New Zealand by the Governor-General), Ministers of the Crown, the Executive Council and government departments.

The executive powers of the Crown are exercised by Ministers who must be elected members of Parliament.

The Public Service is responsible to the appropriate Minister, through chief executives, for:

"(a) The carrying out of the functions and duties of the Department (including those imposed by Act or by policies of the Government); and

(b) The tendering of advice to the appropriate Minister and other Ministers of the Crown; and

(c) The general conduct of the Department; and

(d) The efficient, effective, and economical management of the activities of the Department."[5]

Although the Public Service is responsible to Ministers, it is constrained in the *way or manner* in which it is able to give effect to Ministerial directions. It must take account of the constitutional principles derived from the *rule of law*, namely that:

- the powers of Ministers and officials must be consistent with the law

5 State Sector Act 1988, s32.

- Ministers and officials alike are bound to act according to the law (both statute and common law, including the prerogative powers exercised by the Governor-General).

The second of these includes acting in accordance with:

- the principles of natural justice as developed by the courts through the process of judicial review and recognised in the New Zealand Bill of Rights Act 1990, section 27.

In this context the term "natural justice" has come to mean that "the administrator must act fairly, reasonably, and according to law", to quote from Sir Robin Cooke, President of the Court of Appeal.

These principles are fundamental to democratic government.

Their proper application and observance provide a check against abuse by the Crown of its extensive powers and are embodied in the various rights of individual citizens and groups to fair treatment and freedom from arbitrary decision making.

Executive action and the activities of government departments are subject to external and independent review by the courts (judicial review), by the Officers of Parliament (the Ombudsman and the Parliamentary Commissioner for the Environment), by the Privacy Commissioner, the Human Rights Commissioner, the Race Relations Conciliator, and by the Controller and Auditor-General. Parliamentary select committees also play an increasingly important part. The news media, interested lobby groups, and members of the public all have a role in ensuring that governments and their departments act in the public interest.

THE RELATIONSHIP OF THE PUBLIC SERVICE TO THE PUBLIC

Public Service actions and decisions affecting the public should be guided by principles, and by agreed standards of performance such as those provided for in departmental plans, charters, annual reports, purchase agreements, and so forth. These principles and standards are the objective bases from which the public may judge the adequacy of public administration, and the trusteeship role that public servants assume.

The public is right to consider that the Public Service has an obligation to provide high level services and advice to governments that will take account of their collective interests. In that respect the Public Service is accountable to the government of the day through Ministers of the Crown.

There is a distinction that can and should be made between the duty the Public Service has to the government, and the obligations that all persons who hold public office have to the public interest or common good. In the context of the Public Service this means operating in a way that keeps a "weather eye" on public opinion and understanding where public interests or common good lies. It means adopting a perspective that goes beyond the confines of the formal, accountability framework of the Public Service in order to best discharge those obligations to the public, and to establish the rapport or relationship with the public, or publics.

The term public interest means different things to different people. It also has a variety of meanings in law.[6] In some schools of thought it has come to mean the *aggregation of private interests*. In others it means that which constitutes the *well-being of the community*. What is clear, however, is that for the public servant public interest may be characterised as what people "would choose if they saw clearly, thought rationally, and acted disinterestedly and benevolently."[7] In other words, it accords with the principles of independence, and impartiality, and the carrying out of one's duties and responsibilities free of personal interests, without fear or favour, and openly. To be disinterested (i.e not influenced by one's own advantage) is the essence of public service. As the old adage puts it: "When you enter the Public Service you leave your private interests at the door". Service, however, is an expression of a more fundamental moral principle of benevolence (literally, good-wishing) concerned with the well-being of others.

So, for the public servant, their relationship with the public should be distinguished by benevolence and impartiality, coupled, of course with the highest virtues of honour and integrity, and with a liberal interpretation of fairness and respect for the rights of others.

PRINCIPLES OF PUBLIC SERVICE DECISION MAKING AFFECTING THE PUBLIC

The following principles have evolved – both in statute and in common law and through the process of judicial review – to protect the public interest and provide for fair and just treatment of citizens by the Crown.

Legality

The Public Service is required to act within the letter and spirit of legislation and regulations. Decision makers must act within the scope of the power

6 A list of 141 statutes that use the term "public interest" is provided in the Appendix.

7 Lippman, Walter (1955) *The Political Philosopher*, Little, Brown: Boston.

or discretion conferred, and within their delegated powers. For instance, citizens have a right to complain to the Ombudsman, under the provisions of the Ombudsmen Act 1975, where they consider that decisions affecting them which they consider are unreasonable or unjust or contrary to law.

In exercising executive powers, the Public Service must act in accordance with domestic law, in particular:

- primary (statute) and secondary (regulations)[8] legislation
- case law.

It should also have regard to any international obligations or treaties to which New Zealand is a party. In addition, there is a growing use of so-called "tertiary" legislation, such as codes of practice, and rules within public administration.

Impartiality

Public servants are required to administer government policy impartially. That is to say they must demonstrate consistency in decision making and a lack of bias and / or unfair discrimination. Decision makers must not have a pecuniary interest in decisions nor have a close relationship with the applicant involved.

Decisions must be based on accurate information and relevant considerations, and regard given to the merits of each case.

Fairness and Reasonableness

Public servants are required to act fairly and reasonably, taking into account only relevant considerations. There is a duty to act consistently and to observe the principles of natural justice, including allowing those affected by decisions or recommendations a fair opportunity to make representations.

Access to Personal and Official Information

Public servants are required to give citizens access to personal information about themselves, and official information on request unless there are good reasons for withholding it (as defined in the Official Information Act 1982 and the Privacy Act 1993).

Protection of Political and Civil Rights

Public servants are required to protect and have regard to human rights and fundamental freedoms – in accordance with the New Zealand Bill of

8 Usually, but not limited to regulations. There are other forms, such as Orders in Council, Orders, and Proclamations, that are not regulations. Secondary law is sometimes referred to as "delegated", or "subordinated" law.

Rights Act 1990, the Human Rights Act 1993 and related International Covenants, and as consistent with other legislation.

Protection of Personal or Individual Privacy

Public servants have a duty, in terms of the Official Information Act 1982, to protect official information to the extent consistent with the public interest and the preservation of personal privacy. They need to be aware of and apply the principles set out in the Privacy Act 1993 (s6). Those principles cover the following issues:

- under what circumstances information should be collected
- from whom the information should be collected if it is not otherwise available publicly
- the responsibility to ensure that the subject knows why the information is being collected
- the manner of collection of personal information
- storage and security of personal information
- rights of access to personal information
- the correction of personal information
- the accuracy of personal information
- limits on the storage of personal information
- limits on the use of personal information
- limits on disclosure
- the use of unique identifiers.

The entitlements conferred on an individual by subclause (1) of principle 6 (concerning an individual's entitlement of access to personal information about themselves) of the Privacy Act 1993, in so far as that subclause relates to personal information held by a public agency, are legal rights, and are enforceable in a court of law. The information privacy principles, however, do not confer on any person any legal right that is enforceable in a court of law. That does not mean that the principles should not be applied with care and responsibility, and in accordance with the spirit and intent of the Privacy Act 1993.

In addition, in all their dealings with others, public servants should respect the rights and freedoms of individuals to privacy and confidentiality, whether dealing with official information or not. That extends to being treated in a manner that they themselves would want to be treated.

Efficiency, Effectiveness and Economy

Public servants are required to use resources efficiently, effectively and economically (State Sector Act 1988, s32) and to account publicly for their stewardship as prescribed in the Public Finance Act 1989. What the public servant needs to keep firmly in mind is that the resources they employ are public resources, the funds they use are public funds, and their use is for public purposes. Nothing is likely to affect the relationship of the Public Service and the public more than the manner in which public servants discharge their trusteeship role with respect to public resources.

PUTTING THE PRINCIPLES INTO PRACTICE

Serving the Public

a. Information on Policies, Services and Entitlements

There is a duty to provide clear information to clients on services and entitlements (including criteria for entitlements) and on client obligations. This may mean providing information in both Maori and English text. The information should be presented in plain language and, if possible, in minority languages.

Advertising campaigns may be used to communicate with the public provided they are used solely to explain policy, outline services available and inform the public of its entitlements and obligations.

Advertising should not be used to finance publicity for party political purposes. The Cabinet Office guidelines for the use of advertising are set out in CO (89) 17 of 20 November 1989. The Controller and Auditor-General should be consulted where the application of the guidelines is not clear, or where the guidelines do not seem to cover a particular situation.

Advertising must also have regard to the Advertising Codes of Practice issued by the Advertising Standards Authority. The Advertising Standards Complaints Board hears and adjudicates complaints on the basis of these Codes.

Officials should be familiar with *Cabinet Office Manual* instructions (Chapter 2/8, G15) on what might be considered unacceptable public comments by officials on government policy. The *Cabinet Office Manual* is the authoritative source of reference.

Some departments, for example, the Inland Revenue Department, the Department of Labour's Employment Service, and the Department of Social Welfare's Income Support Service, have taken high profile initiatives to explain policies, entitlements to services, and obligations placed on their clients. Other agencies have taken a more low key approach, targeting particular audiences or sector groups.

In relation to communications about policy, the convention is that Ministers comment on policy, while officials explain and implement. When offering comment on implementation or delivery matters, officials have a duty not to compromise departmental operations, or Public Service-wide operations, or relationships with Ministers. It is essential therefore to keep Ministers informed of any departmental communications on policy implementation and delivery.

b. Level of Service

Ideally, customers should be informed of the level of service they can reasonably expect (such as standard processing times, prompt and courteous service) as well as procedures for making a complaint if these standards are not met. Improvement to service delivery should be attempted even where statutory deadlines are provided.

Some attention is now being given to the value of charters, and other statements of service standards the public may expect from government departments. The Department of Inland Revenue, and the Civil Aviation Authority are two agencies that publish service charters.

c. Accessibility

Reasonable access to service, performance expectations, and information about services and entitlements, should be provided, and care needs to be taken that certain groups or communities are not unduly disadvantaged.

Access to services can be made easier through the wide use of publicity about:

- the location of offices
- flexible working hours
- telephone inquiry points that direct callers quickly to someone who can help
- 0800 lines for limited periods or where regional presence is limited or non-existent
- wheelchair access to buildings[9]
- services and entitlements.

9 Section 42 of the Human Rights Act 1993 makes it unlawful, (a) To refuse to allow any other person access to or use of any place or vehicle which members of the public are entitled or allowed to enter or use; or,(b) To refuse any other person the use of any facilities in that place or vehicle which are available to members of the public; or, (c) To require any other person to leave or cease to use that place or vehicle or those facilities, – by reason of any of the prohibited grounds of discrimination.

The need to make physical access to services easier, and provide services sensitively, has been recognised in recent years by changes to the layout and décor of public areas of departments with high volume public contact.

d. Communication of Decisions and Appeal Rights[10]

There is a general duty, on application, to provide persons with reasons for decisions affecting them.[11] Unless there is good reason for not doing so, the name and designation of the officer making the decision should also be provided. Where applicable, it should be made clear to applicants what avenues are open to them to appeal a decision.

e. Contracting for Services[12]

Where departments contract with external agencies to provide services that may have been previously provided wholly or in part by Public Service employees, the contractor should provide at least the same standard of service that would be required of departmental employees. The form of the contract may determine the standards required, but it is important that contractors understand the context within which they may be employed. That is, that they may be expected to conduct themselves as if they were part of the Public Service.

Departments therefore need to ensure that external agencies are aware of the performance standards and ethics governing Public Service action, and that the contractor is able to deliver to specified standards.

This is particularly important where external agencies are providing services that affect citizens directly. External agencies should also be aware of these issues when involved in policy development work. The principles and standards expected to be followed by external agencies need to be explicit.

Serving the Public Interest

a. Access to Official Information[13]

The purposes of the Official Information Act 1982, consistent with the principle that executive governments are responsible to Parliament, set out in section 4, are:

"(a) To increase progressively the availability of official information to the people of New Zealand in order –

10 See also *The Public Service and Official Information* in the guidance series.

11 Official Information Act 1982, s23.

12 Reference should be made to *Guidelines for Contracting Services* (CO 92/15) of 28 August 1992.

13 Refer also to *The Public Service and Official Information* in the guidance series.

(i) To enable their more effective participation in the making and administration of laws and policies; and

(ii) To promote the accountability of Ministers of the Crown and officials, – and thereby to enhance respect for the law and to promote good government of New Zealand:

(b) To provide for proper access by each person to official information relating to that person:

(c) To protect official information to the extent consistent with the public interest and the preservation of personal privacy."

A key factor in achieving this is the availability of official information (unless, as provided for in the Act, there are good reasons for withholding it).

There is a duty therefore for the Public Service (and Ministers) to act within the spirit and purpose of the Act and not to delay unnecessarily the release of, nor to withhold, information that should in terms of the Act be made available. Failure to do so undermines the intent of the Act. It may also result in staff disaffection and information "leaks".

b. Confidentiality and Privacy

Systems for collection, storage and analysis of personal data need to be designed and reviewed regularly to ensure confidentiality of personal information and protection of individual privacy as provided for in the Privacy Act 1993.

Information concerning natural persons (whether living or deceased) or *personal information* should:

- be collected only for lawful and necessary purposes, and in a manner that is fair and does not intrude to an unreasonable extent upon the personal affairs of the individual concerned
- as far as possible be collected from that individual
- be accurate and pertinent, and retained no longer than required for the purposes for which the information may be used lawfully.

The subject of the personal information should:

- know the information is being collected, the purpose of the collection, and the intended use and or recipients of the personal information
- have access to the information and be able to have the information amended or corrected under certain circumstances.

The agency collecting the information shall ensure that:

- adequate safeguards are in place to prevent loss, unauthorised access or disclosure, or misuse of the information.[14]

14 See also Official Information Act 1982 s9.

c. Consultation

There is a general obligation to provide members of the public with an opportunity (either in writing or in person) to make representations where they may be affected directly by decisions. Consultation may be directed by the Minister; where extensive consultation is contemplated the Minister should be advised and approval sought as appropriate, well in advance.

An obligation may exist where:

- a past practice of consultation exists
- a promise to consult has been given.

A duty to consult may exist in statute, such as provided for in the Children, Young Persons and Their Families Act 1989, (s21).

A key element in consultation is the requirement to provide sufficient time for those consulted to prepare a *meaningful response*.[15] It is also a continuing course of action.

The actual process of consultation is important too. It needs to be carried out in a meaningful way. It should occur while policy options are still open and when there is a need for further information and points of view to be taken into consideration. Otherwise consultation runs the risk of being seen as superficial and may undermine confidence in the Public Service or acceptance of the decisions made subsequently.

After consultation it is important to keep parties informed of the outcome of decisions so their interest and willingness to participate in any future consultations may be retained.

Except where provided for in legislation, consultation with the public is discretionary although it is generally desirable to consult with parties interested in or affected potentially by new policies.

Some departments, such as the Ministry of Women's Affairs, have been created with a defined role to provide Ministers with information on the special needs of particular interest groups. This usually involves consulting with these groups and facilitation of their participation in the policy making process.

Mechanisms for consultation can range from individual interviews, surveys, to client or community advisory groups and consultative committees. Calls for submissions from the public on particular issues are also used.

15 See *R v Wellington Airport*, and Regulations Review Committee report on accident compensation social assistance regulations.

d. Protection of Civil and Political Rights and Crown Obligations under the Treaty of Waitangi

Policy advice and implementation also need to have regard to the following:

- The need to be fair and reasonable. That includes being in a position to make decisions based on accurate and full information, of taking account of all relevant considerations, and consulting with groups where they are significantly affected by changes in policy.
- The need to uphold and protect the civil and political rights of citizens.
- Where individuals or groups may be affected the general principles of natural justice need to be applied.
- Issues relating to the Crown's obligations under the Treaty of Waitangi (see also *The Public Service and the Treaty of Waitangi* in the guidance series).

Sometimes policy is approved by Ministers in principle only, or is very broadly defined, in the expectation that the Public Service will use discretion born of experience and institutional knowledge in developing the detail, including the formation of operational policy. In such cases, there is a duty to develop operational policy consistent with the purpose and spirit of the overall policy (which may or may not be in legislation or regulations) and, as above, to have regard for issues of fairness and reasonableness, Crown obligations under the Treaty, and the protection of civil and political rights.

e. Impartiality of Executive Action and Policy Advice

Public servants have a duty to act impartially and without bias in making decisions affecting the public. This means acting in an apolitical or non-partisan manner. The principle of impartiality is also applicable in the policy development area and is encapsulated in the phrase "free and frank advice".

Impartiality may also imply high quality research, and analysis based on professional standards and values. Avoidance of rhetoric may enhance perceptions of professionalism, and objectivity.

Public servants' personal views will never be value-free, nor neutral. Advice will inevitably reflect the views of those preparing the information or advice. For that reason it is important that the process can be seen to be impartial by the application of the following guidance:

- presentation of a range of views and opinions within the community
- presentation of a range of solutions or policy options available and their relative advantages and disadvantages
- identification of groups benefiting or disadvantaged by particular policy options

- avoidance of personal or agency interest in policy outcomes.

There is a need for departments to ensure that they are not merely presenting the views of one sector or particular interest groups but that views canvassed cover a range of views.

f. Efficiency, Effectiveness and Economy

The Public Service has a duty to use public funds wisely.

State sector reforms have resulted in:

- clearer definitions of the goods and services (outputs) provided by departments in the Estimates, departmental forecast reports, and purchase agreements
- better accountability to Parliament (and the public) for departmental results achieved against the Estimates
- a more conscious use of resources, including a focus on the opportunity costs of organisational and staff deployment decisions.

While the reforms have provided, and will continue to provide, a major impetus in improving the management of public resources, Public Service efficiency and effectiveness does not end there.

Some departments have implemented quality management systems to improve efficiency. Operational efficiency and effectiveness is also improved through regular self-monitoring of performance, for example, management and systems audits, programme evaluations, client surveys, analysis of complaints, and use of research.

Strategic Performance

Governments are concerned to see that the Public Service contributes actively and positively to strategic objectives. The development of Strategic Result Areas is designed to allow chief executives to better ensure that their activities (and their departments) are closely aligned with the goals of the Responsible Minister, and the government of the day.

Reporting Requirements

The reporting requirements of government departments comprise accrual based financial performance information, plus a statement of service performance. Departments are required to produce annual reports, to be tabled in Parliament, on behalf of their Minister. These include audited financial statements incorporating an operating statement, balance sheet, cash-flows, commitments and contingent liabilities. The statement of service performance reports on the department's delivery of agreed goods and services.

Select committees report to Parliament by the end of September on the Estimates referred to them. Committees have until the end of March to present a report to Parliament on the financial reviews that they are required to carry out.

The principles cited above can also provide a basis for the discussion and development of standards of performance that the public (and Ministers) can expect of the Public Service.

Such standards of performance are sometimes given expression in the form of Citizens Charters. An example is the Citizens Charter of the United Kingdom released in 1991, which includes national standards for health, education, transport and social welfare services.

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- Privacy Act 1993
- Public Finance Act 1989
- Official Information Act 1982
- State Sector Act 1988

APPENDIX

Statutes Containing Reference to the Public Interest

Accident Rehabilitation and Compensation Insurance Act 1992
Animal Remedies Act 1967
Animals Act 1967
Antiquities Act 1975
Archives Act 1957
Biosecurity Act 1993
Births, Deaths and Marriages Act 1995
Boxing and Wrestling Act 1981
Broadcasting Act 1989
Building Act 1991
Building Societies Act 1965
Bylaws Act 1910
Casino Control Act 1990
Charitable Trusts Act 1957
Children's Health Camps Act 1972
Children, Young Persons, and Their Families Act 1989
Chiropractors Act 1982
Citizenship Act 1977
Civil Aviation Act 1990
Clerk of the House of Representatives Act 1988
Companies Act 1993
Companies Act 1955
Company Law Reform (Transitional Provisions) Act 1994
Conservation Act 1987
Conservation Law Reform Act 1990
Cook Islands Act 1915
Copyright Act 1994
Corporations (Investigation and Management) Act 1989
Courts Martial Appeals Act 1953
Crimes Act 1961
Crown Minerals Act 1991
Crown Proceedings Act 1950
Customs Act 1966
Defamation Act 1992
Defence Act 1990
Dental Act 1988
Designs Act 1953
Dietitians Act 1950
Diplomatic Privileges and Immunities Act 1968
Disabled Persons Community Welfare Act 1975
Education Act 1964
Education Act 1989
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Electoral Act 1993
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Friendly Societies and Credit Unions Act 1982
Health and Disability Commissioner Act 1994
Historic Places Act 1993
Hospitals Act 1957
Humans Right Act 1993
Illegal Contracts Act 1970
Immigration Act 1987
Import Control Act 1988
Incorporated Societies Act 1908
Industrial and Provident Societies Act 1908
Inland Revenue Department Act 1974
International Air Services Licensing Act 1947
International Finance Agreements Act 1961
Judicature Act 1908 (High Court Rules)
Land Act 1948
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Land Transport Act 1993
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Legal Services Act 1991
Local Government Act 1974
Local Government Official Information and Meetings Act 1987
Maori Purposes Act 1931
Marine Reserves Act 1971
Marketing Act 1936
Marriage Act 1955
Maritime Transport Act 1994
Medical Practitioners Act 1968
Medicines Act 1981
Misuse of Drugs Amendment Act 1978
Motor Vehicle Dealers Act 1975

Mutual Assistance in Criminal Matters Act 1992

National Parks Act 1980

New Zealand Horticulture Export Authorities Act 1987

New Zealand Maori Arts and Crafts Institute Act 1963

New Zealand Security Intelligence Service Act 1969

New Zealand Society of Accountants Act 1958

New Zealand Sports Drug Agency Act 1994

Nurses Act 1977

Occupational Therapy Act 1949

Official Information Act 1982

Ombudsmen Act 1975

Optometrists and Dispensing Opticians Act 1976

Patents Act 1953

Pesticides Act 1979

Pharmacy Act 1970

Physiotherapy Act 1949

Plant Variety Rights Act 1987

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Police Complaints Authority Act 1988

Privacy Act 1993

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The Public Service and the Treaty of Waitangi

A paper in the guidance series 'Public Service Principles, Conventions and Practice'

STATE SERVICES COMMISSION
Te Komihana O Ngā Tari Kāwanatanga

First published in September 1995
by the State Services Commission, Wellington, New Zealand.

ISBN 0-478-08910-4

CONTENTS

INTRODUCTION

The Treaty of Waitangi has been described as New Zealand's founding document. Its constitutional significance is well established. Its political significance continues to be explored.

This discussion is confined to the nature of the obligations arising from the Treaty. Under our legal system treaties have not traditionally in themselves given rise to legal obligations in New Zealand domestic law. While the Treaty of Waitangi is undoubtedly unique, the performance of Treaty obligations is the same as that for other treaties. That is, until given force of law by an act of Parliament, the obligations arising under the Treaty are moral duties (as a matter of domestic law) warranting the fullest commitment of executive government consistent with its overall responsibilities.

Generally, it is not the literal terms of the Treaty, but the principles of the Treaty which can be drawn from its terms, which import the obligation on government. The terms of the Treaty could not encompass the very different society within which it is now interpreted. This reflects the inevitable consequences of the settlement that the Treaty foreshadowed. It is why references to the Treaty generally refer to the principles.

Different emphasis has been placed on the principles of the Treaty by recent governments. Under the Labour Government (1984-87) the jurisdiction of the Waitangi Tribunal was extended[1] to enable it to consider complaints against Crown action dating back to 1840 based on breaches of the principles of the Treaty. (Because the Treaty in its entirety is not incorporated into law it does not, in its entirety, automatically have force of law.) Further, under that Government there was a trend towards inclusion of specific references to the principles of the Treaty in legislation thereby making aspects of the Treaty obligation enforceable at law whether in a substantive or a procedural way.[2] [3]

It had been proposed to affirm the principles of the Treaty in the Bill of Rights.[4] However, the Government accepted the recommendation of the select committee considering the *White Paper on a Bill of Rights for New Zealand* that the Bill of Rights should not include the Treaty. The committee's view was that as the Bill of Rights was not going to be supreme law, inclusion of the Treaty was not appropriate. Further, the committee noted that Treaty issues were being addressed in other ways.

Separate from the legislative recognition of the principles of the Treaty which imported a legal obligation of some nature, in 1989, the Labour Government (1987-90) issued its *Principles for Crown Action on the Treaty of Waitangi*.[5] While clearly evolved from the principles of the Treaty as defined by the courts, these were the principles promulgated by the then Government as a matter of executive policy, by which it would act when dealing with issues that arise from the Treaty. Those principles are the subject of review, although they have not been reviewed to date (Sept. 1995).

Under the National Government elected in 1990, the trend has been away from legislative recognition of the principles of the Treaty toward greater focus on dealing with Treaty issues within the realm of executive government.[6] Another development has been the establishment of units within government departments with a focus on these issues as part of the process of Treaty perspectives being brought into departments at an operational and policy level. An injunction for departments to develop responsive programmes that accommodate Maori aims and aspirations, and their involvement in the Public Service is contained in s56(d) of the State Sector Act 1988.

As the number of Treaty claims grew, and with them the Government's desire to respond in an orderly way to them, it was decided in 1994 to restructure the Treaty of Waitangi Policy Unit (TOWPU) into a better-resourced, and more responsive unit to be known as the Office of Treaty Settlements (OTS).

The OTS is a semi-autonomous unit within the Ministry of Justice designed to co-ordinate government actions on Treaty matters.[7] Its director is accountable directly for policy, claim negotiation, and claim implementation work it is assigned, or undertakes, to the Minister in Charge of Treaty Negotiations, and in other respects to the Secretary for Justice.

The establishment of the OTS coincided with the creation of a new and separate Vote for Treaty Settlements. The role of the OTS is to co-ordinate government actions on Treaty claims, and these changes reflected the high priority placed on the resolution of claims. Te Puni Kokiri – the Ministry of Maori Development – has a broader brief concerned with the relationship between Maori and the Crown.

DEVELOPING NEW LAW

The Cabinet Office Manual (Ch.5/16) sets out the *Cabinet Directions for the Conduct of Crown Legal Business* and the procedures to be followed (Ch.5/App. 1 & App. 2) in preparing a Bill to be included in the legislative programme. One intent of these provisions, among others, is to ensure that legislation complies with the principles of the Treaty of Waitangi. On 23 June 1986 Cabinet:

"*(i) agreed that all future legislation referred to Cabinet at the policy approval stage should draw attention to any implications for recognition of the principles of the Treaty of Waitangi;*

(ii) agreed that departments should consult with appropriate Maori people on all significant matters affecting the application of the Treaty, the Minister of Maori Affairs to provide assistance in identifying such people, if necessary; and

(iii) noted that the financial and resource implications of recognising the Treaty could be considerable and should be assessed wherever possible in future reports."

That decision was endorsed in 1990 by the new Government.

The Legislation Advisory Committee (1991)[8] had this to say in response to the question whether legislation complies with the principles of the Treaty of Waitangi:

> *"The process and judgments involved in answering the question and the giving effect to the decision are very difficult. Simple majority decision making is not always the answer. In some situations, autonomous Maori institutions have a role within the wider constitutional and political system. In other circumstances, the model provided by the Treaty of Waitangi of two parties negotiating and agreeing with one another is appropriate. The law may sometimes accord a special recognition to Maori rights and interests such as those covered by Article 2 of the Treaty. And in many other cases the law and its processes should be determined by the general recognition in Article 3 of the Treaty that the Maori belongs, as a citizen, to the whole community. Policy and procedure in this area are still evolving.*
>
> *Consultation and related processes of decision making are critical. Priority must be given by those involved in preparing legislation to ensure that Maori interests are identified promptly, consultation with the relevant community or communities is undertaken at an early stage, the consultation is carried out in a manner and context with which Maori people are comfortable, the consultation is seen to have clear results, and there is feedback to the Maori community. Proper consultation within the government is also critical.*
>
> *The content of legislation may reflect the Treaty in a variety of ways. It is very important that attention is focused on the specific aspects of the Treaty which are relevant. What are the guaranteed rights or interests which are put in question? What is the role of the Crown's right to govern? So, the Treaty might be mentioned specifically or the reference might be more general. The reference might be to the principles or the Treaty itself. The Treaty (or its principles) might be given a certain priority or it might be a matter to be considered along with others. Legislation over recent years relating to fishing, conservation, state-owned enterprises, the environment, and resource management, as well as the Treaty of Waitangi Act 1975, provide such models*[9]*. . ."*

Clearly, good process and good faith cannot be overstated.

THE PRINCIPLES OF THE TREATY

References to the Treaty of Waitangi in legislation, (and the Waitangi Tribunal's jurisdiction) are expressed in terms of the principles of the Treaty rather than the Treaty's literal terms. "The Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas."[10]

There has now been a considerable jurisprudence on the Treaty and the scope of the duties thereby imposed on the Crown. The courts and the Tribunal have given some assistance as to what is required to ensure

compliance with the principles of the Treaty. The Court of Appeal in the *Lands* (see endnote No. 9) case identified three principles in the context of consideration of section 9 of the State-Owned Enterprises Act 1986. That is, that the Crown:

- acts in accordance with the paramount principle,[11] reasonably and in good faith to its Treaty partner
- makes informed decisions
- avoids impediments to providing redress.

An important counterbalance to these principles (which is a principle in itself) is the acknowledgement that within this framework governments must be able to govern.[12]

The Privy Council in *Broadcasting Assets* emphasised the underlying mutual obligations and responsibilities that the principles give rise to. It held that foremost among these principles are the Crown's obligations to protect and preserve Maori property (including taonga) in return for being recognised as the legitimate government of the whole nation. However, the protective obligation is not unqualified – it is to take such action as is reasonable in the circumstances (having regard to, for example, the risk of the property or taonga, national economic circumstances, and past Crown breaches – and perhaps to past legislative action).

The Tribunal's reports provide information on the Tribunal's views on the obligations imposed on the Crown by the principles of the Treaty.[13] The findings of the Tribunal, however, while they will be given weight, are not binding on the courts.[14] There is an exception to this where the Tribunal is exercising its powers under what are termed the resumption provisions, for example, under the Crown Forests Assets Act 1989. Resumption (or restorative) provisions refer, in this case, to the obligation on the Crown to return Crown forest land to Maori ownership and to compensate Maori under certain circumstances.

Statutory Reference to the Principles of the Treaty

The principles of the Treaty are evolving. While it can be expected that at least some of the principles of the Treaty will have universal or standard expression, their application and or relevance, will depend on the subject-matter of the Act, and on statutory interpretation in each case.

A department or ministry may be required to administer an Act which has a Treaty reference in it. The reference may create legal obligations for all those acting pursuant to the Act whether it be the Minister or an official. A number of statutes make specific reference to the principles of the Treaty. Those references impose legal duties which can be ascertained from broad principles analysed in the context of the particular Act in which the reference is found. This is a matter on which legal advice may have to be sought. The department which administers the Act should have in place a consultative policy or initiative to ensure that it can satisfy the legislative direction.

There is an inevitable tension between the need to comply with any statutory duties and the fact that there are historical Treaty claims still to be resolved. As noted above a number of types of references can be identified. For example, the provision in the State-Owned Enterprises Act 1986 imposes a duty not to act inconsistently with the principles of the Treaty. This imposes a duty of substantive, as opposed to procedural, compliance on the decision-maker. The duty in the State-Owned Enterprises Act 1986 requires the establishment of a protective mechanism for land to be transferred from the Crown to the new State-owned enterprises. In the event of a challenge, the courts ultimately have the power to decide whether the action proposed is consistent with the principles of the Treaty.

Other statutes impose a duty to have regard to, or to take into account, those principles.[15] The Conservation Act 1987 (s4) requires decision makers to "give effect" to the principles of the Treaty and the Long Title to the Environment Act 1986 states that one of the purposes of the Act is to ensure that, in the management of natural and physical resources, full account is taken of "(c)...(iii) The principles of the Treaty...".

The effect of such requirements is procedural. It means that weight has to be given to the principles of the Treaty but it is for those exercising the statutory functions to decide the weight to be given. The court would not interfere with a decision in these circumstances unless there was a failure to have regard to the principles of the Treaty or that the decision is one that a reasonable Minister, in the court's view, could not have taken.

No Statutory Reference

As stated above, the Treaty, like other treaties, is only of legal effect in terms of our domestic law if it is incorporated into that law by a statutory reference. On this view, consideration of the Treaty will generally not be mandatory although there is some potential for the implications of the principles of the Treaty being seen as a relevant consideration depending on the statutory context and on administrative law principles (refer to opinion of 8 May 1993 from the Solicitor-General and to discussion of court decisions in Chief Judge Durie's paper for the New Zealand Law Society Conference, 1993). There is growing support for the view, however, that the Treaty has legal effect because of its place in our constitutional arrangements and there is room for further development on these matters.

The principal cases show the development to date beginning with the decision of the Court of Appeal in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, *(Lands)* then *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 *(Forests)*, *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 *(Coal)*, *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, *Attorney-General v New Zealand Maori Council (No 1)* [1991] 2 NZLR 129 and (No 2) 147 (Radio Spectrum), *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 *(Broadcasting Assets)*, and *Te Runanga o Wharekauri Rekohu Incorporated v Attorney-General* [1993] 2 NZLR 301. The latter case emphasises Parliamentary sovereignty.[16] The Broadcasting Assets decision was upheld by the Privy Council[17] which

affirmed the orthodox view that in the absence of statutory incorporation, the Treaty is not normally enforceable directly by legal action.

The Court of Appeal decision, *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General (Te Ika Whenua)* [1994] 2 NZLR 20 refers to the Treaty acquiring some permeating influence in New Zealand law. The jurisprudence in this area is still evolving.

Where there is no statutory reference it may be that Parliament has determined that the avenue of redress for any action inconsistent with the principles of the Treaty is a complaint to the Waitangi Tribunal. Parliament's silence is likely to be regarded generally as an indication that Treaty matters have been considered and a decision made that legislative recognition should not be given.

GOOD PROCESS[18]

Good Faith

There is one overarching and all-pervading obligation that arises from the Treaty whether it be by statutory reference to the Treaty or otherwise (whether legally enforceable or otherwise). This is the duty of good faith. In the context of government action this imports a duty to make informed decisions on matters of interest or relevance to Maori. In the context of section 9 of the State-Owned Enterprises Act 1986, the courts have said that the duty of good faith means there must be consultation "on truly major issues" *Lands*. However, consultation will not always be required in order to be fully informed on a matter where, for example, the decision maker already has the relevant information before him or her. It is important to address the need for consultation early in the development of policy. Where consultation is required, early consultation will often avoid a challenge to government action.

Consultation is not negotiation nor does it necessarily mean acceptance of the views of the other *(Wellington International Airport Limited v Air New Zealand* et al [1993] 1 NZLR 671). The necessary elements are that it be genuine, be undertaken with an open mind, and that adequate information is provided to enable the other party to make an "intelligent and useful" response. The nature of the appropriate consultation will vary quite widely depending on the issue, the circumstances, and the purpose of the consultation.

The duty to act in good faith (consultation) will often raise questions such as:

- With whom is it necessary to consult? Iwi, hapu, pan-Maori levels?
- What should be the scope of consultation?
- What is the most appropriate form of consultation? In writing? Hui? Meetings with particular organisations or groups?

The 1992 reports of the Waitangi Tribunal arising out of the settlement of Maori fisheries claims provide indications from the Tribunal as to the approach to be taken by the Crown when consulting with Maori on matters having Treaty implications.[19]

International Obligations

There are some provisions in various international instruments to which New Zealand is a party which may be relevant to the development and implementation of policy involving Treaty issues in New Zealand. It is possible, once domestic remedies have been exhausted, for a complaint to be made to the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights alleging non-compliance with one of the provisions in the Covenant. The Human Rights Committee can make recommendations concerning any breach to the relevant government.[20]

Role of Te Puni Kokiri

Te Puni Kokiri has a role in giving advice on appropriate ways of undertaking consultation with Maori interests. Te Puni Kokiri has published a booklet *A Guide for Departments on Consultation with Iwi* and has considerable practical experience of conducting consultative exercises.[21]

FIDUCIARY DUTY

The applicability of the concept of fiduciary duty arising from the doctrine of aboriginal title or from the Treaty has been noted with approval.[22] It is clear from the *Lands* case that a fiduciary duty will be imputed in dealings between the Crown and Maori where there is a statutory reference to the Treaty such as s9 of the State-Owned Enterprises Act 1986. The scope, nature and legal effect of any such duty outside of a statutory reference will most likely be the subject of further debate and development. In particular, there could well be claims brought against the Crown by Maori for alleged breaches of fiduciary duties arising from wrongful extinguishment of aboriginal title.[23]

CONCLUDING COMMENT

This paper has provided an introduction to the law and issues concerning the Treaty of Waitangi for public servants. It has described some of the obligations and approaches pertinent to the Crown and its role as a Treaty partner. The paper makes no pretence at being an authority in these matters.

All Public Service departments and ministries, as instruments of the Crown, have a special interest in Treaty of Waitangi issues and in contributing to the proper discharge of the Crown's obligations and undertakings. It is therefore incumbent on public servants to be well informed on and responsive to Treaty matters.

As each issue between Maori and the Crown, or claim under the Treaty of Waitangi, is determined new interpretations and understandings emerge. The process evolves. New laws or precedents are set. Old perceptions fade; fresh visions arise. For example, the concept of tino rangatitatanga or Maori sovereignty is capable of a variety of meanings all of which will have some implication or bearing on attitudes and practices within the Public Service, and the wider community. Public servants cannot be isolated from these developments, or afford to be unaware of them if they are to discharge their responsibilities appropriately.

What constitutes the public interest is never static. Public Service officials are confronted daily with the need to interpret and appreciate what may, in a given situation, comprise the public interest. For public servants there is no one definition or simple formula. Those entrusted to safeguard and promote the interests of the public, or the common good, must consider all facets. No interpretation of the public interest is valid, however, if it fails to incorporate the aspirations of Maori, or take account of the significance, and spirit, of the Treaty of Waitangi.

APPENDIX 1

The Claims Process

The Waitangi Tribunal

The Waitangi Tribunal established under the Treaty of Waitangi Act 1975 has jurisdiction to consider claims brought by Maori that acts, omissions, policies, or legislation of the Crown are inconsistent with the principles of the Treaty and that the claimants are or will be likely to be prejudiced by the relevant action. If the Tribunal finds a claim to be well founded it may recommend to the Crown that action be taken to compensate or remove the prejudice or to prevent others in future from being similarly affected. The Crown Law Office, in liaison with OTS and other relevant departments whose interests are affected, represents the Crown before the Tribunal hearings.

Apart from the Tribunal's powers with respect to the resumption of certain types of land (State enterprise, certain railways and education land, for example), the Tribunal's powers are recommendatory only. It is for the government, having considered the recommendations, to decide whether and to what extent they should be implemented. The Tribunal's reports can also be evidence before the courts. OTS, Te Puni Kokiri, and the relevant government departments whose interests are affected, together with the Crown Law Office have a role to play in advising the government with respect to the recommendations of the Tribunal.

It is important to note that the Tribunal provides recommendations as to redress for historical claims, and also deals with contemporary breaches of the Treaty and provides advice on remedies for them.

The terms of the Treaty are set out in the First Schedule to the Treaty of Waitangi Act in Maori and in English.

The Tribunal has the power to refer a claim to mediation. The mediator is obliged to use his or her best endeavours to bring about a settlement of the claim.

Direct Negotiations

In late 1989 the Government announced its intention to place an emphasis on direct negotiations with Maori on historical grievances.[24] A distinction may be made between historical and contemporary claims. However, a significant historical component may be established for many contemporary claims.

In December 1994 the Government launched a major consultation exercise with both Maori and the general public about proposed plans to settle historical grievances over a ten year period, and within a specified overall fiscal cap. Submissions on these proposals were due to close on 31 August 1995.

The option of entering into direct negotiations is available to Maori claimants as a complement to the ability to have claims heard by the Waitangi Tribunal. The direct negotiation of a claim can start by either a request from the claimants or by a recommendation for negotiation from the Waitangi Tribunal. The claimants and the Crown must both agree to direct negotiation. A description of the direct negotiation process is set out in the booklet *The Direct Negotiation of Claims* referred to on page 1.

When claimants desire direct negotiations they approach the Office of Treaty Settlements who will analyse the claim and seek assurances on appropriate claimant representation. Authority for negotiations, and the negotiating brief, must be approved by Cabinet on the application of the Minister in Charge of Treaty of Waitangi Negotiations via the Cabinet Committee on Treaty of Waitangi Issues. Once negotiations are concluded successfully a draft deed of settlement will be agreed which both parties may then ratify and sign. At that stage the draft deed becomes a Final Agreement.

Protection of Land, and Land Banks

In 1993 the Government set up a protection mechanism to provide for consultation with iwi when government wishes to sell land surplus to Crown requirements.

This protection mechanism recognises three categories of land for protection purposes:

- non-substitutable sites of special historical, cultural, or spiritual significance
- land of special importance and which is essential for the settlement of a claim
- land not falling into either of the above categories but which is particularly sought by claimants and will facilitate the settlement of claims.

The protection mechanism is intended to ensure that land which Maori applicants claim, and government agrees ought not to be sold, is either transferred to the claimants, or retained by the Crown for possible use by the claimants in the future as part of their claim settlement.

Land banks have been established for claims which have reached an advanced stage of consideration. The purpose of these land banks is to hold and administer land set aside under the protection mechanism process pending transfer to the claimants in settlement or part settlement of their claim. Some land banks have also been established during the course of negotiations with specific claimant groups to hold surplus Crown properties which the claimants identify as potentially part of their settlement.

In May 1995 the Government took additional steps to provide further protection for Maori interests in Crown land. Where land was confiscated, claimants usually seek the return of land still owned by the Crown. In order to allay Maori concerns that the Crown might continue to sell Crown land in the raupata (confiscated) areas, and thus reduce the amount of Crown land still available to be used for settlements, the Government agreed that surplus Crown properties situated within the outer confiscation boundaries would not be sold into private ownership. The Government also agreed to establish a Crown Settlement Portfolio to purchase and hold all these surplus properties for possible use in settlement of Treaty of Waitangi claims.

APPENDIX 2

Aboriginal Title

The doctrine of aboriginal title is that which asserts that the assumption of sovereignty by imperial powers was subject to existing aboriginal, customary or native rights. Those rights, according to the doctrine, continue unabated and are recognised by law until and to the extent to which they have been extinguished or expressly modified. (Refer: *Te Ika Whenua* and McHugh, *The Maori Magna Carta, 1991*) There are considerable evidential and procedural difficulties in the establishment of such concepts. Further, the doctrine on its own terms recognises that these rights can be extinguished. With respect to rights to land, the customary title of most land held by Maori has been extinguished either by sale, by operation of law, or by the progress of the Native Land Courts. The Court of Appeal in *Te Ika Whenua* (a case involving rivers) recognised the possibility of the doctrine having some application in New Zealand, although a claim in that case to modern technology (i.e. hydro generating assets) on the basis of aboriginal title, was rejected.

APPENDIX 3

Source Material

Legislation

- **General**
  Human Rights Act 1993
  Human Rights Commission Act 1977
  New Zealand Bill of Rights Act 1990
  Race Relations Act 1971
  Te Ture Whenua Maori Act 1993
  Treaty of Waitangi Act 1975

- **Specific Legislation with Treaty References**
  For example, *State-Owned Enterprises Act 1986, s9*, and *Conservation Act 1987, s4.*

- **Legislation Dealing with Treaty / Maori Issues in a Particular Area**
  Education Act 1989
  Maori Language Act 1987 (Official Language)
  Maori Fisheries Act 1989
  State-Owned Enterprises Act 1986 ss 27 – 27D
  Treaty of Waitangi (Fisheries Claims) Settlement Act 1992

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Parliamentary Commissioner for the Environment (1992) *Proposed Guidelines for Local Authority Consultation with Tangata Whenua*

State Services Commission (1993) *Maori Participation Strategies for Government Departments*

Te Puni Kokiri (1993) *A Guide for Departments on Consultation with Iwi*

Direct Negotiations

The Direct Negotiation of Maori Claims, TKWPU, 1990.

Court decisions (selected list only)

Huakina Development Trust v Waikato Valley Authority [1987] 2 NZLR 188

New Zealand Maori Council v Attorney-General (1989) [1991] 2 NZLR 129 and (No 2) 147

New Zealand Maori Council v Attorney-General [1989] 2 NZLR 142

New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641

Te Runanga o Muriwhenua Inc v Attorney-General [1990] 2 NZLR 641

New Zealand Maori Council v Attorney-General [1992] 2 NZLR 576

New Zealand Maori Council v Attorney-General (unreported PC 14/93 13/12/93).

Attorney-General v New Zealand Maori Council [1991] 2 NZLR 126

New Zealand Maori Council v Attorney-General (No 2) [1991] (CP 942/88 29 July 1991)

Tainui Maori Trust Board v Attorney-General [1989] 2 NZLR 513

Te Runanganui o Te Ika Whenua Incorporated v Attorney-General [1994] 2 NZLR 20

Te Runanga o Wharekauri Rekohu Incorporated v Attorney-General [1993] 2 NZLR 301.

New Zealand Maori Council v Attorney-General [1994] 1 NZLR 513

Taiaroa and Others v Minister of Justice [1994] (CP 99/94 4 Oct 1994)

International Instruments

Convention on the Elimination of All Forms of Discrimination Against Women

International Convention on the Elimination of All Forms of Racial Discrimination

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

APPENDIX 4

Public Acts Containing a Reference to the Treaty of Waitangi as at May 1995

Commissions of Inquiry Act 1908 s.2

* *Conservation Act 1987* ss.4 & 6(x)

Constitution Act 1986 First Schedule

* *Crown Forest Assets Act 1989* ss. 2, 17, 34, 35, 36, 37, Part IV, 38, 39, 40, 41, First Schedule

* *Crown Minerals Act 1991* ss. 2, 4

* *Crown Research Institutes Act 1992* s. 10

* *Education Act 1989* ss. 181(b), 210, 212, 213, 214

Education Lands Act 1949 s. 5A

* *Environment Act 1986* Title, s. 2

Fisheries Act 1983 ss. 2, 28B, 28D, 28OF, 28S, 28U, 28W, 28ZE, 47, 54A, 86, 88, 89, 103A, First Schedule

* *Foreshore and Seabed Endowment Revesting Act 1991* ss. 2, 3

* *Harbour Boards Dry Land Endowment Revesting Act 1991* ss. 2, 3

Higher Salaries Commission Act 1977 Fourth Schedule

Local Legislation Act 1989 s. 3(2)

Maori Fisheries Act 1989 ss. 2, Part I, 4, 6(c), 7, 9, 18, 19, 29, 30

Maori Language Act 1987

Ministry of Maori Development Act 1991 s. 15

New Zealand Railways Corporation Restructuring Act 1990 ss. 39, 40, Part IV, 41

New Zealand 1990 Commission Act 1988 s. 5

Orakei Act 1991

Public Works Act 1981 ss 23, 24, 25, 26, First and Third Schedules

Queen Elizabeth the Second Postgraduate Fellowship of New Zealand Act 1963 Schedule

* *Resource Management Act 1991* ss. 2, 8, 45(2)(h), 140(2)(h), 253(e), 345(3), Eighth Schedule

* *State-Owned Enterprises Act 1986* s. 9, 27, 27A, 27B, 27C, 27D, Schedule 2A

Te Ture Whenua Maori Act 1993 or Maori Land Act 1993 ss. 18, 339

* *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992* ss. 2, 6, 9, 10, 13, 14, 15, 20, 22, 39, 42, 43

* *Treaty of Waitangi (State Enterprises) Act 1988* s. 1, Part I, 2, 5, 6, 7, 8, 10

* *Treaty of Waitangi Act 1975* ss. 1, 2, 4, 4A, 4B, 5, 6, 6A, 7, 8A, 8B, 8C, 8D, 8E, 8F, 8G, 8H, 8HA, 8HB, 8HC, 8HD, 8HE, 8HF, 8HG, 8HH, 8HI, 8HJ, 8I, First and Second Schedules

Waitangi Day Act 1976 ss. 3, Schedule

* Acts which also contain specific reference to the principles of the Treaty of Waitangi.

APPENDIX 5

Public Acts Containing a Reference as at May 1995 to the Aims and Aspirations of Maori

Accident Rehabilitation and Compensation Insurance Act 1992: s. 122(2)(d) of Second Schedule

Arts Council of New Zealand Toi Aotearoa Act 1994: First Schedule

Broadcasting Act 1989: cl. 5(2)(d) of Schedule

Business Development Boards Act 1991: cl. 13(2)(d) of Schedule

Civil Aviation Act 1990: cl. 28(c) of Third Schedule

Commerce Act 1986: s. 18A(2)(d)

Crown Research Institutes Act 1992: s. 5(4)(d)

Defence Act 1990: s. 59(2)(d)

Education Act 1989: s. 337(2)(c)

Films, Videos, and Publications Classification Act 1993: First Schedule

Fire Service Act 1975: s. 83A(2)(d)

Foundation for Research, Science, and Technology Act 1990: s. 11(2)(d) of First Schedule

Health and Disability Services Act 1993: s. 2 (definition of "good employer")

Historic Places Act 1993: s. 69(c)

Land Transport Act 1993: First Schedule

Law Practitioners Act 1982: s. 42A(2)(d)

Local Government Act 1974: s. 119(2)(d)

Maritime Transport Act, 1994: First Schedule

Museum of New Zealand Te Papa Tongarewa Act 1992: s. 24(2)(d) of Schedule

New Zealand Sports Drug Agency Act 1994: Schedule

New Zealand Tourism Board Act 1991: cl. 13(c) of Schedule

New Zealand Symphony Orchestra Act 1988: s. 8(2)(d)

Resource Management Act 1991: cl. 24(d) of Fifth Schedule

Social Welfare (Transitional Provisions) Act 1990: Third Schedule

State Sector Act 1988: ss. 56(2)(d), 77A(2)(d)

State-Owned Enterprises Amendment Act (No 4) 1986: s. 9(2)(d)

NOTES

1 The Treaty of Waitangi Act 1975 was amended accordingly in 1985.

2 The best known of the former is s9 of the State-Owned Enterprises Act 1986 ("the SOE Act") which prohibited action inconsistent with the principles of the Treaty. An example of the latter is s8 of the Resource Management Act 1991 which requires decision makers acting pursuant to that Act to take into account the principles of the Treaty. Other significant legislative recognition includes s4 of the Conservation Act, and s5(2) of the Law Commission Act 1985 (Commission to take into account te ao Maori and to give consideration to the multicultural character of New Zealand society).

3 A complete list as at May 1995 is attached as Appendix 4.

4 See the *White Paper on a Bill of Rights for New Zealand 1985*

5 In brief, these are:

1. *The Kawanatanga Principle*: The government has the right to govern and to make laws.
2. *The Rangatiratanga Principle*: The iwi have the right to organise as iwi, and, under the law, to control their resources as their own.
3. *The Principle of Equality*: All New Zealanders are equal before the law.
4. *The Principle of Reasonable Co-operation*: Both the government and the iwi are obliged to accord each other reasonable co-operation on major issues of common concern.
5. *The Principle of Redress*: The government is responsible for providing effective processes for the resolution of grievances in the expectation that reconciliation can occur.

6 See Chief Judge Durie's paper to the NZ Law Society Conference 1993, *Politics and Treaty Law* p.10.

7 Palmer, G (1992) pp.84-5.

8 Report No.6 *Legislative Change: Guidelines on Process and Content* revised edition, pp.14-15.

9 See also Keith (1995).

10 See Cooke P in the *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 *(Lands)* and in *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 *(Broadcasting Assets)* and reference to matters "so remote from anything that the Queen's representative and the Maori signatories could have had in mind in 1840 that this Court should hold it to be outside the Treaty."; and *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General (Te Ika Whenua)* [1994] 2 NZLR 20.

11 The first Article of the Treaty gives expression to the right of the Crown to make laws and its obligations to govern in accordance with constitutional process, subject to the promise to accord the Maori interests specified in the second Article the protection assured. This is sometimes referred to as the paramount principle.

12 See Cooke P in the *Lands* case.

13 Refer to Chief Judge Durie (1993), and to Brownlie (1992) pp.13-21.

14 See *Lands* case.

15 See for example, s8 of the Resource Management Act 1991, s4 of the Crown Minerals Act 1991, or s10 of the Crown Research Institutes Act 1992.

16 On this point refer also Palmer, *Speech Notes for Address to Wellington District Law Society* 14 December 1989.

17 See *NZ Maori Council v Attorney-General* unreported Privy Council 14/93 13 December 1993.

18 See also section in this paper on *Developing New Law* above, and reference to *Cabinet Directions for the Conduct of Crown Legal Business*.

19 See reports in respect to *Wai 307* and *Wai 321*.

20 Refer to: International Covenant on Civil and Political Rights (New Zealand has acceded to the Optional Protocol to the Covenant); International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women (The Convention provides for states which are parties to it to report periodically on progress made in implementing the Convention to the United Nations Committee on the Elimination of Discrimination against Women. The Committee may make suggestions and general recommendations to the General Assembly of the United Nations based on its consideration of these country reports.); and the International Covenant on Economic, Social and Cultural Rights.

21 The Crown Law Office has a role in providing advice on process.

22 See Cooke P in *Sealords* and *Te Ika Whenua*. See also Chief Judge Durie's paper to the New Zealand Law Society Conference, 1993, and 8 May 1992 opinion from the Solicitor-General to the Cabinet Strategy Committee.

23 See Cooke P in *Te Ika Whenua* at p6.

24 See *The Direct Negotiation of Maori Claims* TCWPU, 1990.

The Public Service and Official Information

A paper in the guidance series 'Public Service Principles, Conventions and Practice'

STATE SERVICES COMMISSION
Te Komihana O Ngā Tari Kāwanatanga

First published in September 1995
by the State Services Commission, Wellington, New Zealand.

ISBN 0-478-08912-0

CONTENTS

INTRODUCTION

Government departments hold considerable quantities of information of all kinds. Much is acquired by legal compulsion from outside sources. It includes personal information about people and their affairs. Much is generated inside the Public Service in the course of its functions of developing policy, advising Ministers and administering legislation.

This paper is concerned with the responsibility of public servants in relation to information held by their departments and with the need to maintain a balance between the security of the State, and the power of the State to acquire, use and disclose information on the one hand, and the protection of individual rights and freedoms, and personal privacy [1] on the other.

The law governing these matters is to be found mainly in the Official Information Act 1982 and its amendments, and in the Privacy Act 1993. These laws are among the most important constitutional and civil rights developments of the last 30 years affecting the Public Service. The first directly enhances the public's right of access to official information and reverses the former presumption of secrecy. The second gives some protection to personal privacy from intrusion by governments and others.

These themes are potentially in tension. The two principal pieces of legislation, touching on information held by departments and ministries, have different objectives, but those differences can be generally reconciled. Both are concerned with rights, responsibilities, and accountability. In a few cases these rights are directly enforceable by the courts. In most cases, however, they are determined by decisions of the Ombudsmen under the Official Information Act 1982 or the Privacy Commissioner under the Privacy Act 1993.

Although the Official Information Act 1982 has been in force for over ten years, it is still understood imperfectly by some public servants. Moreover, the impulse to shelter behind secrecy has not entirely disappeared. Public servants' attitudes toward and thinking about, official information should be guided by the spirit and intent of the Official Information Act 1982. The long title to the Act states that it is *"an Act to make official information more freely available, to provide for proper access by each person to official information relating to that person, to protect official information to the extent consistent with the public interest and the preservation of personal privacy, to establish procedures for the achievement of those purposes, and to repeal the official Secrets Act 1951."*

The responsible public servant recognises that the Official Information Act 1982 is not just an important piece of primary legislation. It also:

- stresses the twin objectives of participation (s4), and availability (s5)
- promotes accountability (s4)
- reinforces the constitutional principles concerned with an open democracy

1 See also *Cabinet Office Manual*, Chapter 6, *Disclosure and Protection of Official Information.*

- articulates fundamental principles guiding proper attitudes and behaviour about information.

All public officials should operate in ways that are entirely consistent with the terms, spirit and intent of the Act.

The purpose of this paper is to indicate the principles according to which public servants should act in issues of information and privacy; not to provide a detailed guide to making decisions nor a commentary on the law. That guidance is to be found principally in practice notes issued by the State Services Commission and the Ombudsman, and in the Ombudsmen's *Practice Guidelines*.

The Official Information Act followed closely the recommendations of the Danks Committee (Committee on Official Information 1978-81) and a study of its report will help public servants to understand the philosophy and policy of that Act. Books and writings on the subject such as *Freedom of Information in New Zealand*, Eagles, Taggart and Liddell (1992), are also a useful source of information.

INFORMATION AND PRIVACY

The precise relationship between the Official Information Act 1982 and the Privacy Act 1993 has not been settled. The common subject matter of both Acts is information. The primary concern of the Official Information Act 1982 is the availability of government information or information held by governmental agencies to the public, and the purpose of the Act is to provide the basis upon which information is made available to the public. The greater part of such information does not impinge on privacy issues. The thrust of the Privacy Act 1993 is to safeguard what it calls the "information privacy" of the individual from improper invasion. The Act applies to both private and public sectors.

However, a significant area of overlap exists. The Privacy Act 1993 contains provisions formerly in the Official Information Act 1982 giving individuals a right of access to information concerning them held in departments. It underlines and enhances the importance of personal privacy as a public interest that may justify withholding official information. However, it would be wrong to see the Privacy Act 1993 as a justification for avoiding obligations under the Official Information Act 1982, or vice versa. In other words the Official Information Act 1982 should not be used as an excuse to release private information, and the Privacy Act 1993 should not be a shield to prevent access to official information.

There will be instances where the accountability requirements of the Official Information Act 1982 will override the right to protection of privacy. That is, where the public interest in the circumstances outweighs a right to privacy.[2]

What is Official Information?

Official information is any information held by a department or organisation or Minister of the Crown in their official capacity. It includes personal information, a point that is sometimes not appreciated. The Act is not framed in terms of documents but of information. Official information can include for instance aural or video tapes and also knowledge carried in someone's head. It may include information generated within an organisation, or obtained from outside sources.

THE OFFICIAL INFORMATION ACT 1982

The Official Information Act 1982 reversed the traditional principle of secrecy of government information epitomised in the Official Secrets Act 1951, which it repealed. It creates a legal requirement that official information is to be made available to anyone who seeks it unless there is good reason to withhold it. That reason must be found in the Act itself or in some other enactment.

> The question whether any official information is to be made available. . . shall be determined. . . in accordance with the purposes of this Act and the principle that the information shall be made available unless there is a good reason for withholding it.[3]

In stating the grounds on which this principle of availability rests, the Act contains an authoritative summary of some constitutional principles relevant to the Public Service.[4] The availability of official information to the people is to increase progressively in order to:

- permit their more effective participation in the making and administration of laws and policies
- promote the accountability of Ministers and officials
- enhance respect for the law and promote the good government of New Zealand.

2 See Appendix 1.

3 Official Information Act 1982 section 5.

4 Ibid. section 4.

Three implications of this are of particular importance to public servants.

- First, the regime established by the Act is dynamic, not static. Parliament has envisaged that information will become more freely available as time goes by.
- Second, Parliament has accepted that officials as well as Ministers are to be accountable. This is in line with the New Zealand tradition exemplified in the title *public servant*[5]
- Third, private individuals are to be able to take an effective part in making and administering laws and policies. As the Chief Ombudsman has said[6] this does not do away with representative democracy and the supremacy of Parliament. It does not mean that the public are to sit in on decision making. But if there is to be participation in policy making the individual must have:
  - the right to know what options are open and being considered
  - sufficient information about them to form a proper judgment
  - time to enable him or her to consider and express views before the government is committed to a policy.

The impact of changing technologies has greatly facilitated the capability of departments to respond appropriately to requests for official information, and to give expression to the principle of availability.

Legally Enforceable Rights

In three instances persons have a legal right of access (with very limited exceptions) to information about themselves held by a department. These rights may be described as:

- internal rules affecting decisions (s22, Official Information Act 1982)
- the reasons for decisions affecting the requester in his or her personal capacity (s23, Official Information Act 1982)
- personal information concerning the requester and held in a way that can be retrieved readily, (Principle 6, Privacy Act 1993).

Exceptions to Right of Access

There are compelling reasons why some official information cannot be available to everyone. Public access to government information is an important interest, but other competing interests must sometimes be allowed to override accessibility. So, every country that has legislated for freedom of information has recognised that there must be exceptions. In New Zealand, the exceptions do not take the form of rules defining classes of documents that may not or need not be released. No class of document or information is automatically protected from release. Rather, the

5 See *The Senior Public Servant* in the guidance series.

6 See the *Report of the Ombudsmen* to Parliament 1993, p.8.

approach of the Act is to define and delimit those public interests that do or may override the principle that information is to be available. In most cases a balancing process is required.

Some reasons are conclusive, however. For example, the defence and security of New Zealand, and the maintenance of law, including the prevention of, investigation and detection of offences. Others are contingent. They justify the withholding of information unless other circumstances render it desirable in the public interest to make it available.

Certain commercial interests are able to be protected under the provisions of the Official Information Act 1982, section 9(2)(b), (i), & (j), but caution should be exercised in the application of those provisions. Before a request is met, or refused, a thorough understanding of the matters that should be considered is recommended.[7] It is also pertinent to inform affected parties should the release of information be contemplated, to give them an opportunity to be heard in the matter.

The protected interests relating to constitutional conventions and advice are of particular relevance to public servants. Subject to countervailing public interest considerations, information may be withheld if it is necessary to maintain the constitutional conventions for the time being which protect:

- the confidentiality of communications by or with the Sovereign or her representative
- collective and individual ministerial responsibility
- the neutrality of officials
- confidentiality of advice tendered by Ministers of the Crown and officials.

Or maintain the effective conduct of public affairs through:

- the free and frank expression of opinions by or between or to Ministers of the Crown . . . or officers and employees of any department . . . in the course of their duty
- the protection of such Ministers, officers and employees from improper pressure or harassment.

This should be applied in an objective and commonsense way, and consistently with the intention of Parliament that over time information should be disclosed more freely. The trigger for this, and for all s9 grounds, is that withholding the information is *necessary* to protect the interests described. This suggests that recourse to the exceptions should not be made lightly. It contrasts with the tests in sections 6 and 7,[8] where information may be withheld if making it available would *be likely* to prejudice the described interest.

7 See Eagles (1992) Ch.11 pp.291-332. See also Ombudsmen's *Practice Guidelines* No. 3.

8 S.6 relates to *conclusive reasons for withholding official information*, while s.7 provides for *special reasons for withholding official information related to the Cook Islands, Tokelau, or Niue, or the Ross Dependency*.

In all cases, a judgment is called for in respect of the conclusive reasons in sections 6 and 7. That is, would the release of this information be likely to prejudice a protected interest?

In respect of the contingent interests in section 9 a judgment is called for in respect to:

- whether the withholding of this information from necessary to protect one or more of these interests
- and, if so, are there nonetheless reasons why in the public interest the information should be released?

These judgments need to be objective ones, in that there must be sufficient evidence to support them. Each decision on a request for information must be made on its own merits. Information may not be withheld on the basis of a strained interpretation of the exceptions. If public servants contemplate non-disclosure they should ask themselves the question, could I justify a decision to withhold the information if that decision is reviewed by an Ombudsman?

When dealing with problems the public official is well-advised to refer to the Ombudsmen's *Practice Guidelines* for guidance in the first instance.

Two further points need to be stressed.

First, the reasons stated in the Act for withholding information are comprehensive. Reasons, and constitutional conventions, may not be unearthed from elsewhere. Thus it would not be a valid reason for withholding information that its release:

- would be inconvenient to the Minister (or the department)
- might show the department in a bad light
- might embarrass the Minister politically
- is no business of the requester
- might be misunderstood by the requester, or by the media, (in which case the wisest course may be to provide an explanation or material that will set the information in its proper context).

In short, whether information is supplied under the Official Information Act 1982 or not, it is no business of a department or ministry to try to ascertain what use may subsequently be made of that information.

Second, the exceptions provide grounds on which information *may* be withheld. They do not themselves prohibit the release of any information. So a Minister, or a public servant acting with authority, may decide to release any information although he or she may be entitled under the Act to withhold it.[9]

9 Some other statutes do in positive terms forbid the disclosure of certain information. The Privacy Act 1993 is one of them.

There are justifications for refusing requests for information that do not relate to the nature of that information. These are to be found in section 18. Examples of such justification include that the information is or soon will be publicly available (the law does not proscribe temporary press embargoes on reports and speeches), or that the information cannot be made available without substantial collation or research (the law does not require the Public Service to undertake research at the behest of inquirers).

The Act (e.g. s12) makes a deliberate distinction between departments and Ministers. Chief executives of departments are authorised to release information as are Ministers. The former may consult their Ministers and Ministers can make decisions independent of their departments. Members of the public may therefore direct a request for information either to a Minister or to a department.

PRIVACY ACT 1993

The Privacy Act 1993 develops and enlarges the concept of individual privacy referred to in the Official Information Act 1982. Ministers and public servants are not the sole judges of what personal information to collect and what use to make of it, and who to disclose it to.

The Long Title of this Act indicates its purpose. It is to promote and protect individual privacy . . . and in particular to establish certain principles with respect to:

- the collection, use and disclosure by public and private sector agencies, of information relating to individuals
- access by each individual to information relating to that individual and held by public and private sector agencies.

The Privacy Act 1993 states 12 information privacy principles.[10] They deal with:

- the purpose of collecting personal information
- the source of personal information
- the collection of information from the subject
- the manner of collecting personal information
- storage and security of personal information
- access to personal information
- the correction of personal information
- the checking of accuracy of personal information before use
- the requirement not to keep personal information longer than necessary

10 See section 6 of the Privacy Act 1993.

- limits on the use of personal information
- limits on the disclosure of personal information.

The principle of access of the individual to personal information held about himself or herself was formerly in the Official Information Act 1982. (The rights of access to such information by corporate bodies still are.) In respect of Ministers and departments (and the public sector generally) it continues to be a legal right enforceable in the courts. Other principles are binding in the sense that aggrieved individuals may complain of their breach to the Privacy Commissioner. If the complaint is not settled by conciliation, the Privacy Commissioner (or in some circumstances the person aggrieved) may bring civil proceedings before the Complaints Review Tribunal. This tribunal has powers to make declarations and restraining orders and to award damages.

RESPONDING TO REQUESTS FOR INFORMATION

Procedures

The principle of availability governs the process as well as the substance of decisions on requests. The Official Information Act 1982 contains many provisions of this nature – time limits for dealing with requests, the duty to help formulate requests, the transfer of requests to the appropriate agency, the provisions for releasing information in the form preferred by the requester and for releasing material with any necessary deletions. These are instances of an underlying duty – to help persons seeking information to get that information as far as is reasonably possible.

Good procedures for handling information requests are therefore of great importance. They are in the interests of departments and public servants no less than members of the public.

When a request for information is directed to a department, or Minister, there is an onus on the organisation or person to direct the request to the agency most able to supply the information, or to respond to the request. Where two or more agencies hold pertinent information it is appropriate that there be co-operation between agencies. To avoid any suggestion of obfuscation, or dilatory behaviour, and to comply appropriately, any co-ordination required should be effected expeditiously.[11]

Information and Third Parties

Although the Official Information Act 1982 does not directly require consultation with third parties upon a request for information, several provisions envisage and make provision for such consultation. In some circumstances, consultation is appropriate and desirable. It may clarify, for example, whether release of the information might prejudice

11 See Appendix 2.

commercial interests or dry up further information from the same source.[12] Negatively, it may safeguard against an application for judicial review based on failure to hear a person affected.

Nonetheless, persons who supply information to departments, whether voluntarily or under a legal requirement, do not have a veto over its disclosure to others. Information supplied may be of a personal or confidential character, and thus have a measure of protection. This may be addressed in the particular statute requiring the information, e.g. Inland Revenue legislation. However, the duty of confidentiality cannot be unilaterally imposed by the supplier. Nor does a contractual term override the provisions of the Official Information Act 1982.[13] The public interest may outweigh the interests of the individual.

Charging for Access

It was not intended that charging for access should infringe the principle of availability. Personal information must be provided free of charge, and the purpose of charging for other information is to take account of the reasonable costs of the labour and materials incurred by the Minister of the Crown or the organisation to whom the request was made. It is often possible to strike an appropriate charge with a requester, or to preclude unnecessary information by agreement, in order to meet a request. Every effort should be made to provide access at reasonable cost.

The Ministry of Justice has the responsibility for issuing guidelines on charging from time to time. The latest were issued in January 1992.[14] The *Cabinet Office Manual* Ch.6/4 A20 also provides guidance in respect to handling requests that might entail large volumes of information.

Frivolous, Vexatious, or Trivial Requests

The Ombudsman has held that a request is frivolous or vexatious if the requester is patently abusing the rights granted by the Official Information Act 1982 rather than exercising them in a bona fide manner.[15] (The most common example of this is where the information has already been supplied, and there is no additional information.) That is, the particular request must be frivolous or vexatious to be denied in terms of sections 18 (h), or 27 (l) (h), of the Official Information Act 1982. A request can also be refused under these provisions on the grounds that it is trivial. A refusal on the grounds of triviality may not be necessary if the requester is prepared to pay an appropriate fee for the reasonable time and trouble that might be taken to retrieve or collate information to meet the request. Adopting such a course may be an opportunity to demonstrate goodwill, and effective public relations.

12 See Official Information Act 1982 sections 9(2)(b) and (9)(2)(ba).

13 See *Wyatt Co NZ Ltd v Queenstown-Lakes District Council* 1991 2 NZLR 180.

14 See *Department of Justice Guidelines* STA(92) M1/3.

15 Ombudsmen's *Practice Guidelines* No. 9.

PUBLIC SERVANTS AND MINISTERS

The relationship between Ministers and public servants under the Act is a subtle one. The Act is part of the law that public servants are required to uphold, and decisions to release or withhold information must be made in accordance with it. The level at which these decisions are to be made is a matter for the chief executive of the department.

Ministers of the Crown may receive requests for information under the provisions of the Official Information Act 1982, sections 12, or 16. Ministers have a personal responsibility to comply with those requests. Ministers may also be involved in making decisions about responding to requests for information made to departments or ministries.

Consultation with Your Minister

Where a request is made for information that has important or sensitive political implications, the officer responsible ought normally to consult with the chief executive, and the Minister as necessary. The *Cabinet Office Manual* (Ch.6/3 A16) indicates the general practice that should be followed:

> *"A department can consult with its Minister over the decision it proposes to make on a request for information but it must then either make the decision itself, or transfer the request to the Minister concerned. If, after consultation, the Minister takes the view that the information should not be released but the department believes it should be, then transfer of the request to the Minister is the only way in which the department can meet its constitutional duty to follow Ministerial direction and the obligation to comply with the Official Information Act.[16] Each case of this kind needs to be carefully handled at a senior level within the department, including reference back to the Minister for further consideration if necessary."*

The propriety of transfers to Ministers is not subject to review by an Ombudsman, but may be subject to judicial review.

Of course, in order to discharge their responsibilities appropriately Ministers must be well informed with respect to official information requests. It rests with chief executives to ensure that their Ministers are fully briefed on their role, powers and obligations.

Where the views of departments and Ministers after consultation are contrary (that is, one thinks the information should be released and the other does not), then it is competent for the chief executive to advise the Minister that the chief executive intends to consult with the State Services Commissioner, or seek an opinion from, say, the Crown Law Office, before responding to the request. In other words, in some special circumstances,

16 See *Cabinet Office Manual* Ch.6/3 A16; and Appendix 3 State Service Commissioner's *Release of Official Information Guidelines for Co-ordination* letter of 30 March 1992.

it may be appropriate to seek an impartial opinion from a third party. Such a referral should be able to be made by agreement without breaching the constitutional duty to follow a Minister's direction.

Power of Veto

Although the word veto is not used in the relevant legislation the Crown, by Order in Council, has powers to prevent disclosure of requested information.

The Governor-General, by Order in Council, can direct before the expiry of the time limit (twenty working days) that the recommendation of an Ombudsman to release requested information does not become binding. In such cases the veto works to nullify the Ombudsman's recommendation before it can have legal effect.

It should be stated that the Governor-General and the Ministers of the Crown, acting individually or collectively, are bound by the principle of availability in the same way as departments and organisations are by the legislation. If a veto is exercised the requester can have the decision judicially reviewed at the expense of the Crown.

There is a further situation where an action may prevent the release of information. The Attorney-General may exercise a power to prevent release of information by certifying that to do so would infringe the security of the State, the conduct of good government, or the national or public interest. The veto in this case effectively prevents an Ombudsman from exercising his or her powers and is contained in the Ombudsmen Act 1975 s20(1).

Although the Official Information Act 1982 s31 provides that the Prime Minister and the Attorney-General may together certify, on a number of grounds, that the release of information would be likely to be prejudicial, and prevent or pre-empt release, this provision may be regarded not so much a veto as an exception to the application of the principle of availability.

Handling Requests During General Elections, or By-Elections

The provisions of the Official Information Act 1982 are not affected because of a general election, or by-election. In responding to requests at these times for information, however, the public servant needs to be sensitive to the politics of the situation and avoid any suggestion, or actual or potential criticism, that they may be partisan, either by their actions or inactions, or in the manner of responding. In some cases it may be appropriate to consult with the portfolio Ministers, or transfer the request. Judgment is required in these circumstances lest it be construed that such a consultation or transfer is just a delaying tactic.[17]

It is more essential than usual to adhere to time-lines with meticulous care and to ensure that requests are processed promptly, and efficiently.

17 See State Service Commission Circular of 7 May 1993, *Guidelines for Release of Official Information Prior to an Election* (in Appendix 3).

EFFECT OF FREEDOM OF INFORMATION ON POLICY MAKING

One of the purposes of the Official Information Act 1982 is:

- "To increase progressively the availability of official information to the people of New Zealand in order to enable their more effective participation in the making and administration of laws and policies."

This purpose is subject to conclusive and other reasons for withholding official information.[18] In particular, sections 9(2)(f) & 9(2)(g) provide that official information may be withheld to:

9(2)(f) "Maintain the constitutional conventions for the time being which protect –

(i) The confidentiality of communications with the Sovereign or her representative

(ii) Collective and individual ministerial responsibility

(iii) The political neutrality of officials

(iv) The confidentiality of advice tendered by Ministers of the Crown and officials, or

9(2)(g) Maintain the effective conduct of public affairs through –

(i) The free and frank expression of opinions by or between or to Ministers of the Crown [or members of organisations] or officers and employees of any department or organisation in the course of their duty, or

(ii) The protection of such Ministers [members of organisations], officers, and employees from improper pressure and harassment."[19]

The foregoing is not a licence to keep the policy advisory, or policy development, participation of public servants only a matter of confidence between themselves and their Ministers. The provisions of the Act should allow for a free exchange of ideas and information, but in the knowledge that such communications may still become known publicly in the fulness of time.[20]

Public servants who are involved in providing policy advice need to be fully aware of their responsibilities under the Official Information Act 1982, and not use the exemptions as either an opportunity to preserve secrecy, nor a reason to withhold or tailor their advice to Ministers.

18 Sections 6,7, & 9 of the Official Information Act 1982.

19 For a discussion of these and other pertinent matters see Eagles (1992) Ch.12, *Political and Administrative Processes.*

20 See also Office of Ombudsmen *Practice Guidelines* No 2. Also, note that such communications may become subject to the provisions of the Archives Act 1957.

INAPPROPRIATE CONDUCT

Use of Information for Gain

Public servants must not improperly disclose or otherwise make use of official information for the gain or advantage of themselves or others. This elementary rule of conduct is supported by criminal sanctions. Under s105A of the Crimes Act every official is liable for imprisonment for a term of up to seven years who corruptly uses any information acquired in his or her official capacity to obtain directly or indirectly an advantage or a pecuniary gain for themselves or any other person.

This does not, of course, forbid every use of official information. If the information is already public (published reports, public registers), there is no corruption or impropriety in taking advantage of it. The disclosure of information in accordance with the Official Information Act is *not merely lawful but obligatory* However, the integrity of public servants must be *apparent as well as actual* So they may not use for gain or advantage information that would be made available if it were requested but in fact has not been released.

"Leaking"

The Official Information Act 1982 is not a licence to "leak" information, or disclose information in an unauthorised way. "Leaking," as explained in the companion paper in the guidance series, *The Senior Public Servant*, cannot be condoned in any circumstances. Those who may be tempted to indulge in leaking official information to the media, opposition parties, or to others should be reminded of the *Public Service Code of Conduct* which provides (p.17) that:

"It is unacceptable for public servants to make unauthorised use or disclosure of information to which they have had official access. Whatever their motives, such employees betray the trust put in them, and undermine the relationship that should exist between Ministers and the Public Service. Depending on the circumstances of the case, the unauthorised disclosure of information may lead to disciplinary action, including dismissal."

The obligation not to use or disclose information to which they have had access in an authorised way, persists beyond the term of employment for a public servant. The obligation applies to former employees, i.e. those who have resigned or retired from the Public Service.

THE SIGNIFICANCE OF THE FREEDOM OF INFORMATION LEGISLATION

The Official Information Act 1982 may be viewed as a radical and significant element of New Zealand's constitution. It is radical because it has "significantly altered the balance between the State and the individual",[21] and it is significant because it has radically changed the way public servants have had to think about the status of official information, the rights of individuals, and public servants' place in the constitutional scheme of things.

The significance of freedom of information and the Official Information Act 1982 is underlined by the New Zealand Bill of Rights Act 1990, section 14, which affirms that:

> *"Everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form."*

21 McMullin, J in *Fletcher Timber v Attorney-General (1984)* 1 NZLR 290, 305, (CA).

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APPENDIX 1

Practice Guidelines No. 6

CURRENT APPROACH OF THE OMBUDSMEN TO THE INTERFACE BETWEEN SECTIONS 9(2)(a) & 27(1)(b) OF THE OFFICIAL INFORMATION ACT/SECTIONS 7(2)(a) & 26(1)(b) OF THE LOCAL GOVERNMENT OFFICIAL INFORMATION AND MEETINGS ACT AND THE PRIVACY ACT

1. Introduction

1.1 These guidelines are designed to explain to Ministers of the Crown, Departments, organisations and local authorities how the Ombudsmen interpret sections 9(2)(a) and 27(1)(b) of the Official Information Act [sections 7(2)(a) and 26(1)(b) of the Local Government Official Information and Meetings Act (LGOIMA)] in the light of the provisions in the Privacy Act relating to the protection of privacy. They do not provide a definitive ruling on matters of law. In the absence of any judicial clarification of the legal issues, they reflect the approach the Ombudsmen have adopted to the provisions which they are required to administer. They do not detract from the need for each case to be considered on its own merits, but reflect the general approach which the Ombudsmen have developed based on their experience.

1.2 Other elements of the interface between the aforementioned Acts, for example, the Public Register Privacy Principles, are not addressed in these guidelines.

1.3 The term "Official Information Act" in these guidelines also means LGOIMA.

1.5 Where reference is made to particular sections of the Official Information Act, the relevant provisions of the LGOIMA are given in square brackets.

1.6 Ministers of the Crown, Departments, organisations and local authorities are referred to as "public sector agencies" in these guidelines.

2. What is personal information?

2.1 Section 2 [s.2] of the Official Information Act defines **"personal information"** as *"any official information held about an identifiable person"* **"Person"** includes *"a corporation sole, and also a body of persons, whether corporate or unincorporate"*. Subject to some exclusions specified in s.2 [s.2] of the Act, **"official information"** means any information held by a public sector agency.

2.2 The Privacy Act 1993, defines **"personal information"** as "*information about an identifiable individual; and includes information contained in any register of deaths kept under the Births and Deaths Registration Act 1951"* **"Individual"** is defined as "*a natural person, other than a deceased natural person.*"

3. What are the different categories of personal information which may be held by public sector agencies and can be requested?

3.1 In general, requests for personal information held by public sector agencies fall within one of the following four broad categories:

(i) Requests by or on behalf of natural persons for personal information **about themselves** where:

(a) the agency holds the information in such a way that it can readily be retrieved (Information Privacy Principle 6 refers), and

(b) the requester is a New Zealand citizen or a permanent resident of New Zealand or is in New Zealand (s.34 of the Privacy Act refers);

(ii) Requests by bodies corporate for personal information about themselves.

(iii) Requests by persons (either natural or legal) for personal information about natural persons (living or deceased) other than themselves.

(iv) Requests for personal information which comprise a mix of information about the requester and information about other persons.

4. How to determine which Act applies?

4.1 As a consequence of the enactment of the Privacy Act, public sector agencies (and the Ombudsmen and Privacy Commissioner on review) are required to identify which Act applies to the information at issue in a particular case.

4.2 Generally **Category (i)** is covered by the Privacy Act.

4.3 **Category (ii)** is covered by Part IV of the Official Information Act.

4.4 Generally **Category (iii)** is covered by Part II of the Official Information Act.

4.5 **Category (iv)** may be covered by the Privacy Act or the Official Information Act alone or by both Acts depending on the precise nature of the information at issue in a particular case.

4.6 Distinguishing between personal information covered by the Privacy Act and personal information covered by the Official Information Act is often difficult. For example, particular difficulties may arise in deciding which Act applies to a request made by a parent/guardian for personal information about his or her child. Does such a request fall into **Category (i)** or **Category (iii)**? Much will depend on whether the child is considered able to exercise independently his or her rights and whether or not it is in the interests of the child for the information to be released. Each case has to be considered on its particular facts and circumstances.

4.7 Often requests for personal information about the requester are triggered by a decision which has affected him or her in his or her personal capacity and he or she wants to find out why that decision was made. In some cases such requests may be dealt with more effectively by providing a statement of reasons in terms of s.23 [s.22] of the Official Information Act. Separate Practice Guidelines are being prepared to cover the application of this provision.

4.8 Having determined which Act applies to the information requested (or which Act applies to which parts of that information), the decision on the request must be made in accordance with the provisions of that Act.

5. Relevant provisions to consider when a request for personal information which raises privacy issues falls for consideration under the Official Information Act.

5.1 Generally speaking, s9(2)(a) [s.7(2)(a)] is likely to be the relevant provision to consider where the request falls within **Category (iii)** or **Category (iv)**. It provides good reason for withholding the information requested unless, in the circumstances of the particular case, the interest in withholding that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available (s.9(1) [s.7(1)]).

5.2 Section 27(1)(b) [s.26(1)(b)] provides that information may be withheld if disclosure would involve the unwarranted disclosure of the affairs of another person. This section may be relevant when considering requests by bodies corporate for personal information about themselves which also comprises information about other persons.

6. The test for withholding under s.9(2)(a) [s.7(2)(a)]

6.1 There are three possible scenarios facing a public sector agency when considering whether s.9(2)(a) [s.7(2)(a)] applies in a particular case:

(i) withholding the information is **not** necessary to protect the privacy of the natural persons concerned, in which case there is no good reason in terms of s.9(2)(a) [s.7(2)(a)] to withhold the information; **OR**

(ii) withholding the information is necessary to protect the privacy of the natural persons concerned and this public interest consideration is **not outweighed** by countervailing public interest considerations favouring disclosure, in which case there is good reason in terms of s.9(2)(a) [s.7(2)(a)] to withhold the information; **OR**

(iii) withholding the information is necessary to protect the privacy of natural persons **but** this public interest consideration **is outweighed** by countervailing public interest considerations favouring release of the information, in which case the information should be released in terms of s.9(1).

7. Assessing the privacy interest in s9(2)(a) [s.7(2)(a)]

7.1 Before accepting in a particular case that there is good reason for refusing a request pursuant to s9(2)(a) [s.7(2)(a)], a public sector agency (or an Ombudsman on review) must be satisfied that –

(a) the withholding of the information requested is "*necessary to protect the privacy of natural persons, including that of deceased natural persons*,"and

(b) this interest is not "*outweighed by other considerations which render it desirable, in the public interest, to make that information available*" s9(1)(a) [s.7(1)(a)]

7.2 Both of these elements must be met before s9(2)(a) [s.7(2)(a)] provides good reason for refusal.

7.3 Section 9(2)(a) cannot automatically be relied on to refuse a request simply because the information relates to another person. What has to be established is –

(a) what the effect of disclosure of the information would be;

(b) whether that effect is such that it is necessary to withhold the information *"to protect the privacy of natural persons"*

7.4 Where practicable, consultation with the person to whom the information relates, or any other person whose privacy might be affected by release of the information, should be undertaken. The view of the person concerned about whether he or she believes disclosure of certain information would infringe his or her privacy is likely to assist an assessment of whether the information should be withheld. However, the fact that a person to whom the information

relates does not consent to disclosure is not necessarily the end of the matter. Other relevant factors may also be taken into account.

8. Information Privacy Principle 11 of the Privacy Act and s9(2)(a) [s.7(2)(a)] of the Official Information Act

8.1 In enacting the Privacy Act 1993 and the information privacy principles contained therein, Parliament has recognised a strong public interest in withholding information disclosure of which would infringe personal privacy. The Privacy Act is clearly relevant when assessing under the Official Information Act whether information should be withheld to protect personal privacy. However, some public sector agencies have taken the view that the sole determining factor when assessing a request for personal information about someone other than the requester is whether disclosure of the information would involve a breach of the agency's obligations under Information Privacy Principle (IPP) 11.

8.2 However, where an agency is subject to the Official Information Act, requests for information which is subject to Part II of that Act can only be refused for the reasons set out in that Act. While IPP 11 may well be a relevant factor in assessing whether a request should be refused under s9(2)(a) [s.7(2)(a)] of the Official Information Act, any refusal must satisfy the test set out in that Act.

8.3 Whether or not release of information complies with IPP11 of the Privacy Act, or a modification of that principle as contained in a Code of Practice issued under the Privacy Act is not, on its own, automatically determinative of whether s9(2)(a) [s.7(2)(a)] of the Official Information Act applies. Were it so, s.29B {s.29A] would be redundant.

8.4 Section 29B [s29A], which was inserted by s.8 of the Official Information Amendment Act 1993, provides:

> *"Where an Ombudsman investigates a complaint made under section 28 of this Act in relation to a refusal to make official information available in reliance of section 9(2)(a) of this Act, the Ombudsman shall, before forming a final opinion under section 30 of this Act in relation to the merits of refusing that request on that ground, consult with the Privacy Commissioner under the Privacy Act 1993."*

8.5 Section 29B [s.29A] is designed to ensure that when investigating and reviewing a decision to refuse information in reliance upon s9(2)(a) [s.7(2)(a)] an Ombudsman is aware of the Privacy Commissioner's views on the existence and relative weight of any privacy interests which he believes require protection before forming a final opinion on whether or not the test under s9(2)(a) [s.7(2)(a)] has been satisfied.

8.6 The fact that s.29B [s.29A] was inserted signals that requests cannot be refused pursuant to s9(2)(a) [s.7(2)(a)] simply on the grounds that release of the information would be contrary to IPP 11, or any other provision of the Privacy Act.

8.7 Equally, the fact that one of the exclusions to IPP 11 applies in respect of particular information does not automatically mean that s9(2)(a) [s.7(2)(a)] will not apply.

8.8 In every case an objective assessment of the facts and circumstances must be made, in including the Privacy Act, before deciding whether or not the test under s9(2)(a) [s.7(2)(a)] has been satisfied.

8.9 If, after considering all the particulars of the case, an assessment is made that disclosure of certain information would infringe the privacy of a natural person, that is not the end of the matter under the Official In formation Act. In accordance with s.9(1) [s.7(1)], the decision-maker (and the Ombudsman on review) must also consider whether the interest in protecting the privacy of the person concerned in the circumstances of the particular case "*is outweighed by other considerations which render it desirable, in the public interest, to make that information available*".

9. Striking the balance with countervailing public interest considerations

9.1 The scheme of the Official Information Act requires a balance to be struck between competing public interest considerations for and against disclose. This balance is reflected in S5[s.5], which states –

> "*5. Principle of availability – The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that information shall be made available unless there is good reason for withholding it,.*"

9.2 Section 4 [s.4] of the Act, which sets out the purposes, also reflects the balance between availability of information and protection of information.

9.3 Sections 6, 7, and 9 [ss.6 and 7] of the Act establish what may be good reasons for withholding information and these reasons reflect public interest considerations which may require protection.

9.4 Essentially s.9[s.7] envisages the decision-maker (and the Ombudsman on review) striking a balance between:

(a) the public interest in withholding certain information (as reflected in s.9(2)(a)-(k) [s.7(2)(a)-(j)], and

(b) the countervailing public interest favouring disclosure of the particular information at issue (s.9(1) [s.7(1)] refers).

9.5 In cases where valid privacy and countervailing public interest considerations are present, striking a balance between the competing considerations can often be difficult.

9.6 Ultimately, the Ombudsman's statutory function is to form his or her independent opinion as to whether, in the circumstances of the particular case, the request should have been refused. As observed by Jeffries J in *Wyatt Co Ltd v Queenstown Lakes District Council* [1991] 2 NZLR 180 (at page 191), in discharging the review function under the Official Information Act an Ombudsman is required to

> *"exercise his judgment using experience and accumulated knowledge which are his by virtue of the office he holds. Parliament delegated to the (Ombudsman) task, which at times are complex and even agonising, with no expectation that the Courts would sit on his shoulder about those judgments which are essentially balancing exercises involving competing interests. The Courts will only intervene when the [Ombudsman] is plainly and demonstrably wrong, and not because he preferred one side against another".*

10. Consultation procedures between the Ombudsmen and the Privacy Commissioner

10.1 The Ombudsmen and the Privacy Commissioner have implemented flexible consultation procedures between their respective Offices to ensure that, irrespective of which Office receives a particular complaint and irrespective of whether the decision on the request was made by the public sector agency in terms of the relevant legislation, the compliant is processed by the appropriate Office. The main concerns of the two Offices, especially in relation to request involving "mixed information", have been to avoid unnecessary duplication by the public sector agency holding the information at issue, and to minimise delays for the complainant in completing a review process where two independent review bodies are necessarily involved.

11. The application of s.27(a)(b) [s.26(1)(b)] of the Official Information Act

11.1 Section 27(1)(b) [s.26(1)(b)] provides:

> "(1) A Department or Minister of the Crown or organisation may refuse to disclose any personal information requested under section 24(1) of this Act if, and only if, –
>
> (b) The disclosure of the information would involve the unwarranted disclosure of the affairs of another person or of a deceased person."

11.2 Although the Official Information Act does not require an Ombudsman to consult with the Privacy Commissioner before forming an opinion as to whether or not information requested may be withheld in reliance upon s.27(a)(b) [s.26(1)(b)], an Ombudsman may, in a particular case, decide to seek the Privacy Commissioner's comments on the existence and relative weight of any privacy interests which he believes require protection, before forming a final opinion on the matter.

12 Conclusion

12.1 Public sector agencies considering requests for information need to keep the overlap / interface clearly in mind because of the possibility that both Acts may apply.

12.2 Public sector agencies should bear in mind that the privacy test under the Official Information Act is as set out in s.9(2)(a) [s.7(2)(a)]. Section 7(2) of the Privacy Act clearly notes that nothing in IPP 11 derogates from any provision in any Act of Parliament (such as the Official Information Act) that regulates the manner in which personal information may be obtained or made available. In other words, IPP 11, while relevant, does not replace the test under s.9(2)(a) [s.7(2)(a)].

Other Practice Guidelines

Practice Guidelines No. 1 (Revised edition No. 2) – "Official Information Act 1982 and local Government Official Information & Meetings Act 1987 – Application of Administrative Provisions" – July 1994

Practice Guidelines No. 2 – "Current Approach of the Ombudsman to s.9(2)(f)(iv) and s.9(2)(g)(i) of the Official Information Act 1982" – February 1993

Practice Guidelines No. 3 – "Current approach of the Ombudsman to sections s.9(2)(b), (ba),(i), (j) & (k) of the Official Information Act and sections 7 (2)(b), (c), (h), (i) & (j) of the Local Government Official Information & Meetings Act including information relating to tenders" – September 1993

Practice Guidelines No. 4 – "Local Government Official Information & Meetings Act 1987 – Requests for information on Local Authority Trading Enterprises" – April 1994

Practice Guidelines No. 5 – "General guidelines for Departments and organisations subject to the Ombudsmen Act 1975, the Official Information Act 1982 and the Local Government Official Information & Meetings Act 1987 on the role and investigation procedures of the Ombudsmen – July 1994

Practice Guidelines No. 7 – "Current Approach of the Ombudsmen to requests of information relating to the reasons for decisions or recommendations made by public sector agencies about a requester which affect that person in his, her or its personal capacity. Section 23 of the Official Information Act and section 22 of the Local Government Official Information and Meetings Act – July 1994

Practice Guidelines No. 8 – Current approach of the Ombudsmen to the provisions of the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987 which are relevant where the person making a request for official information asks that the request be treated as urgent.

Practice Guidelines No. 9 – Current approach of the Ombudsmen to the provisions of section 18(h) of the Official Information Act 1982 and section 17(h) of the Local Government Official Information and Meetings Act 1987.

Practice Guidelines No. 10 – Current approach of the Ombudsmen to the provisions of section 9(2)(g)(ii) of the Official Information Act 1982 and section 7(2)(f)ii) of the Local Government Official Information and Meetings Act 1987.

APPENDIX 2

Release Of Official Information Guidelines for Co-ordination

30 March 1992

All Chief Executives

Recent discussions on the Official Information Act have highlighted the chief executives to be conscious of the value of adequate consultation in deciding whether to release information under the Official Information Act 1982 The following guidelines have therefore been prepared to provide assistance to chief executives in making decisions on whether and when it is appropriate to consult other departments or Ministers of the Crown.

A number of recent requests have related to matters involving controversial government policy decisions and often a single request has involved material which had input from a number of departments. In those cases therefore, consultation with Ministers and other departments was desirable in order to provide a consistent and considered response. Unfortunately this did not always occur and there were occasions when different departments gave different responses to a request for the same information. You will appreciate that this does not reflect well on the Public Service.

The Act recognises departments as entities separate from the Minister in relation to Official Information requests. Section 15(4) requires that the chief executive or his or her delegate must make the decisions on any request to the department. Subsection (5) of that section provides, however, that subsection (4) does not prevent consultation with a Minister or with any other person in reaching a decision on any request. These guidelines are not intended to undermine the legal requirements on the chief executive but rather to suggest the approach that a chief executive should adopt when fulfilling the legal obligation. It remains, of course, a matter for the judgement of the chief executive whether it is necessary in the particular instance to consult.

Nor is it the intention of these guidelines to suggest that proper disclosure of information under the Official Information Act should in any way be avoided. On the contrary it is intended that by following the guidelines information will be released in a manner consistent with one of the purposes of the Official Information Act namely to “promote good government” in New Zealand by providing information to the public:

(i) to enable their more effective participation in the making and administration of laws and policies; and

(ii) to promote the accountability of Ministers of the Crown and officials. (section 4). Consultation is necessary for the following reasons:

(a) At the most basic level as a matter of courtesy to the department which provided input.

(b) To make the other department aware of the request and of your proposed decision on that report because in some cases another department may be in a better position to assess whether or how certain information should be released.

(c) To check whether similar requests have been made of other departments so that consultation and co-ordination can occur to ensure that a proper stance taken by one department is not undermined due to the actions of another department of whom a similar request has been made.

A When should Departments Consult?

1 Consultation with other departments should normally occur:

(a) When a joint working party has produced some or all of the information which is the subject of the request.

(b) When another department than the one receiving the request has provided substantial or critical input into the information requested, for example, Cabinet papers often contain advice specifically proffered by another department.

(c) When the information sought contains material that relates to the activities of another department or that may result in publicity for another department.

(Where the situation in either para (b) or para (c) occurs there may well be good grounds for transferring the request to that other department – refer Part C).

2 The Official Information Act has not removed the duty on a public servant to keep the Minister fully informed on all relevant matters. It is important to consult with Ministers where release is likely to lead to public comment on a political issue. (Such a step should be second nature to senior public servants). Consultation over an official information request gives a Minister an opportunity to comment on any political issues or matters relating to government management. Examples of situations where it would be appropriate to consult with a Minister are

(a) requests from the Opposition, the Opposition Research Unit, recognised interest groups or the news media especially where the information is particularly sensitive;

(b) where the subject matter is controversial and likely to lead to questions of Ministers;

(c) where facts, opinions or recommendations in the information are especially quotable or unexpected;

(d) where the information reveals important differences of opinion among Ministers or agencies.

There is no special procedure for consulting with a Minister or another department regarding an official information request. Departments may wish to develop their own procedures for such consultation.

Attention is drawn to the statutory time limit requirements.

(a) Section 14, which requires transfers of requests to be made "promptly, and in any case not later than 10 working days after the day on which the request is received" and to inform the requester accordingly;

(b) Section 15, which requires that decisions on requests be made "as soon as reasonably practicable and in any case not later than 20 working days after the day on which the request is received";

(c) Section 15A, which provides for the extension of the above time limits, and that any such extension must be notified to the requester within 20 working days after the day on which the request is received.

B After Consultation

1 Once due consideration has been given to the advice of another department or Minister that there is good reason to withhold information the department must decide whether to release the information, to decline the request, or to transfer the request under section 14. Different decisions can be made in respect of the particular pieces of information that have been requested.

If it is decided nevertheless to release the information the department or Minister whose advice is being overridden should be given reasonable notice prior to the release. (A week is suggested as the minimum.)

2 It should be noted that in some cases a Minister's advice that there is good reason to withhold information could indicate that the request should be transferred to the Minister for response, in terms of section 14(b)(ii). The basis for the transfer would be that the information is more closely connected to the functions of the Minister. Such a step would reflect the constitutional relationship between the chief executive to the Minister and would also meet the requirements of the Official Information Act.

In general it will be clear when it is appropriate to transfer a request for official information under section 14. There will however be some situations when a judgement will be called for.

NB Only 10 working days from the date of receipt of the request are given for such transfers.)

Some examples are:

(a) Where a document held by the department was prepared by another department. The request as it refers to that document could be transferred to the department that prepared the document.

(b) Where the department holds a document produced for an officials' committee which was chaired by another department. The request as it relates to the document could be transferred to that other department.

(c) Where during consultations another department or a Minister considers there is good reason to withhold information which the department receiving the request is not as well placed to judge.

(d) Requests from the Opposition, Opposition Research Unit or recognised interest groups might be transferred to the appropriate Minister after consultation with the Official Information Act representative in that Minister's office.

C Release

Some departments have found that information properly released under the Official Information Act has subsequently been publicised as a "leak". To minimise this happening it is suggested that the information can be photocopied on special paper, marked "RELEASED UNDER THE OFFICIAL INFORMATION ACT". This paper is available from the Government Printer.

If you have any queries about the guidelines please contact the State Services Commission's Legal Division.

D K Hunn
State Services Commissioner

APPENDIX 3

Guidelines For Release Of Official Information Prior To An Election

CE 1993/012

7 May 1993

All Chief Executives

"A General Election is the central event in a constitutional democracy."

"Officials appeared not to appreciate the significance of the need for speedy decisions and the extreme importance of a well informed electorate at the time of a General Election."

[Extracts from the 1991 Report of the Ombudsmen]

In the Annual Report for the year ending 30 June 1991 the Ombudsmen referred to a number of difficulties involving Official Information Act requests in the lead up to the 1990 General Election. Those difficulties centred primarily on the timeliness of the responses by officials to a series of official information requests directly related to issues in the General Election.

After investigating the matters raised by the Ombudsmen, and having discussed the matter with the Ombudsmen I concluded

- there is some basis for the Ombudsmen's concerns in respect of the appropriate handling of information requests at the time of General Elections;
- no department considered that its handling of such requests amounted to a deliberate attempt to affect the outcome of the 1990 Election; and
- there appears to have been uncertainty in the minds of some public servants over the correct manner in which to handle information requests during the period leading up to an Election.

I decided to issue guidelines on this matter in advance of the forthcoming General Election to avoid any recurrence of the difficulties experienced in 1990.

The main point that I wish to stress is the need for you to ensure that as the General Election approaches your employees have brushed up on the proper procedures for processing official information requests. There should not be room for even the slightest hint that any public servants have in any way improperly interfered with the democratic process. This may mean that you need to institute special procedures for a limited time.

The requirements of the Official Information Act do not alter in any fundamental way simply because a general election is pending. Rather there is a need for a heightened awareness of the purposes of the Official Information Act and the way in which certain requirements under the Official Information Act should be applied at this time. Public servants must be aware that they will be judged as much by **perceptions** of their actions as by their actual conduct. A general election places a particular demand on the Public Service to maintain its political neutrality whilst continuing to serve loyally the Government of the day. Senior public servants in particular are required to maintain the appropriate balance.

General Purpose and Principles of the Act

The purposes and basic principles underlying the Act should govern the actions of departments at all times.

The purposes of the Act are set out in section 4. At the time of a general election section 4(a) of the Act is likely to be of particular relevance:

"To increase progressively the availability of official information to the people of New Zealand in order –

(i) to enable their more effective participation in the making and administration of laws and policies; and

(ii) to promote the accountability of Ministers of the Crown and officials, –

and thereby to enhance respect for the law and to promote the good government of New Zealand."

At the same time, however, departments need to be aware of the further purpose in section 4(c) which reads

> "To protect official information to the extent consistent with the public interest and the preservation of personal privacy."

The Official Information Act has always required the balancing by officials between the different purposes in the Act. In making such judgments the Act states that there is to be a general principle of availability of official information. Thus section 5 of the Act states that except as expressly provided otherwise in the Act

> "The question whether any official information is to be made available ... shall be determined ... in accordance with ... the principle that the information shall be made available unless there is good reason for withholding it."

The President of the Court of Appeal has interpreted this Principle in the following way: "if the decision maker ... is in two minds in the end, he

should come down on the side of availability of information. I say this ... because the Act itself provides that guidance in the last limb of section 5." (*Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 at p.391)

Public Interest

People require information in order to exercise their democratic rights in an informed manner. This applies equally to candidates as to the general public. The public interest factor in the Official Information Act therefore assumes an even greater importance than usual at the time of a general election. The public interest is of particular significance when deciding whether to withhold information under section 9. That section allows for information to be withheld "unless in the circumstances of the particular case the withholding of that information is outweighed by other considerations which render it desirable in the public interest, to make the information available."

Procedure

There may well be a case for having official information requests cleared by an experienced officer in the months preceding the general election. (Some departments may already use this procedure as a matter of course.)

Consultation

The need to decide at an early date whether or not the Minister should be consulted, or for the request to be transferred to the Minister is particularly important at the time of a general election to maintain a clear separation between the party political activities of Ministers and the proper administration of the Public Service. The Act distinguishes between information held by a Minister of the Crown and information held by a Department (or organisation). The purpose of the consultation process is to enable a Department to ascertain the concerns, in terms of the Act, which a Minister (or another Department or organisation) might have were the information requested to be released so that:

(a) a decision can be made as to whether the request should be transferred; and,

(b) if it is not to be transferred, the concerns of the Minister (or other Department or organisation) can be taken into account by the Department in making its decision on the request.

My earlier notes on consultation with the Minister will be of particular importance during this period.

Time Limits

With the General Election having a fixed date timely responses to official information requests will assume even greater importance than usual. The

maximum time limits are: Section 14 Transfer of requests – "... 10 working days after the day on which the request is received ..."; and Section 15 Decisions on requests "... as soon as is reasonably practicable and in any case not later than 20 days ..."

As always, wherever possible inquiries should be dealt with well within those timeframes. It is important that departments make an early judgement as to whether or not the Minister needs to be consulted or the request transferred to the Minister's office. Delays on these decisions could well be perceived as an attempt to frustrate the purposes of the Act. At election time Ministers are often not as readily available for departmental business. Departments need to ensure that sufficient time is allowed for the Minister to consider any proposed response.

NOTE: To assist in meeting the required timeframes the various alternative methods of providing the information could be considered. Section 16 details alternative ways in which information can be made available, for example, by "giving a reasonable opportunity to inspect the document" or by "giving an excerpt or summary of the contents". In considering these alternatives you should also note that section 16(2) requires information to be provided in the form requested except in certain defined circumstances. (This may be a matter that you will need to discuss with your Minister who may wish to be consulted over the manner in which the information is released.)

Extension of Time Limits under Section 15A

It is important to note that this section implies that only one extension should be requested and the power exercised sparingly.

Assistance

The requirement in section 13 – to give reasonable assistance to a requester to make a request in the correct manner – also becomes more important from a public interest point of view. Departments, where necessary, should assist requesters:

– to specify the information more particularly

– by directing them to the appropriate department, Minister or organisation in cases where the request has been sent to the wrong body

– by meeting any requests for urgency where at all possible.

Sections 9(2)(f)(iv) and 9(2)(g)(i)

These two provisions, which deal with the constitutional conventions relating to the confidentiality of advice, and with the maintenance of the

effective conduct of public affairs through the free and frank expression of opinion, have provided to be probably the most difficult parts of the Act to apply in practice.

The Ombudsman has expressed the view (in his *Practice Guidelines* issued in February 1993) that these two sections are intended to protect the particular process of government to which the information relates. Information should only be withheld where disclosure is likely to adversely affect the conduct of public affairs. When making a decision involving these sections chief executives should take account of –

(i) The policy and / or decision-making process to which the information relates;

(ii) The stage of the process; whether the process is complete and, if not, what stage has been reached;

(iii) Whether the information requested is still under consideration, and if not, what decisions have been made in relation to it;

(iv) Whether any concern about releasing the information relates to the content of the information or the context in which it was generated or supplied;

(v) The effect of disclosure on the policy and / or decision-making process to which the information relates;

(vi) The extent to which, if any, the topic in question is already in the public domain;

(vii) The public interest. Having considered (i) and (iv) above, are there any overriding public interest concerns which would outweigh the need to withhold information?

Again this is an area where you may well need to consult your Minister. Such consultation should occur at the earliest possible time.

Resources

I recognise that departments have many tasks to attend to in the period leading up to the general election. These guidelines should not add significantly to the demands on departments as they serve only to reinforce your existing procedures for handling official information requests. The key is to ensure your procedures are in place and your staff well versed in them. You should also bring to their attention the importance of strict adherence to these procedures during the months leading up to the General Election.

It is also most important that you ensure that your Minister is kept informed of all information that is released under the Act i.e. a “no surprises” policy. This does not amount to public servants getting involved in promoting

the activities of the Government; rather they should not inadvertently undermine the policies and the plans of the Government of the day.

FOR FURTHER GUIDANCE ON THE OFFICIAL INFORMATION ACT REFER:

State Services Commissioner: *Release of Official Information Guidelines for Co-ordination* [1992]

Office of the Ombudsman: *Handling Requests for Information* when Administrative Provisions of the Official Information Act may apply [*Practice Guidelines No. 1* 1992]

Office of the Ombudsman: *Official Information Act 1982* Section 9(2)(f)(iv) and Section 9(2)(g)(i) Practice Guidelines No. 2 [1993]

Office of the Ombudsman: *General Election 1993*, Section 9(2)(f)(iv) and Section 9(2)(g)(i) [April 1993]

Dept. of Justice: *Official Information Act: Charging for Services* [January 1992]

Cabinet Manual Chapter 6 A1-A37.

D K Hunn
State Services Commissioner

Official Information Act 1982

4. Purposes – The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament, –

(a) To increase progressively the availability of official information to the people of New Zealand in order –

  (i) To enable their more effective participation in the making and administration of laws and policies; and

  (ii) To promote the accountability of Ministers of the Crown and officials, –

  and thereby to enhance respect for the law and to promote the good government of New Zealand:

(b) To provide for proper access by each person to official information relating to that person:

(c) To protect official information to the extent consistent with the public interest and the preservation of the personal privacy.

5. Principle of availability – The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where the Act otherwise expressly requires, in accordance with the purposes of the Act and the principle that the information shall be made available unless there is good reason for withholding it.

The Public Service Employer

A paper in the guidance series 'Public Service Principles, Conventions and Practice'

STATE SERVICES COMMISSION
Te Komihana O Ngā Tari Kāwanatanga

First published in September 1995
by the State Services Commission, Wellington, New Zealand.

ISBN 0-478-08909-0

CONTENTS

INTRODUCTION

The purpose of this paper is to:

- set out the statutory basis for the employer role of chief executives and senior public servants and the general legal obligations of Public Service employers
- highlight additional or special provisions that apply to Public Service employers
- discuss some specific issues and particular situations that can arise.

CHIEF EXECUTIVES AS EMPLOYERS

Section 59 of the State Sector Act 1988 provides for chief executives of Public Service departments to appoint and dismiss employees and (except where provided expressly to the contrary in the Act) to have the "rights, duties, and powers of an employer in respect of the persons employed in the department for which the chief executive is responsible."

The responsibility of chief executives for personnel matters reinforced the application of those tenets of State sector reform designed to improve managerial flexibility, autonomy, and accountability. The employer rights and powers are tempered appropriately by the responsibility of chief executives to operate personnel policies within the framework of "good employer" principles.[1] These principles, which have guided employment practices in the New Zealand Public Service at least since the introduction of equal pay in 1960, are perpetuated and reinforced by the State Sector Act 1988.

In practice chief executives may delegate many of the responsibilities they have in this area to other senior officials so that all senior staff should be aware of the powers, obligations and responsibilities that chief executives have as employers.

As employers, chief executives are bound by "common law" and statutory requirements that apply to employers in their employment relationship. As Public Service employers, chief executives are bound by a number of specific standards. All of these various obligations are subject to change or interpretation in the form of new legislation and decisions in particular cases by the courts. It is important, therefore, that chief executives and senior officials keep abreast with such developments.

1 For a useful discussion see Boxall, Peter *Would the Good Employer Please Step Forward? A Discussion of the "Good Employer" Concept in the State Sector Act 1988* in New Zealand Journal of Industrial Relations, 1991, vol 16, pp 211-231.

COMMON LAW REQUIREMENTS

Employers have general obligations to provide work in accordance with the provisions of the relevant employment contract, to provide a safe work environment, and deal with their employees fairly and reasonably on the basis of a relationship of mutual trust and co-operation. As the law stands, it is important from an employer perspective to note that:

- Fundamental to any employment contract is the obligation on both parties to conduct themselves in a manner which will maintain a relationship of trust and confidence between the employer and employee.[2] This creates a mutual duty of *fair dealing* on the part of the employer and the employee. In this respect contracts of employment differ from ordinary commercial contracts. Employment contracts will be interpreted having regard to what is just and reasonable to both parties in all the circumstances.

GENERAL STATUTORY REQUIREMENTS

Under the Employment Contracts Act 1991, employees are employed under the terms of an *individual* or a *collective* employment contract.

In the Public Service, where an *individual* employment contract is entered into, the chief executive is the employer party and may enforce the contract accordingly. Current practice is that *collective* employment contracts are negotiated by a chief executive in terms of s68 of the State Sector Act 1988 under delegated authority from the State Services Commission (s70). Both kinds of contract are subject to the provisions of the Employment Contracts Act 1991 and statute law affecting the general law of contract which binds the Crown.[3] Once agreed the provisions of contracts bind the parties and are enforceable by them. In relation to personal grievances, the chief executive of the department concerned is always the employer party.

In relation to disputes about the interpretation, application or operation of any collective contract, the employer party is the chief executive acting, if the State Services Commissioner so requires, together with or in consultation with the Commissioner.[4] Where a person in authority delegates his or her

2 See *Brighouse Ltd v Bilderdeck & Ors.*, AEC 30/93, & CA 143/93 4 NZELC 95,615.

3 Examples of such legislation include the Frustrated Contracts Act 1944, the Illegal Contracts Act 1970, and the Contractual Mistakes Act 1977. For further information on this and other matters to do with employment law a standard reference work should be consulted and/or competent professional advice obtained.

4 State Sector Act 1988 s23 (8).

functions or powers to another person that delegation, of itself, does not affect the responsibility of the person making the delegation for ensuring that the delegation remains appropriate. A delegation of a statutory function or power cannot totally abrogate the original statutory responsibility.

The delegation of a function or power to act creates certain legal and moral expectations on both parties. Those who make the delegation must ensure that they have the power to do so, that they have complied with any pre-conditions to the making of the delegation, that the person receiving the delegation is an appropriate person to entrust with those powers or functions, that any conditions or limitations to the delegation are clearly expressed, and that there is an appropriate means of monitoring the exercise of that delegation.

The extent of any responsibility that might attach to the person making the delegation would depend largely on whether the delegation had been made and monitored in a responsible manner. Even then, it is not unusual for the person holding the original functions or powers to be held accountable for specific decisions made under the delegation.

It is beyond the scope of this paper to provide a comprehensive summary of the provisions and implications of the Employment Contracts Act 1991 but chief executives and other senior officials should ensure that they are familiar with these and have access to more detailed reference material and / or technically competent advice as required.

A *minimum* code of conditions set out in different pieces of legislation generally applies to all employees. These conditions apply for minimum wages, equal pay requirements, minimum holiday requirements, parental leave provisions, protection of wages owed to employees, leave for voluntary defence service, protection from discrimination, and leave for jury service.

Both the Employment Contracts Act 1991 and the Human Rights Act 1993 contain important provisions prohibiting discrimination in employment matters on specified grounds and providing procedures for dealing with complaints and disputes. *Collective* and *individual* employment contracts may also include binding "non-discrimination" provisions. Under the Human Rights Act 1993 discrimination is prohibited on the grounds of sex, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status, and sexual orientation – in each case as defined in the legislation. Sexual harassment and racial harassment, again as defined, are also made unlawful. In addition, the Employment Contracts Act 1991 prohibits discrimination or dismissal on the basis of activities in employee organisations, or duress arising from an employee's membership or non-membership of an employee organisation. The Act provides a further right of action to employees who believe they have been disadvantaged in their employment or in any one or more of the conditions of that employment because of some unjustifiable action of the employer.

HEALTH AND SAFETY

The Health and Safety in Employment Act 1992 consolidated much of the health and safety law contained in a variety of earlier statutes or regulations. But, there are some current exceptions. These include parts of the Smoke-free Environments Act 1990, the Resource Management Act 1991, the Building Act 1991, the Boilers, Lifts, and Cranes Act 1950, the Machinery Act 1950, the Amusement Devices Regulations 1978, and the Traffic Regulations 1976. It would pay any senior official to scan these to gain a wide appreciation of employer obligations.

The intent of the Health and Safety in Employment Act 1992 has been to shift the focus from an emphasis on control and compliance to a regime which accentuates positive incentives for employers to manage health and safety risks to their employees, contractors, and the public alike. Even if the law did not provide those incentives, it would be consistent with good management to act in the spirit and intent of the Act. Quite apart from the account that ought to be taken of the human factors, the opportunity for cost savings and cost avoidance in terms of reductions in accident compensation premiums, inquiries, litigation, and productivity should be sufficient motivation for managers to contain and minimise health and safety risks.

Under the Act, which imposes important obligations on all employers and employees, employers must:

- take all practicable steps to ensure the safety of employees while at work. In particular they must: provide and maintain a safe working environment, amenities, and facilities for the safety and health of employees; ensure that plant is so arranged, designed, made and maintained that it is safe for employees so that they are not exposed to hazards arising out of anything in or near (if under the employer's control) their place of work
- take all practicable steps to ensure that all significant hazards are eliminated or, failing elimination, isolated, minimised, and monitored
- give every employee all the results of any monitoring of their health, safety, or exposure to hazardous substances, and, if requested, the results of all general monitoring
- ensure that all employees are given information about what to do in an emergency, what hazards are likely to arise from their work, what hazards may be created and how to minimise their effect on other employees, and where all necessary safety clothing, devices, equipment, and materials are kept
- ensure that employees are properly trained and supervised so that they are not at risk

- ensure that employees are fully involved in the development of these procedures and with procedures for dealing with, or reacting to, emergencies or imminent dangers
- take all practicable steps to ensure that no contractor or subcontractor (or their employees) is harmed while doing any work that the contractor was engaged to do.

For the purposes of managing health and safety risks "all practicable steps", in relation to achieving any result in any circumstances, means all steps to achieve the result that it is reasonably practicable to take in the circumstances, having regard to *all* of the following:

- the nature and severity of the harm that may be suffered if the result is not achieved
- the current state of knowledge about the likelihood that harm of that nature and severity will be suffered if the result is not achieved
- the current state of knowledge about harm of that nature
- the current state of knowledge about the means available to achieve the result, and about the likely efficacy of each
- the availability and cost of each of those means.

It is not just a matter of meeting minimum standards and codes laid down by statute. It is important that Public Service employers set not only high standards, but also "their own standards commensurate with the principal object of the Act, after due analysis and criticism."[5]

It is not sufficient to address employer obligations with respect to health and safety matters in a broad and general sense. Good employers are alert, proactive and progressive, and seek to discharge their responsibility to identify specific hazards and risks. The best way to do this, and to meet the requirements of the Act (section 14), is to encourage and support employees to assist in that task through the establishment of departmental or divisional health and safety committees, and to develop health and safety plans, specific codes, registers, and education and training programmes for staff. The Act provides the legislative framework for this to happen.

If employers want to demonstrate that all practical steps have been taken to discharge their responsibilities the Health and Safety in Employment Act 1992 provides for the development and approval of statements of preferred work practices, known as "approved codes of practice". These are the recommended means of compliance with provisions of the Act, (section 20) and may include procedures which can be used by an employer to control hazards in the workplace and to be seen to be doing so.

5 See *Department of Labour v Regina Ltd* (1994) 4 NZELC (digest) 98,287.

"Approved codes" are promulgated as a result of consultation between the Occupational Safety and Health Service of the Department of Labour and affected industry members.

Employees have obligations too. These include the requirement to take all reasonable steps to ensure their own safety while at work, and to ensure that their actions do not endanger or harm other persons. But these obligations do not lessen the general responsibility of employers.

SPECIFIC PUBLIC SERVICE REQUIREMENTS

A number of specific statutory requirements are set out in the State Sector Act 1988.

The Act:

- provides for departmental staff to be employed by chief executives and for the Employment Contracts Act 1991 to apply to employment contracts in the Public Service
- includes special conditions for chief executives and members of the Senior Executive Service in relation to matters such as criteria for appointment, tenure, conditions of employment, and opportunities for training and development
- includes expectations that employees in the State services will be "imbued with the spirit of service to the community" and maintain appropriate standards of integrity and conduct
- requires chief executives to operate a personnel policy that complies with the principle of being a "good employer" as defined in the Act and ensure that all employees maintain proper standards of integrity, conduct and concern for the public interest
- authorises the State Services Commissioner to issue a code of conduct covering the minimum standards of integrity and conduct that are to apply in the Public Service. These conditions are binding on all employees
- requires chief executives to develop, implement, publish and report on annual equal employment opportunities programmes
- requires chief executives in making appointments to notify vacancies wherever practicable, to give preference to "the person who is best suited to the position", to notify appointments (other than those of acting, temporary or casual employees), and to establish a procedure for reviewing appointments requested by departmental employees. (The review procedures must be submitted to, and approved by the

State Services Commissioner and comply with guidelines prescribed by the Commissioner from time to time.)

- provides for the transfer of employees within a department and between departments in restructuring situations
- requires appointments to be made in writing by the chief executive or a person acting under formal delegated authority from the chief executive
- authorises chief executives to require any applicant for appointment to their department and any existing employee to undergo a medical examination
- authorises chief executives to issue instructions that must be observed by all employees of the department
- expressly limits the personal liability of chief executives and departmental employees for acts done in good faith in pursuance or intended pursuance of the functions and powers of the department or chief executive concerned.

THE "GOOD EMPLOYER" PROVISIONS

A "good employer" is defined in section 56 (2) of the State Sector Act 1988 as an employer who:

> " . . . operates a personnel policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment, including provisions requiring –

(a) Good and safe working conditions; and

(b) An equal employment opportunities programme; and

(c) The impartial selection of suitably qualified persons for appointment; and

(d) Recognition of –

  (i) the aims and aspirations of the Maori people; and

  (ii) the employment requirements of the Maori people; and

  (iii) the need for greater involvement of the Maori people in the Public Service; and

(e) Opportunities for the enhancement of the abilities of individual employees; and

(f) Recognition of the aims and aspirations, and the cultural differences, of ethnic or minority groups; and

(g) Recognition of the employment requirements of women; and

(h) Recognition of the employment requirements of persons with disabilities."

In terms of the Public Service the definition of a "good employer" is not confined to the description in the State Sector Act 1988. The parameters and tests of a "good employer" are being developed progressively by case law and precedent. It behoves each employer to be alert to, and informed about, subtle and significant changes to employment law, and the expectations and obligations of employers and employees alike. Section 56 (2) of the State Sector Act 1988 outlines the minimal definition.

Recent case law suggests that "good employer" obligations may extend in some respects to interested prospective employees as well as existing employees. In addition, the concept of "good employer" includes some obligation to create working environments that allow employees to contribute to their full potential.

In addition to the specific statutory requirements, the employment decisions taken by chief executives are subject to the provisions of the Privacy Act 1993, Official Information Act 1982, to review by an Ombudsman under the Ombudsmen Act 1975, and to judicial review by the courts. Access to judicial review arises because all employment decisions taken by chief executives, or by other staff under delegation from chief executives, are taken pursuant to statutory authority.

THE OVERALL FRAMEWORK

The combined effect of these provisions and obligations is to establish an employment framework in which there is a strong emphasis on equity in personnel management and on impartial, open, fair and principled treatment of employees. These things are important and need to be seen in the full context of obligations placed on departments and their chief executives. However, it is clear that personnel decision making cannot be reduced to a simple formula; nor are the interests of individual employees the only matters that can or should be taken into account.

"The State Sector Act 1988, is an Act:

(a) To ensure that employees in the State services are imbued with the spirit of service to the community; and

(b) To promote efficiency in the State services; and

(c) To ensure the responsible management of the State services; and

(d) To maintain appropriate standards of integrity and conduct among employees in the State services; and

(e) To ensure that every employer in the State services is a good employer; and

(f) To promote equal employment opportunities in the State services; and

(g) To provide for the negotiation of conditions of employment in the State service; and

(h) To repeal the State Services Act 1962, the State Services Conditions of Employment Act 1977, and the Health Service Personnel Act 1983."

The overall context requires a number of factors to be taken into account including:

- the department's need to get its work done and meet its obligations
- the need to be fair to all concerned (including the department, staff directly involved, and co-workers) in both substance and process
- the need to respect people and their rights
- the need to be fair to the tax-payer.

Some senior officials may be concerned that the framework does not give them sufficient discretion in employment matters. It is sometimes argued that if managers are not free entirely to "hire and fire" their staff they cannot be expected to accept responsibility for the achievement of results.

The Public Service employer needs to consider that:

- It is inherent in the nature of the Public Service that it will be expected to set a good example in employment matters, that its practices will be subject to external scrutiny in a variety of ways, and that effective restraints on potential abuses such as nepotism and favouritism can be shown to exist.
- The nature of Public Service employment differs from most other employment situations, and demands the application of its own standards and values.
- Private employers are also required to make decisions within a framework of obligations which is increasingly emphasising the need for fair treatment and due process in employment matters.
- Obligations to be a "good employer", to be responsive in dealing with employment matters of different cultural traditions, and to be conscious in particular of the status of Maori as tangata whenua should not be seen as negative constraints or as a necessary price to pay if important equity goals are to be achieved. Good, constructive policies

in these areas can improve relationships with employees, enhance the ability of departments to deliver quality services to the public, and tap valuable human resources. To take one example, flexible working arrangements will be attractive to employees with family responsibilities. This may give departments who make such arrangements available an important competitive advantage in the recruitment and retention of such employees.

In the remaining sections of this paper, comments will be made about some specific issues for employers and particular situations that may arise.

THE NATURE AND CHALLENGE OF HUMAN RESOURCE MANAGEMENT

With the passage of the State Sector Act in 1988, the nature of personnel administration in the Public Service changed dramatically. Not only was decision making authority devolved from the State Services Commission to individual departments but the basic nature of personnel decision making and entitlements changed. Negotiated or prescribed conditions became "minima" which can be enhanced at employer discretion. Decision making now involves a much greater element of discretion.

Taken together these changes represent a most significant change in Public Service reform, arguably the most significant since 1912. The changes also represented the start of a movement away from a concept of personnel management based on the determination and administration of entitlements to a concept of human resource management. This is concerned with ways of ensuring that departmental objectives are achieved in the short and long-term through well-motivated, well-treated and appropriately skilled people working in well-structured entities with good organisational systems. This transformation is far from complete but, even now, it is important for senior officials to see the employer function in that broad context and not in the limited context of entitlements and administration of those entitlements.

Modern theories and practice of human resource and personnel management have helped broaden understandings and perspectives on work and employment relationships. For instance, approaches which regard expenditure on staff, and staff resources, as an investment rather than a cost, provide the basis for new perspectives on the value of people to an organisation. Human resource accounting methods are an example.

Chief executives and senior officials are responsible for the effective management and performance of their own departments in a wider Public Service context. Just as a department needs to "deliver" in both the short

and longer term, so too does the Public Service as a whole if it is to fulfil its obligations with respect to the collective interests of government. One important way of contributing to this is by the development of skilled and experienced managers who can fill management and leadership positions in a variety of departments.

From time to time, there may be a tension between the needs of departmental organisations and the needs of the Public Service as a whole in matters of staff career development. The important thing is that those tensions, whether they be more or less agency centred or service-wide, are recognised and confronted by those responsible for making employment decisions.

ETHICS AND STANDARDS

The individual conduct of senior staff can have a profound influence on the way in which other staff perceive the importance of ethical issues, what is regarded as acceptable behaviour, and how people behave. As well as setting a good personal example senior officials have important roles to play in the following:

- developing, clarifying and explaining standards and expectations
- identifying potential ethical problems that may arise in the department
- promoting knowledge of, and commitment to, good practice
- evaluating personal and organisational performance
- providing training, counsel and advice
- making careful and principled decisions on particular matters that arise.

A 1991 Employment Court decision[6] has confirmed that if chief executives and senior staff wish to establish binding standards and obligations over and above those in the *Public Service Code of Conduct*, that additional standards and obligations must be communicated formally and clearly to departmental staff.

In establishing additional standards and obligations senior officials need to be aware of:

- formal standards and requirements such as the *Public Service Code of Conduct*, and any applicable departmental codes
- specific issues or temptations that may arise within their department which may need to be the subject of instructions, procedures, training or monitoring arrangements

6 *New Zealand Public Service Association v Iwi Transition Agency* (1991) 3 ERNZ 147.

- the general climate of opinion or culture of the organisation, any risks that may exist because of this, and any action that should be taken to change the prevailing culture
- the need to have effective mechanisms in place for detecting and dealing with misconduct or inappropriate behaviour if it occurs
- the need to adopt an approach which will be respected as reasonable, sensible, and practicable in all circumstances.

Issues of personal conscience and conflicts of loyalties can arise at any time. To take some examples:

- Members of professional groups may find a tension between the ethical standards and values of their professions and their obligations as employees.
- Maori staff may find it difficult at times to reconcile loyalty to their whanau, hapu and iwi groups, to the welfare and best interests of Maori as a whole as they perceive it, and to their departments and the government of the day.
- Staff employed to promote the interests of a particular group, for instance, in a ministry with special responsibilities for a sector group, may find it difficult to accept the discipline inherent in operating in a public service environment.

Senior officials should aim to anticipate such situations wherever possible and to deal with them sensitively, firmly and expeditiously when they arise. Explicit "up front" discussion of the issues with staff involved may be necessary and valuable. A climate in which departmental employees feel free and even encouraged to discuss potential conflicts and concerns they have about the development of government or departmental policy and decision making should make problems such as "leaking" much less likely.

INDEPENDENCE OF DECISION MAKING

Section 33 of the State Sector Act 1988 states that:

> " . . . in matters relating to decisions on individual employees (whether matters relating to the appointment, promotion, demotion, transfer, disciplining, or the cessation of the employment of any employee, or other matters), the chief executive of a department shall not be responsible to the appropriate Minister but shall act independently."

This provision needs to be read in the context of Part IV of the State Sector Act 1988 and the constitutional position of Ministers.

Part IV of the State Sector Act 1988 deals with the Senior Executive Service and imposes certain obligations on chief executives to consult with the State Services Commissioner in certain circumstances and to make Senior Executive Service members available for training.

As far as Ministers are concerned a Speaker's ruling in September 1989 confirmed that Parliamentary questions relating to any of the matters set out in section 33 of the State Sector Act 1988, as they relate to an individual employee, are not in order. The ruling stated that this "does not prevent questions relating to employment decisions generally as they are followed in each government department, but the Minister will not be answerable for personnel actions taken in respect of any identified member of staff."[7]

It should be noted that the rule only relates to Public Service departments – not to Crown entities, Crown Health Enterprises, or other public agencies. Furthermore, Rule 128 / 2 does not extend necessarily to the appointment of chief executives, or to questions relating to, for instance, the non-appointment of a named individual to a chief executive position. Questions have been allowed and answered on these matters since the Rule was promulgated.

In the interests of maintaining good working relationships between Ministers and officials, and in keeping with sound management principles, and prudence, it is appropriate for chief executives to consult their Ministers on any personnel matters of significance, or about those staffing matters likely to become an issue of public concern, or affect the administration of their departments.

Clearly any such briefings need to be undertaken carefully to avoid any suggestion that the chief executive has not acted independently in arriving at a decision relating to an individual employee.

Consultation with Ministers on personnel matters should be guided by a full appreciation as to why the consultation is necessary. In addition, there are two conditions that should apply:

- Initiative – the chief executive should initiate any such consultation and be clear of its purpose. It would be inappropriate for a Minister to do so, and a chief executive, or a State Services Commissioner as the case may be, should anticipate the need for consultation.
- Timing – the consultation should take place *before* decisions are made. That is, the consultation should be an opportunity to signal an intent about a possible course of action or likely decision. In normal circumstances there are two points at which consultation is critical. In the case of the appointment of senior staff the Minister

7 Speakers' Ruling 128/2.

should be consulted a) *before* a position is advertised, and b) *before* an appointment is decided. In that way the Minister's views may be known before the chief executive, or the State Services Commissioner as the case may be, exercises their authority in terms of the State Sector Act 1988.

While the desirability of such consultation is apparent in terms of maintaining close working relations between the department and its Minister, it must be equally apparent to all the parties concerned that the final decision on, and the ultimate accountability for, individual appointments must rest with the chief executive alone.

In all cases, but particularly where senior or sensitive appointments are contemplated, the importance of following departmental procedures cannot be stressed enough. To avoid embarassment or to minimise the likelihood of later challenges on the grounds that proper procedures were not followed, it is wise to check all references, and with referees, of short-listed applicants for position vacancies. Checks should also extend to an applicant's previous employers, provided permission is first obtained from the subject. Information from these sources, and from consultants, should be considered in the process of decision making.

Situations may arise where a Minister (or Ministers) becomes concerned about the capacity, performance or presentation of a particular official. In extreme cases, and in the interests of both fairness and good administration, a chief executive must try to deal with such concerns on their merits and in consultation with the employee concerned. In the end effective administration will require the acceptance of the Minister's preference, notwithstanding that the official may, in the opinion of the chief executive, be a most competent person. In such circumstances any decision needs to take account of the career prospects of the official concerned.

Senior officials should think very carefully where an otherwise suitable prospective appointee is being considered for possible appointment to a senior or sensitive position (e.g. those involved in significant direct contact with Ministers) and the person concerned has been involved actively in party or pressure group politics in the past. Relevant considerations in such cases may include the potential value to the department of the prospective appointee's skills and experience and the potential impact on the actual and perceived political and policy impartiality of the appointee and the department. Discussion with the prospective appointee about these matters may also be appropriate to test their grasp of the issues involved and to determine their views and intentions.

The Senior Public Servant

A paper in the guidance series 'Public Service Principles, Conventions and Practice'

STATE SERVICES COMMISSION
Te Komihana O Ngā Tari Kāwanatanga

First published in August 1994
Second edition September 1995
by the State Services Commission, Wellington, New Zealand.

ISBN 0-477-05 594-X

CONTENTS

In November 1558 Elizabeth I appointed William Cecil as her principal adviser saying:

'This judgment I have of you, that you will not be corrupted by any manner of gift, and that you will be faithful to the State, and that without respect of my private wish you will give me that counsel you think best, and that, if you shall know anything necessary to be declared unto me of secrecy, you shall show it to myself only, and assure yourself I will not fail to keep taciturnity therein.'

As a simple guide to the obligations of a senior official and the relationship that might exist this charge remains pertinent.

And as Mark Twain once said. . .

'Always do right. This will gratify some people and astonish the rest.'

This paper is a guide to good practice and a reference for senior public servants in their daily work. It should be read with discernment. The reader should also refer to the Cabinet Office Manual and Cabinet Office circulars, for specific direction where applicable.

INTRODUCTION

The purpose of this paper is to discuss some of the issues that arise for senior public servants as employees. Reference is made to features of general employment law and to aspects of the employment relationship that apply to public servants generally. However, the main emphasis is on difficult issues that arise from time to time and on issues of principle with which senior public servants should be familiar.

The paper is in four main sections.

- *Section One* discusses the desirable qualities and attributes of a "professional" public servant.

- *Section Two* discusses the distinctive features of the employment environment of the senior public servant.

- *Section Three* discusses relevant aspects of general employment law and summarises the law as it applies to public servants in particular.

- *Section Four* identifies and discusses a number of specific issues of particular relevance to senior public servants.

  Appendix 1 contains the statement of the New Zealand Public Service on *Striving for Excellence in Serving New Zealand*.

  Appendix 2 identifies some basic reference material.

Section One
THE PROFESSIONAL PUBLIC SERVANT

There has been some debate about whether there is a distinct profession or professional grouping to which public servants, particularly senior public servants belong. Whatever the case it is important that senior public servants act professionally. That is, they act to support and maintain generally accepted standards and values of conduct, and share a sense of common purpose and duty.

Senior public servants are conscious of the special institutional and constitutional framework within which they operate. They are concerned with promoting the public welfare. They have well-developed and informed notions of personal integrity, and the need to be above reproach, as this applies to their positions in the Public Service and their personal conduct.

Desirable Attributes

To be professional in the Public Service means:

- obeying and upholding the law
- discharging obligations to the elected government of the day in a politically impartial way
- displaying a high level of knowledge and competence
- delivering services and achieving results through organisational efficiency, and fiscal responsibility
- demonstrating a strong sense of personal responsibility, personal integrity and commitment to the public good
- preparing advice, delivering services, and making decisions reached by using analytically sound, well-rounded, informed and inclusive approaches
- respecting people and their views both inside and outside the Public Service
- tendering advice with courage, tenacity and independence
- promoting and advocating the core values of the organisation, evaluating the performance of staff in the light of those values, assessing the extent to which core values are actually reflected in the organisation, and providing opportunities for general training and counselling as appropriate.

It would not be professional for a public servant to:

- act out of spite or bias or favouritism
- allow official action to be influenced by personal relationships, self-interest, or personal obligations
- promote a particular political viewpoint or personal agenda.

Ambiguity and Tension

What emerges from this attempt to distil some of the essential elements of Public Service professionalism is a strong sense of ambiguity from which tension or conflict may arise. This is inevitable in an environment where senior public servants must:

- be committed, informed, and prepared to pursue tenaciously what they believe to be right and important
- be dispassionate, impartial and willing to accept political direction without public demur
- be committed to serving their Ministers and the government of the day wholeheartedly and be prepared to identify with its policies and priorities while remaining non-partisan and preserving their ability to provide the same level of service and commitment to any future government
- acknowledge, respect and support political control of the service in the processes of government while also accepting public, personal and organisational responsibility for actions and performance.

Section Two
THE EMPLOYMENT ENVIRONMENT

Distinctive Features

Senior public servants operate in an unusual and distinctive employment environment. The senior public servant is employed in a public context and has a variety of formal duties and obligations. Chief executives are employed by the State Services Commissioner. Chief executives are the employers of public servants within departments. All public servants, including chief executives, have an important relationship with the Minister or Ministers with responsibility for their departments. Those Ministers are not the employers of senior public servants, but the duties which senior public servants owe to them are very similar to the duties which employees are deemed to owe to employers.

Obligations

Senior public servants also have obligations to Parliament and to the government as a whole and they must act according to law – a wide concept that includes the notion that any person vested with statutory authority must exercise that authority properly in terms of both substance and process. This applies whether a public servant is acting under delegated authority from a Minister or an administrative superior, or is acting as an independent decision maker in the exercise of some statutory functions, such as those of the Public Trustee, the Comptroller of Customs, or the Registrar of Electors.

The various grounds on which an Ombudsman may find that an official "decision, recommendation, act or omission" warrants further consideration or review provide a useful reminder of the way in which such matters need to be dealt with and the kinds of things that need to be taken into account:

- Was it contrary to law?
- Was it unreasonable or unjust?
- Was it oppressive or improperly discriminatory?
- Was it based on a mistake of law or fact, or incomplete information?
- Was it wrong?

Natural Justice

In addition to these considerations, administrative law requires that decisions are arrived at fairly, impartially and in accordance with due process. As a minimum standard in this area, section 27 (1) of the New Zealand Bill of Rights Act 1990 provides that "every person has the right

to the observance of the principles of natural justice by any tribunal or public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law."

A Question of Ethics

Finally, there is the matter of the duty of senior public servants to the "public interest" however defined. The question is whether or how far that duty extends beyond the obligations they owe to their employers, and to Ministers of the Crown, both individually and collectively. The answer cannot be expressed in simple terms, or by the promulgation of some code or set of normative statements. The resolution requires judgment, and the exercise of a discretion tempered on a case-by-case basis. In short, the question is a matter of ethics.

The employment relationship in which senior public servants participate is both complex and distinctive. There are a number of reasons why this should be so:

- Public Service departments are public agencies set up by government or Parliament to promote public purposes.
- Public officials and public agencies are an important part of the overall scheme of government.
- Public Service agencies should operate – and should be seen to operate – in an efficient, responsive, principled and professional way, to enhance public confidence in government and, by extension, in the legitimacy of the State and its institutions.

In this context, it is important but not sufficient just to comply with instrumental requirements. Issues of efficiency, effectiveness, responsiveness and accountability also acquire or assume an ethical dimension. That is, their achievement ought to be a higher or moral duty occasioned by the very nature of being a Public Service official. The subject of ethics implies more than adherence to codes of conduct, for instance. While such rules may prescribe ways of keeping out of trouble, ethics is concerned with determining what ought to be done in a given situation, both at an individual and an organisational level.

Public Expectations

Public Service departments rely on and regularly exercise the coercive power and sovereign authority of the State to obtain the revenue they need to operate, to obtain sensitive information and to carry out their functions. Individual members of the public may be obliged by law to

deal with government agencies and be dependent on them to protect their interests and their privacy or even to provide them with the necessities of life.

On the basis of the foregoing, it is inevitable that politicians and the public wish to be reassured that: government departments behave ethically, they are well managed, public money is being spent efficiently and for the purpose intended, departmental functions are carried out well, and statutory power and authority is exercised properly. The public and public organisations have a legitimate stake in the activities and performance of the government and its agencies.

Acting Responsibly

For their part, public servants should be aware of the considerable powers, responsibilities and discretion they have been given – not as of right but as trustees of public resources and public office. They should aim to act in ways that reassure the public and politicians that the Public Service is carrying out its functions responsibly and effectively, and that it is worthy of continuing trust and confidence.

Public Service departments work in a climate where their senior managers are expected to demonstrate publicly a high standard of efficiency in the management of resources and a commitment to achieving specific output production targets, notwithstanding that these requirements may seem onerous or even inappropriate.

Public Service managers only have as much freedom to manage as elected politicians and, ultimately, the public are prepared to give them. At the same time, more and more will be expected of managers in terms of efficient and productive administration and performance. In the words of a former senior British civil servant "If you cannot work like that . . . you are in the wrong business."

Summary

- The activities of Public Service departments take place in a specific institutional and constitutional context and must be carried out in a particular and characteristic way.
- Senior public servants have to deal with a high level of ambiguity, and potentially conflicting demands.
- The actions of senior public servants and their agencies are subject to regular scrutiny, constraints and imperatives of a public nature.
- Government departments must continue to be subject to effective political direction and control by people who are given the mandate to do that through the electoral process.

Ministerial Responsibility and the Public Official

The notion of *ministerial responsibility* is linked closely with the idea of *responsible government*. Both concepts derive from the function of Parliament in providing a control or influence upon the powers of the State as exercised by the government of the day and its Ministers.

"In general terms, it is the responsibility of Ministers to determine policy and defend policy decisions; it is the responsibility of officials to advise Ministers and to implement Government policy."[1] Ministers collectively are responsible for formulating and promoting government and ministerial policy, and individually accountable for the achievements or shortcomings of their departments.[2] Ministers have the constitutional right to determine within the limits of the law what is in the public interest, and the constitutional duty of public servants is to give effect to those determinations.

Ministers are not the only people who influence or develop policy, however. The public, community groups, and sectoral interests are increasingly involved in the public policy development processes through a variety of means. In addition, it has long been recognised that public servants exercise considerable influence, through the knowledge they hold, the advice they give and the discretion they exercise when giving effect to government policy or dealing with issues that may not warrant direct ministerial attention. That power is not, and should not be, exercised in a moral vacuum.

Impartiality and Political Neutrality

Senior public servants appointed independently and on merit have a duty to tender informed, impartial and politically-disinterested advice on policy initiatives, and they should be "at one" with the Minister at all times in public. Once firm decisions have been made senior officials should not promote alternative or counter policy proposals. All efforts must be devoted to implementing policy decisions. It is not appropriate for public servants to be involved or seem to be involved in any subsequent public debates or discussions that might in any way undermine those decisions, or appear to criticise the Responsible Minister, or the government.[3]

While Ministers accept the merits of a professional, apolitical Public Service they are free to seek advice elsewhere. Ministers will often seek input from their own political staff and from a variety of sources outside the Public Service.

1 *Cabinet Office Manual* Ch. 2/6 G5.

2 *Cabinet Office Manual* Ch. 2/5 G4.

3 *Cabinet Office Manual* Ch. 2/8 G17.

The doctrine of ministerial responsibility is complemented by the principle of *political neutrality*.[4] This holds that if public servants are to maintain the confidence and trust of, and be fit to serve, successive governments, those officials must conduct themselves and tender advice impartially, without fear or favour to any party political interest or particular administration. To step over the often indistinct line between promoting or defending policy and explaining, advising on or implementing policy is to provide the opportunity for the loyalty of the Public Service to be called into question. Knowing where the boundaries are requires the senior public servant to exercise a judgment based on the circumstances of the situation and the issues involved.

Demonstrating Commitment

A willingness and ability to serve legitimate governments of whatever persuasion should not be confused with a lack of commitment to formulating and implementing the policies of a government. In this context the otherwise useful distinction between explaining government policy and advocating it (in terms of its merits as seen by Ministers) may not always be sustainable. Any apparent lack of enthusiasm by officials about particular government policies or initiatives may be just as telling as direct criticism of its substance, and is inappropriate. Obvious personal enthusiasm for (and public commitment to) particular government policies or initiatives can be just as inappropriate.

Independence

Independence, in the context of the Public Service, has a particular meaning. It evolves from the need for the Public Service to be seen to be non-partisan, and to act in ways that reflect integrity and professionalism. For the public servant independence is also concerned with having a duty to provide high quality, disinterested advisory services, and applying one's knowledge and experience in all aspects of the job without fear or favour.

Senior officials are appointed and promoted because they have certain desired qualities which include intellectual abilities and an absence of strong partisan allegiance. They are appointed for their capacity to make judgments in the context of a particular political environment.

Ministers must be able to rely on their departments for more than an unthinking obedience, if only for the reason that their departments must be presumed to know their public well, and to be able to measure for the Minister's information the effect of existing or proposed activities and the reaction to them.

4 See also *The Publice Service and Government.*

Independence, in the context of the Public Service, means having a capacity and willingness to provide advice that will be both "free and frank", and be tendered from a disinterested, informed, and non-partisan standpoint.

In circumstances when senior officials feel that criticism of particular policy proposals ought to be tendered to a Responsible Minister the manner in which such criticism is conveyed is important. Any criticism should be constructive, and in the context of "free and frank" advice,[5] and made with the approval of and by the chief executive, personally. In some particularly contentious cases, or where matters of important principle are at issue, it may be appropriate to also provide the comment or criticism in written form.

Collective Responsibility and the Public Official

Policy decisions of substance are taken by Ministers collectively rather than individually. Officials must frequently contribute to the preparation of advice to groups of Ministers by groups of officials from different agencies. This process can easily blur the established relationship between particular Ministers and senior officials. Yet, situations can arise where senior officials are directed to do things by Ministers which seem contrary to the wishes of Cabinet, or even to refrain from consulting with other officials and Ministers. Under such circumstances a chief executive should raise the matter with the Responsible Minister, in writing if necessary, and seek counsel from the State Services Commissioner as appropriate.

Attendance at Select Committees

If a chief executive or senior official from a department is asked, for example at a Select Committee, to comment on the soundness of a Responsible Minister's policy proposal by the Minister's colleagues, and the chief executive or official feels that the response will seem critical of the Responsible Minister the *Guidelines for the Chairmen of Select Committees* (1987) offers useful guidance. *". . . Departmental officials being examined by select committees are in a special position. They attend select committees on behalf of ministers, and are subject to that minister's direction as to what answers they should give, and which officials shall represent the department[6]. . . . .The following guidelines may assist committees:*

- *committees are entitled to question departmental officials on opinion or advice given to a minister or to the Government in confidence;*
- *a departmental official is entitled to refuse to disclose such opinion or advice without the agreement of the minister;*
- *a minister can claim that such information is confidential state information;*

5 See also *Cabinet Office Manual* Ch.2 G12.

6 In practice the chief executive will determine departmental representation.

- *the House can order production of such information; protecting it if necessary by having it produced before a select committee;*
- *a departmental official or minister who refused to obey such an order of the House could be proceeded against by the House for contempt.*

A refusal to answer a question cannot be treated as a contempt unless the answer is insisted on by the committee (by majority if necessary). A simple refusal to answer an individual member's question is not contempt. . ." section 5.8. p.19.

Attendance at Cabinet Committees

The situation with respect to Cabinet Committees is substantially the same. The difference is that the forum is private rather than public, only government members are present, and the opportunity for frank exchanges is thereby enhanced. While it is hoped that committee members would not put a chief executive in a position to give an opinion or reveal information or advice that would compromise their relationship with their Minister, such cases will arise from time to time. The key is to be aware of the possibility, be ready to make a judgment to accede to or refuse a request for information based on the circumstances of the situation while preserving the integrity of the advice, the office holder, and retaining loyalty to the Minister.

Dual Accountability

Dual accountability may arise when a public servant experiences a conflict of duty, usually between a duty to his or her employer, and a duty to, for instance, a professional body or a sectoral interest.

Dual accountability is a real issue for many officials. If and when conflicts arise they need to be confronted early, and worked through conscientiously. However, it will mean that where the conflict of loyalty cannot be managed satisfactorily, accountability to the Minister and to the government of the day should normally prevail. Public servants enter the Public Service not to satisfy self, group or sectoral interests, but to work in the wider public interest.

Policy Ministries

Not all public servants are closely involved in tendering advice to Ministers. Most public servants are concerned with delivering departmental outputs and services to the public. There are now several ministries and departments such as Women's Affairs, Consumer Affairs, Conservation, and Pacific Island Affairs that have a special advocacy role. That is, they are seen to advocate for particular interests. In these agencies it is desirable that clear understandings and ground rules are established to avoid serious conflicts of duty, and for officials to know to whom they

are accountable. There is, and should be, a distinction between advocacy and representation. Matters of dual accountability and duty are determined ultimately on the basis of a priority to the employer. In other words, the acceptance of "the Queen's shilling" denotes an allegiance to the Crown, which, for all practical purposes, means the government of the day and the Responsible Minister.

Conflict Resolution

In the final analysis, such conflicts may need to be approached by emphasising the political legitimacy conferred on elected politicians by their electoral accountability, asking whether a breach of the law or some basic constitutional convention (such as the obligation to provide correct information to Parliament) was involved, and by discussing the circumstances in which a public servant, having explored alternatives, should feel compelled to resign or take action short of resignation rather than conspire in implementing what is to that person morally unacceptable, corrupt policy.

The option of resignation is not always realistic or necessary except in extreme cases. Even then it is most often a matter of individual conscience for which no specific guidance can be provided.

Good Government: 'Striving for Excellence'

The objective of trying to achieve an appropriate balance is reflected in the Public Service statement *Striving for Excellence in Serving New Zealand.*

In this statement, the vision of the Public Service is discussed in terms of helping New Zealand governments – but helping them to achieve specified goals in the form of a higher quality of life, higher living standards, high employment, social equity and justice, a high quality natural environment, and international respect as a member of the community of nations.

As well as existing to advise the government and to implement its policies and decisions to the highest possible standards of quality and integrity, the Public Service is described as being imbued with the spirit of service to the community and operating in accordance with the principles of law *and* democracy. The Public Service is seen as giving free and frank advice to the government of the day and informing and implementing its decisions, having a role in the "custodianship of the nation's resources for future generations of New Zealanders" and maintaining "the stability and continuity required in a system of democratically elected governments".

As in many other areas affecting senior public servants, an important aim is finding a balance, however elusive that will prove.

7 See Appendix 1.

Section Three
PUBLIC SERVANTS AND EMPLOYMENT LAW

Most senior public servants are employed under individual contracts of employment – as a chief executive, or otherwise. As such, they should be aware of relevant provisions of their individual contracts, the State Sector Act 1988, the Employment Contracts Act 1991 and those of the general law of employment as it has developed in New Zealand.

Contract of Employment

Employment contracts for chief executives are entered into with the State Services Commissioner. Employment contracts for other senior public servants (including Senior Executive Service members) are entered into with the chief executive of the department concerned or someone acting under the delegated authority of the chief executive.

Such contracts will include provisions dealing with matters such as:

- the duties the employee is expected to perform and other obligations they have as an employee
- the obligations of the employer
- the term of a contract
- early termination of the contract
- remuneration
- arrangements for setting out performance requirements and reviewing performance in terms of those requirements
- other matters.

Efforts should be made by both parties to ensure performance obligations are discharged fully. The performance agreement process is important not only because it provides an input into periodic reviews of remuneration, but also to specify performance expectations and appraisal criteria, provide feedback to employees on their performance, and record the achievements and experience of senior officials.

The State Sector Act 1988

The Act:

- provides for departmental staff to be employed by chief executives and for the Employment Contracts Act 1991 to apply to them with necessary modifications
- includes special conditions for chief executives and members of the Senior Executive Service in relation to matters such as criteria for appointment, tenure, conditions of employment, and opportunities for training and development

- is aimed at ensuring that employees in the State Services will be "imbued with the spirit of service to the community" and will maintain appropriate standards of integrity and conduct
- requires chief executives to operate a personnel policy that complies with the principle of being a "good employer" as defined in the Act and which ensures that all employees maintain proper standards of integrity, conduct and concern for the public interest
- authorises the State Services Commissioner to issue a code of conduct covering the minimum standards of integrity and conduct that are to apply in the Public Service
- requires chief executives to develop, publish and report on annual equal employment opportunities programmes
- requires chief executives in making appointments to give preference to "the person who is best suited to the position", notify vacancies wherever practicable, notify appointments (other than those of acting, temporary or casual employees) and establish a procedure for reviewing appointments that are the subject of any complaint by departmental employees (which must be approved by the State Services Commissioner and comply with guidelines prescribed by the Commissioner)
- provides for the transfer of employees within a department and between departments in restructuring situations
- requires appointments to be made in writing by the chief executive or a person acting under formal delegated authority from the chief executive
- authorises chief executives to require any applicant for appointment to their department and any existing employee to undergo a medical examination and to issue instructions that must be observed by all employees of the department
- limits the personal liability of chief executives and departmental employees for acts done in good faith while carrying out the functions and powers of the department or chief executive concerned.

Personal Liability

Section 86 of the State Sector Act 1988 states that:

> *"No chief executive, or member of the Senior Executive Service or other employee, shall be personally liable for any liability of the department, or for any act done or omitted by the department or by the chief executive or any member of the Senior Executive Service or any other employee of the department or of the chief executive in good faith in pursuance or intended pursuance of the functions or powers of the department or of the chief executive."*

This provision does not, of course, provide a blanket immunity from criminal prosecution. The *Cabinet Directions for the Conduct of Crown Legal Business* (which were revised in April 1993) provide that if an employee of a department is charged with a criminal offence arising out of the course of their employment, any claim for the reimbursement of the employee's legal costs shall be decided by the chief executive of the department concerned.

The *Directions* also provide that if an employee of a department is named as defendant in a civil action arising out of the course of their employment, the Crown shall bear the expenses of that defence and the Attorney-General may take over the conduct of the case.

The Public Finance Act 1977

The Public Finance Act 1977 contains some important, although little used, provisions which have important implications for the personal liability of public servants for proper custody and use of public money and stores.[8] Section 30 of the Act provides for the Controller and Auditor-General to surcharge those persons responsible for a "deficiency or loss" for the full amount involved or some lesser amount where intent is proven .

Deficiency or loss is defined widely for this purpose and includes:

"*(a) Any deficiency or loss of, or failure to fully and properly account for, money or stores by reason of –*

(i) The wilful or negligent omission of any person or persons to collect, receive, or account for any money or stores; or

(ii) The application and charging of any money to any service or purpose from which it was not legally available or applicable; or

(iii) The payment of any money without proper authority or without being properly vouched; or

(iv) The failure to comply with any enactment; or

(b) Any deficiency or loss of money or stores, or expenditure of money, or damage to stores, or expenditure for the replacement or repair of stores, caused through –

(i) The fraud, mistake, default, negligence, or error of, or improper or unauthorised use by, any person or persons; or

(ii) The failure to comply with any enactment."

People who may be the subject of a surcharge have the right to make representations to the Controller and Auditor-General and to appeal against a surcharge decision to the Minister of Finance. The matter of intent on the part of the public official is an important element in establishing liability.

8 See also Medicines Act 1981, section 102 for provisions for the protection of persons acting under the authority of that statute.

(Note: There is provision in Section 35 of the Act for disputes between a government department and the Audit Office over the following matters to be referred, if necessary, to the Governor-General for decision:

- the charging of any expenditure to any vote, appropriation, account, fund, or other authority
- the crediting of any receipt to the proper allocation of revenue, account, or fund
- the legality of any expenditure or proposed expenditure.)

The Employment Contracts Act 1991

The Employment Contracts Act 1991 provides a framework for the negotiation of individual and collective employment contracts. This framework will apply to all officials, including senior public servants other than chief executives, and members of the Senior Executive Service for whom special conditions are set out in the State Sector Act 1988. The Employment Contracts Act 1991 also contains specific rights and procedures which, depending on the terms of individual contracts of employment, may apply to senior public servants. These relate to disputes over the interpretation, application or operation of contracts and to cases of alleged:

- unjustifiable dismissal
- disadvantage in employment or in one or more of the conditions thereof because of some unjustifiable action of the employer
- discrimination in employment based on colour, race, ethnic or national origins, sex, marital status or religion or ethical belief or because of any involvement in the activities of an employee organisation
- sexual harassment in employment
- duress arising from an employee's membership or non-membership of an employee organisation.

Separate discrimination provisions exist in the Human Rights Act 1993 (see page 20 Other Statutory Provisions).

General Legal Provisions

In addition to the terms and conditions of particular employment contracts and applicable statute law, the courts have developed some general terms of contract which are deemed, as a matter of law, to be incorporated into employment contracts. This area of the law will continue to be affected on a case-by-case basis but some general comments can be made.

Duty to Employer

Employees have a duty to do work allowed for in their employment contract which is provided by their employer and to do so diligently and competently. Employees are also required to carry out the lawful and reasonable instructions of the employer. Employers do not have an unfettered discretion to allocate "new" work which is outside the scope of an existing employment contract but the courts have protected the ability of employers to change the "mode of performance at work to adapt to technological change, so long as the nature of the work remains the same". In the case of senior executive staff, in particular, the courts have recognised a substantial (but not unfettered) discretion to assign different duties to employees from time to time so long as the terms and conditions of employment of the employee concerned are preserved.

Duty of Fidelity

Employees also have a duty of fidelity. There is no fixed or simple statement of what this duty involves but it has been described as involving an undefined duty to act reasonably, in good faith, co-operatively, in a non-disruptive manner and generally in such a way as to maintain an employment relationship of mutual trust and confidence. It includes obligations not to do anything which would impinge adversely on an employer's business, or anything which could have that effect, and not to reveal valuable information about an employer's business which has been obtained in the course of employment. The test is how an honest and reasonable person would view the action concerned.

Duty of Fairness

The courts have been developing the notion that employers have an obligation in law to deal with their employees fairly and reasonably. In the case of Public Service employers, such an obligation exists by virtue of the "good employer" provisions of the State Sector Act 1988.

Other Statutory Provisions

Other statutory provisions that may apply to senior public servants as employees include:

- the Human Rights Act 1993[9] which lists provisions generally prohibiting discrimination in employment on the grounds of sex, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status and sexual orientation, as defined in the legislation, and which make sexual harassment and racial harassment unlawful. Provisions are also included for dealing with complaints arising from these provisions.

9 The Human Rights Act 1993 consolidates and amends the provisions of the Human Rights Commission Act 1977, and the Race Relations Act 1971, and consequently repeals those Acts.

- the Health and Safety in Employment Act 1992
- the Parental Leave and Employment Protection Act 1987
- the Wages Protection Act 1983
- the Holidays Act 1981
- the Volunteers Employment Protection Act 1973
- the Equal Pay Act 1972.

This list is not exhaustive.

Code of Conduct

The State Services Commissioner has issued a Public Service *Code of Conduct* under the authority of the State Sector Act 1988 and a number of departmental chief executives have issued one or more of their own codes of conduct applicable to departmental employees generally or employees in particular types of positions.

The Public Service *Code of Conduct* sets out minimum standards of conduct and behaviour for all public servants – including those holding senior positions. Senior public servants should make themselves thoroughly familiar with the provisions of the Public Service *Code of Conduct* and all relevant departmental codes. They should also recognise that the provisions in these codes are of special relevance to them for at least two reasons:

- some of the provisions will be of particular pertinence to more senior staff because of the positions they hold
- senior public servants have an important leadership and modelling role to play as exemplars of good conduct and behaviour both within and outside their organisations.

Matters where any suggestion of impropriety or inappropriateness may arise should be the subject of early and prior disclosure to an appropriate superior so that counsel may be given and received and necessary decisions made. The key concept is *disclosure*.

The Public Service *Code of Conduct* sets out the legislative obligations placed on employers and employees and establishes three principles of conduct which all public servants are expected to observe. These are as follows:

1. **Employees should fulfil their lawful obligations to government with professionalism and integrity.**

   Specific issues discussed under this heading include:

   - employees' primary obligations of service to their Minister / government and the need for political impartiality, whichever party is in power

- guidelines on making public comment on government policy, and on individual comment in the public arena
- guidelines on private access to and communications with Ministers and members of Parliament
- the possibilities for conflict arising from individual participation in public bodies or voluntary associations, and requirements if a public servant wishes to stand for Parliament
- guidelines on the release of official information.

2. **Employees should perform their official duties honestly, faithfully and efficiently, respecting the rights of the public and their colleagues.**

   Specific issues discussed include guidelines on the following :

   - expectations and responsibilities involved in satisfactorily carrying out duties at work
   - need for courtesy toward and respect for the rights of colleagues and the public
   - need for honesty and impartiality and avoidance of situations which could compromise integrity or lead to conflicts of interest
   - handling of offers of gifts or gratuities.

3. **Employees should not bring their employer into disrepute through their private activities.**

   Specific issues discussed include:

   - guidelines on personal behaviour and activities in both official and private capacities which might bring an employee's department into disrepute or jeopardise its relationships with government or the public.

Section Four
SITUATIONS AND ISSUES

When difficult situations arise, there are number of approaches the individual should consider – personal reflection, reference to written sources such as this guide, discussions with superiors, mentors and colleagues, reference to departmental legal services, consultation with the Solicitor-General, and reference to the State Services Commissioner. In some circumstances it may be appropriate to speak directly with the Minister. Whatever the preferred approach, issues will almost certainly be easier to deal with, and less likely to affect working relationships adversely, if the senior public servant develops a firm personal reputation for professionalism and principled and ethical decision making.

Ministers, for example, may not appreciate being advised that a senior public servant is unable to comply with their wishes or requirements. In the end, however, Ministers want to be served by officials on whose consistency and common sense they may rely.

Senior officials should aim to establish good working relationships with their Minister or Ministers based on mutual respect and recognition of the distinctive role, responsibilities and obligations of the other. Senior officials should not become involved in party politics but they do need to have a sensitive appreciation of the political pressures which apply to Ministers. Ministers also need to feel that their senior officials understand such things and that they are genuinely committed to serving government and Ministers efficiently and professionally.

The need for a positive working relationship does not mean it is necessary or even desirable that there should be strong personal or social relationship between Ministers and their public servants. The relationship needs to be professional rather than personal and senior public servants should be careful to retain a measure of detachment in their dealings with Ministers.

Preserving Integrity

While maintaining their integrity at all times on matters of law and principle, officials should aim to avoid becoming too “precious” about their independence or place in the scheme of things. Above all, the office of the Minister, and the person holding such office for the time being, is entitled to respect and to the highest possible quality of service.

In the Public Service, *perception* is very important. Just as justice must be seen to be done, a high standard of ethical and appropriate behaviour must be seen to be maintained. Steps should be taken to avoid apparent or potentially inappropriate behaviour. Senior public servants, by virtue of their position, also need to be aware of the impact their actions or perceived actions may have on others.

A good test is to consider how you would feel if a particular action or practice became the subject of news media scrutiny, reviewed by some competent authority, and/or partisan political debate. Would you still feel that the action or conduct concerned was proper and appropriate under all the circumstances – even though it might not be universally popular? How would you feel about discussing the issue with friends and mentors? What would be the likely impact on the reputation of your department and the standards of conduct of departmental staff and their attitudes to ethical issues?

This test is *not* the same as asking whether it would be possible to justify the action or conduct concerned or to defend yourself or the department against some formal charge or complaint. It may well be possible to do that without satisfying the suggested tests. What can be justified and what ought to be done may not be the same. What ought to be done is the ethical position.

Public Servants and Ministers

In constitutional and administrative terms the relationship between a chief executive and portfolio Minister is pivotal. When the relationship is professionally based and founded on a good understanding of each other's role, effective governance is enhanced.

Relationships between Ministers and senior public servants, including chief executives, are never static. They are affected by personality factors, and the political environment of the times. Relationships may be at a variety of different levels – with the Minister as a person; as a member of Cabinet; as a member of Parliament; as a member of a party caucus; as a member of a political party; as a representative of an electoral constituency. The relationships are never simple, or always well-defined.

For the senior public servant there are a number of potentially challenging issues that can be identified. These are in two main areas:

- dealings with the Minister as the Minister
- dealings with the Minister as a member and proponent of a particular political party.

Serving the Minister

The authority for senior officials to act for their agency derives from the chief executive. In contacts with Ministers senior public servants do not operate independently from their chief executive, but act for and with the confidence of the chief executive.

In their dealings with Ministers chief executives need to maintain regular contact, personally, and to ensure that such contact is not impaired by third parties, be they senior officials, or Ministerial staff.

Contacts with Ministers

In each department, protocols should be developed about the extent to which the Minister deals with senior departmental staff directly. A suitable approach may be to confirm the principle that staff of appropriate seniority and competence may deal directly with the Minister but should keep the chief executive informed and be cautious about committing the department in areas where prior consultation with other departmental staff and / or the chief executive would be wise. Devolution of authority to senior officials carries with it an explicit reporting requirement to chief executives.

Problems may arise if a Minister appears to be preferring a particular official as a source of advice. There is no simple formula for such situations but the chief executive should be aware of the signs, and should certainly initiate discussions at an early stage with the Minister if favouritism or bias seems to be developing. The onus on the senior public servant to recognise the situation and to report his or her concerns to the chief executive is equally important. A consequence of not acting in these circumstances may be to dilute the authority and standing of the chief executive which could affect the integrity of departmental advice.

If officials are contacted directly by a Minister and given oral instructions on a matter of substance, the official should make sure that the instructions are recorded fully and accurately and that the chief executive is advised as soon as possible.

It is competent for a Minister to refuse to deal with a particular official. In those circumstances steps should be taken to avoid conflicts, and to ensure that the official is not penalised in any unwarranted way.

Free and Frank Advice

The imperative to provide free and frank advice is related directly to the need to maintain the confidence of the current as well as a future portfolio Minister, and to the principle of political neutrality. In addition, the onus is to provide advice free of personal interest or the interests of the agency. The advice should reflect an understanding or appreciation of the policies and priorities of the government of the day and be transparent. That is, the advice should not contain unclear or hidden agendas.

Free and frank advice is not always the same as advice the Minister may wish to hear. Advice to a Minister that has been watered-down may not meet the test of being free and frank. It is inappropriate, for instance, for departmental advice to be altered, or influenced unduly, by a third party (say, by ministerial staff) before it reaches a Minister.

In giving advice, officials should be sensitive and responsive to Ministers' aspirations and objectives. At the same time, officials tendering advice should aim to take the broadest possible view, to balance (often explicitly) short-term considerations against the longer term and to have regard to a concept of the broader public interest which they can (if necessary) define and articulate. Such an approach requires a wide appreciation of relevant subject areas and may also require a sound institutional memory and well-developed links with the wider policy communities and sector groups affected. It requires effective and professional relationships between advisers in different agencies and a good grasp of ethical principles.

The obligation and function of public servants to give free and frank advice to Ministers and to the government of the day is vital and it can give rise to some difficulties.

For example, it will not always be easy to determine when to stop giving advice on a matter about which the Minister and the government have already made up their minds. In such cases, being quite explicit about the issue may be helpful – even to the point of the chief executive suggesting that the Minister says when, in his or her view, the critical point has been reached. Until then, senior officials have an important role to play in making available to Ministers all relevant information and experience at their disposal and the most honest, comprehensive and rigorously developed evaluation possible of proposals and alternatives.

Ministerial Prerogative

The development of public policy may be informed by good research, analysis, and rational decision making, but it is also subject to the imperatives and influences of political judgment, and processes. Those processes are an expression of democratic and representative government. Ministerial prerogative refers to the right of a Minister, subject to the support of the Cabinet as a whole, to determine policy. That right or prerogative is in turn an expression of the democratic principle which derives from the nature of representative and responsible government. That is, that Ministers' decisions represent the will of the people, and Ministers are accountable to the people through Parliament and the democratic processes for their actions and decisions. The actions and decisions of Ministers will be concerned with preserving the confidence of the people in the way they are governed and building and maintaining political support as well as with resolving particular issues or problems.

In the end, of course, it is for Ministers to make the policy choices and officials need to recognise that such decisions will not always be the preferred ones from an official's viewpoint.

A sense of proportion and modesty are virtues to be encouraged in those who tender advice to Ministers and governments. An acceptance that you might not have all the answers, or be able to make precise predictions in all circumstances, should temper the approach of the professional adviser.

Commitment to the implementation of ministerial decisions does not require that officials change their views about the wisdom or appropriateness of a policy or decision. It does require them to keep their counsel and to develop and provide any subsequent advice discreetly and within the policy development processes of the government.

Seeking Clarification

It can be helpful to seek guidance from the Minister about the extent to which they wish to be exposed to differences of view within the department (possibly with a summary and recommendation from the chief executive) or to a single, filtered, departmental view. It is, of course, necessary to distinguish between situations where there is a genuine, known difference of opinion within the department and those where a senior official may feel that important information, options or insights are being systematically and deliberately withheld from a Minister. The latter is not acceptable in the context of providing free and frank advice.

A senior official may feel that the Minister is not being provided with full, accurate or appropriate advice from within the department or ministry. In those circumstances there is an onus on the official to first bring the concern to the notice of the chief executive. If the concern persists it may then be proper for the official to seek collegial support, and to submit an opinion to the chief executive in writing.

Possible Problem Areas

General Administration

- Situations may arise where Ministers direct their senior officials not to consult with the officials of other departments, or direct them to implement decisions which the senior officials of the department believe to be contrary to the expressed collective view or known collective opinion of the Cabinet. In such cases, the chief executive should be advised by officials and the chief executive should raise the matter with the Minister concerned. If the Minister confirms the directive, the chief executive may feel the need to:
  - proceed on the basis of a confirmed Ministerial directive knowing that the political consequences of this are matters for which the Minister accepts responsibility, or
  - discuss the issue with the State Services Commissioner. In extreme cases a matter that cannot otherwise be resolved may then be referred jointly to the Prime Minister.
- Although senior public servants are responsible directly to their Minister, they may also be called upon to deal with other Ministers as members of formal Cabinet committees or otherwise. Indeed the State Sector Act 1988 explicitly recognises that chief executives may be required to give advice to other Ministers. Officials need to be careful

in this context to fulfil both their general obligation to provide frank and complete advice and maintain their duty to support and keep faith with their Minister. Where it can be anticipated that this may be an issue, prior discussion with the Minister is desirable.[10] Officials should not have discussions with, or tender advice to, other Ministers without the knowledge and consent of their own Minister. The possibility of conveying advice through, or in the name of, the Minister should always be considered.

- If an acting Minister issues instructions which a senior official believes may be contrary to the approach or policy of the Minister, this should be drawn to the attention of the acting Minister. In the event of serious concern, options include trying to contact the absent Minister, discussion with the State Services Commissioner and referral to the Prime Minister.

- If a direction is received directly from the Prime Minister every effort should be made to ensure that the Minister is aware of this and is given the opportunity to express any concerns he or she may have. In the end, however, Prime Ministers must be considered to have the authority of their office and the confidence and support of the Cabinet.

Issues of Law

- In situations where issues of law or the inappropriate use of authority may be thought to be involved, the approach may need to be different.

  – Of particular concern will be any case in which a ministerial directive involves the expenditure of public money. In such cases Ministers are generally acting under explicit delegation from Cabinet. The Public Finance Act 1989 requires that public money only be spent pursuant to lawful authority. In particular cases, discussion with the Controller and Auditor-General may be necessary in order to clarify the direction.

  – Other exceptions to carrying out directions, while important, are not so clear cut. Take, for example, a situation in which a Minister requests information about particular individuals or organisations and the senior officials concerned have reason to believe that the Minister intends to use the information for personal reasons unrelated to their ministerial office, for the benefit of other parties, or to the detriment of the individuals and organisations concerned. Even if the Minister was lawfully entitled to request the information, it may be appropriate for a

10 See also Constitution Act 1986, section 7, which provides that *"Any function, duty, or power exercisable by or conferred on any Minister of the Crown (by whatever designation that Minister is known) may, unless the context otherwise requires, be exercised or performed by any member of the Executive Council."*

chief executive to seek an indication about the reasons for the request and, if necessary, express concern about the propriety of the department complying with it.

- The obligation of senior officials to carry out the directions of Ministers is not absolute. The chief executive should decline to act on the directives of Ministers in the following situations:

  – where it is reasonably held that instructions are unlawful because it would be unlawful for the Minister to issue them (either in administrative or criminal law)

  – where it would be unlawful for officials to accept them (again, in administrative or criminal law)

  – where officials would have to break the law in order to carry out the directive.

  In these circumstances the chief executive should consult appropriately before taking the decision.

Ministerial Involvement in Detailed Management and Administration

The State Sector Act 1988 envisages that Ministers will not normally involve themselves in the day-to-day management of their departments and that chief executives will have direct, personal and explicit responsibility in this respect. Within their briefs chief executives have a wide discretion in managing their departments to achieve results. Attached to that discretion are explicit disclosure and reporting requirements on the chief executive, including being answerable for actions or omissions to the Minister. The relative autonomy of a chief executive should be balanced by the provision of appropriate information to the Minister to avoid surprises, or to anticipate issues or difficulties related to the affairs of the department.

In terms of the State Sector Act 1988 and the Public Finance Act 1989 the general relationship between Ministers and departmental chief executives should be characterised as:

- Departments being extensions of the Minister acting in the Minister's name and in accordance with the Minister's wishes and direction. The Minister is continually and directly – if not always personally – responsible for all the activities in the department.

- Chief executives under the Public Finance Act 1989 having "a delegated authority to enable the production of contracted outputs in the most efficient and effective manner" and being "accountable for the exercise of this authority". As well as their direct, personal accountability to their Ministers (who retain political and constitutional responsibility for the activities of departments) chief executives also have duties to Cabinet as a whole, to Parliament and to the law.

Under section 32 of the State Sector Act 1988, chief executives are responsible to their Ministers for:

> "*(a) The carrying out of the functions and duties of the Department (including those imposed by Act or by the policies of the Government); and*
>
> *(b) The tendering of advice to the appropriate Minister and other Ministers of the Crown; and*
>
> *(c) The general conduct of the Department; and*
>
> *(d) The efficient, effective, and economical management of the activities of the Department.*"

Under section 33 of the Public Finance Act 1989, chief executives are responsible to the "Responsible" Minister for "the financial management and financial performance of the department and shall comply with any lawful financial actions required by the Minister [of Finance] or the Responsible Minister."[11]

Chief Executive Performance Management

The performance of individual chief executives is subject to annual review by the State Services Commissioner as employer, and on behalf of, and in consultation with, the appropriate Minister. This review is carried out having regard to the terms of the formal performance agreement that each chief executive is required (by Cabinet directive) to enter into with the appropriate Minister. These agreements contain some common provisions designed to reflect and protect the collective interests of the government as a whole and the obligation on chief executives to provide free and frank advice of high quality to their Ministers. The agreements also contain undertakings that relate specifically to the department concerned.

While this approach is essentially based on a formal agreement between Ministers and chief executives, the importance of effective personal relations with the Minister or Ministers and being responsive to their requirements, should be maintained at a more informal level.

It is in this context that the *Cabinet Office Manual* notes (inter alia) that:

> "*Ministers should not have operational responsibility for the routine performance of Departments. They must have, however, some form of 'early warning system' so that they are alerted to potentially controversial matters very quickly.*[12]"

The degree of ministerial involvement in departmental activities varies from department to department depending on their nature. One way of

11 For further discussion see *The Public Service and Government*, – Ministers' Relationships with Departments.

12 *Cabinet Office Manual* Ch. 2/6 G6.

recognising this has been to distinguish between Ministers "of" something and Ministers "in charge of" a particular department. The *Cabinet Office Manual* describes the different ministerial designations.[13] The "in charge of" designation is mostly used for Crown entities rather than departments.

In many areas of government administration a firm convention has developed that – in the interests of neutral administration – Ministers should not become involved in matters involving the personal affairs of individuals or firms with which the department is dealing unless there is specific statutory provision for this or there are some exceptional circumstances. Normally, such matters should be dealt with by departmental and statutory officers, specialist tribunals and / or the courts.

Other Relationship Aspects

Ministers are constitutionally and politically responsible for the activities of their departments and they may be required to answer in Parliament and to the public accordingly. In that capacity (as well as in their capacity as representatives of the collective owner of the department for the purposes of the Public Finance Act 1989 and the purchaser of its outputs) they are clearly entitled to timely and comprehensive information about any and all aspects of their department's present and future activities. They are also entitled to receive frank and professional advice about matters of policy and administration. They determine policy issues, within the limits of the law, are entitled to have their departments give effect to their wishes and requirements in implementing government policies, and to be satisfied that their departments are being managed properly and efficiently.

Having noted earlier the importance of mutually supportive relationships between Ministers and chief executives, there is still scope for issues to arise where the exact allocation of responsibility between them is not clear. An example is the question of whether the Minister or the chief executive should communicate with the news media on an issue, or with those affected by a policy issue or programme, and what the content of such communications should be. The *Cabinet Office Manual*[14] provides useful guidance in this respect but the application of such guidelines to particular cases may still require careful consideration.

The quality of departmental advice and management remain matters for which chief executives are accountable in terms of the State Sector Act 1988 and their personal performance agreements. Should a Minister lose confidence in the quality of departmental management or policy advice, the Minister may seek advice elsewhere or initiate a review or reviews of the department and its management.

13 *Cabinet Office Manual* Ch. 2/2 C1.

14 *Cabinet Office Manual* Ch.2/8 G15-17.

Dealing with Special Concerns

A chief executive may be concerned that a Minister is:

- intending to make purchase decisions or set priorities inconsistent with existing statutory requirements
- trying to involve the department in the promotion of party political objectives
- wishing to use his or her position improperly
- seeking to have too much influence over matters about which the chief executive is required to make independent decisions.

These matters need to be discussed by the chief executive with the Minister in the first instance. If the situation is clear and the concern of the chief executive well-founded in fact the action should be to decline to act or comply. If the situation is unclear then discussion and clarification with the Minister should be pursued. Only then should a second opinion be ventured or obtained (and then only with the Minister's knowledge), or a third party consulted.

Then, if the concern of the chief executive is not resolved, other parties may be involved including the State Services Commissioner, and in special circumstances the Solicitor-General. Only after these avenues have been exhausted should recourse to other Ministers or the Prime Minister be contemplated. In no instance should there be any suggestion of going behind the Minister's back to resolve matters.

Ministerial Staff

It is desirable that good relations be established and maintained between ministerial staff and senior departmental officials. To provide a basis for this relationship the functions and roles of the various staff in ministerial offices should be clarified in writing so that these are clearly understood by all concerned. Only the Minister has the power to direct ministerial staff, and those seconded to the Minister's office, or require them to act. Any significant requirement or direction which is said to reflect the wishes of the Minister should be confirmed by the Minister in writing. This is particularly important in any case where a statutory power or the expenditure of public money is involved.

Personal and Organisational Conduct

This is a general area where senior public servants need to be above reproach if they are to enjoy (and deserve to enjoy) the confidence of politicians, their own staff, and the general public. Expectations and requirements in this area may be more intrusive and demanding than is the case either for members of the public or for senior managers in the private sector.

Public confidence in the integrity and probity of the Public Service is crucial to the operation of government.

In addition to the general provisions in the Public Service *Code of Conduct* about matters such as gifts and rewards, preferential treatment, and financial interests, senior public servants need to be conscious of several other issues.

External Links

In order to carry out their jobs properly, senior public servants may need to maintain links with outside organisations and to participate in discussions and debate on policy issues outside the department and the Public Service. That need should be balanced by the imperative to preserve loyalty to the Minister at all times, and to maintain a good working relationship and understanding with the Minister or Ministers.

New Zealand has not developed as much as some overseas countries the notion of "policy communities" within which particular types of issue are debated intensively, knowledgeably, and with a substantial measure of frank but discreet disclosure of views, information and options. Frank exchanges between departmental officials and a variety of other people and organisations may still be useful and appropriate if public servants are to be well-informed and governments are to have the benefit of well-developed and comprehensive advice.

Such processes, however, inevitably carry with them risks of capture by interest groups or influential individuals and even the possibility of undue influence. Senior public servants must be aware of this and be careful to retain their political neutrality.

New Zealand is a small country in which a relatively small number of people may be closely involved in the activities of particular organisations. Many people wear a number of different hats and it is almost inevitable that public servants will need to deal with people on an official basis whom they know personally, and even socially. This places demands on the impartiality and ethical sensitivity of senior public servants who need to be alert to the issues involved.

Impartiality and Discretion

Senior public servants are in a position to influence the granting of benefits to, or the exercise of administrative discretion in favour of, individuals, organisations and firms. Examples include the letting of contracts, the administration of government programmes, and employment decisions such as appointments and promotions. Absolute impartiality, fairness and discretion is essential in such processes.[15]

15 Refer to Cabinet Office *Guidelines for Contracting for Services* (1992).

Sometimes a balance may have to be struck between the genuine value of established, continuing, business-partner type relationships with particular firms or suppliers and the need, for reasons of probity, public confidence, and conspicuous even-handedness, to test existing arrangements by periodic tender and renegotiation processes.

The Political Dimension

Particular care is required when a department is required to deal with any matter where a Minister, a member of Parliament or any other person prominently associated with a political party has a direct or personal interest.

Any person is entitled to have matters affecting them dealt with by a department fairly, competently and dispassionately. In practice, it is important to appreciate that the decisions or actions of an official may become the subject of political and news media interest and that issues may be raised about:

- the extent to which officials may have applied different considerations, acted other than in a proper manner, or treated people differently
- the extent to which people may have taken advantage (or tried to take advantage) of their position or connections.

Such concerns are far from hypothetical. Since 1978 there have been at least three formal inquiries into cases where such concerns have been raised – the 1978 inquiry by the Chief Ombudsman into the granting of import licences to a former member of Parliament, the 1980 inquiry into what became known as The Marginal Loans Board Affair, and the 1989 inquiry into the dealings between a Parliamentary Under-Secretary to the Minister of Agriculture and officials of the Ministry of Agriculture and Fisheries on matters relating to his personal agricultural interests.

The findings of these inquiries confirm the value of having action on such matters supervised by senior staff with broad experience and sound judgment, and of full records being kept of all discussions and the reasons why decisions have been made.

Personal Relationships and Work

Senior public servants should be aware of the impact that personal relationships in the immediate workplace, or between people from different agencies having an interest in the same issues, can have on real or perceived objectivity.

Where conflicts of interest may arise, or are likely to be perceived to be present from personal relationships, the senior official should avoid any possible accusation of nepotism or favouritism. There is no place for any

patronage, or hint of bias in staff appointment or promotion processes, or in matters of policy formulation or development. In the latter instance it is proper for an official to declare any conflict of personal interest, and to offer to withdraw from, or not be involved in, subsequent policy discussions. Interests in this context include not only the interests of the individual public servant, but may extend to the interests of members of his or her immediate family.

With respect to staff appointments and promotions it is not sufficient for the official merely to take no part in the decision-making procedure. (Nor is it appropriate in the case of staff discipline where favouritism or bias may be seen to be exercised through inaction). Prudent practice goes to the point of saying that relatives, and persons with close personal relationships such as those in de facto marriages, should not be employed in the same area of work within a department. There are exceptions where the nature of the job is geared for partners, but in these cases the persons are usually of similar or equal status with no direct power to influence the advancement, or impede the employment prospects of the other.

The practice is valid not only as a way of avoiding actual or perceived conflicts of interest, but also may be applied in the best interests of other staff, the maintenance of general staff relationships, good personnel management, and operational efficiency.

Formal Public Service-wide rules used to exist on the employment of near family members in the same department and similar rules will have been adopted in many individual departments. In practice, other sorts of relationships may actually be of equal or more concern. The kind of intense personal relationship that may be formed from time to time between co-workers and may not even be known to immediate work colleagues may be more significant in terms of judgment and objectivity than more established and well-known family or quasi-family relationships. Similarly, close personal links based on friendship or common membership of organisations may be very influential, and should be declared and managed in ways that avoid any possibility of mis-interpretation or partisanship.

Hospitality and Gifts

As both the Public Service and general business environment have developed in recent years, there are many more opportunities available to senior public servants to participate in business hospitality and enjoy offers of various kinds.

For example, firms invite senior public servants to take advantage of preferential hospitality at major sporting or cultural events and firms may suggest all-expenses-paid trips overseas for study, seminar or promotional purposes. Travel companies offer substantial frequent-traveller inducements or attractive familiarisation trips for departmental staff – including personal assistants of senior employees.

In the absence of more formal rules practice should be guided by objectivity, sound judgment, and the need for the reputation, integrity and principles of the Public Service to be preserved.

As a general rule, the following guidelines are suggested:

- Offers of significant hospitality should be disclosed to the chief executive (or to the Minister as the case may be) before acceptance.
- Hospitality should not be accepted at any time when the company concerned is seeking or may soon be seeking to expand or confirm its business relationship with the department, or even with the government, for example, through a tender or contract.
- Senior departmental staff should be aware of the way that acceptance of hospitality could be perceived by other parties – politicians, business competitors, the news media, departmental staff and the public.
- Any offers of subsidised travel for trips overseas should be declined. It may be appropriate to attend sponsored conferences or seminar overseas but travel should be met by the department.
- Senior staff must be scrupulous in ensuring that nothing is done which could be interpreted as soliciting hospitality, travel or other such benefits.
- Conspicuously lavish, excessive or over-generous hospitality should be avoided at all times.
- Public servants should not derive personal benefit from business promotions associated with repeated use of particular goods and services provided to the department or at departmental expense (for example, free trips for frequent flyers or competitions based on petrol purchases). In most cases – and in the case of senior staff in particular – it would not be appropriate for public servants to derive personal benefit in this way, particularly if there is an element of discretion involved in which the supplier is chosen to provide particular goods and services.
- Gifts of significant value received in the course of official duties should be disclosed and then transferred to the department, as determined in each case by the chief executive.

Other Personal Benefits

Senior public servants need to be particularly careful about not deriving undue personal benefit from their employment – either by reason of their access to information or, more directly, through fees, royalties or gratuities paid to them for work done in their official capacity. For example, payments for speaking engagements or carrying out official duties should either be declined or paid to the department.

Other things being equal, however, such requirements need not prevent:

- acceptance of modest or token expressions of appreciation
- public servants accepting remuneration for approved paid activities carried out in their own time or on leave.

This is provided such acceptance has been approved in advance by the authority of the chief executive or it otherwise conforms to departmental codes.

Employment contracts for senior public servants will generally specify that the remuneration set out in the contract represents full and complete compensation for services provided to the employer by the employee.

Secondary Employment

Before accepting any outside or secondary paid employment, or unpaid activity, a senior public servant should first obtain specific approval from the chief executive. Approval should only be granted provided the outside employment does not place the official in a conflict with their official duties, and will not adversely affect the efficiency or performance of the employee, and is performed wholly in their own time. Interests that may create a conflict include:

- employment in a business which is in the process of entering into, or has a contractual relationship with any Public Service department
- employment in an organisation which receives public funding[16]
- businesses concerned with lobbying Ministers, or members of Parliament, or government-owned agencies
- situations where the public servant's employing department is in a regulatory relationship with the company or concern offering secondary employment
- secondary employment that might make demands on or compete for the public servant's time after normal working hours (for overtime, for instance), "on call" situations, or special duty availability
- situations giving access to privileged, private or confidential information in the course of official duties as a public employee pertinent to the business or client base of the secondary employer.

Personal Affairs

Employment contracts for senior public servants may include provisions allowing for dismissal in the event of bankruptcy, insolvency, serious financial difficulties and criminal offences involving dishonesty or other serious criminal activity.

16 For instance, acceptance of a directorship in a Crown entity would not be appropriate.

More generally, senior public servants should immediately disclose to their administrative superiors full details of any situation which has arisen in which their personal conduct is likely to be called into question in court, the media or some other public forum. Some conduct which, while undesirable, may be tolerable in a member of the public or a more junior employee may raise serious questions concerning the continued employment of more senior public servants.

Setting an Example

The authority of a senior public servant derives from a number of sources, including the nature of their position, their knowledge and experience, and their demeanour and personal reputation. Much of their authority, or legitimacy to act, will stem from their personal conduct, and the standards and values they subscribe to and communicate to others. How well they command respect, and how well they are able to obtain the best from staff, will often depend on such intangible, but conspicuous qualities.

Senior public servants should set a good example to their colleagues and display leadership qualities and attributes in the work environment, and in their public lives. There are inestimable benefits of appropriate modelling on staff morale, professionalism, and personal and administrative ethics. The obverse is also true. So, in such matters as treating people as individuals, respecting confidentiality and privacy, maintaining appropriate standards of dress, not allowing personal financial circumstances to intrude in the workplace, avoiding non-professional dependencies (in the matter of borrowing or lending money, for instance), and the use of alcohol, senior officers should set a good example.

Using Authority Responsibly

Senior public servants should not abuse their positions of seniority in their department and the discretion and authority they have. They should be scrupulous in avoiding the use of departmental assets, facilities or funds for private purposes. They should avoid taking advantage of their position to pressure or influence more junior members of staff into, for example, participating in social activities or financial transactions. They should avoid any suggestion that they are seeking to influence colleagues or more junior staff (in the same or other agencies) to exercise discretion for the benefit of individuals or organisations.

Independent Statutory Functions

In addition to their managerial and policy advice responsibilities, a number of senior officials have specific statutory powers and discretion assigned to them by law which they are required to exercise in their own right and not as the delegate or agent of their Minister.[17]

17 See also *The Public Service and the Law* for a further discussion on the role of a statutory officer.

As a matter of general administrative law, where Parliament has specified that an official is to exercise a particular power or discretion in their own right, the official cannot be subject to ministerial direction and control in that respect. The Minister may have views on a particular issue and the decision maker may consult their Minister and take his or her views into account. Indeed, such consultation may be necessary if the decision maker is to be fully informed of all relevant and proper considerations. In the end, however, the decision must be taken by the statutory officer, having regard to all proper and relevant considerations. This is because any decision they take may be subject to judicial review and to the criteria employed in such reviews.[18]

In some cases the independence of senior officials from ministerial direction and control is explicit in law. For example, the State Sector Act 1988 requires that personnel decisions affecting individual employees be taken independently by chief executives and makes it clear that Ministers are not responsible for such decisions.

Even so, Ministers still have a clear and basic right to be kept informed and to be advised as they wish or need to be about the activities of departments for which they remain responsible. Part of the role of senior officials is to recognise and be sensitive to the public and to the Parliamentary responsibility that Ministers have for the activities of their departments. Decisions taken independently, by someone other than a Minister, can still have significant consequences in terms of public and political concern. For these reasons it is important that a Minister is advised of decisions and announcements before they are made public.

Limits on Political and External Activity

A public employee has an obligation and duty to serve the aims and objectives of their Minister, and the government of the day. The Public Service *Code of Conduct* outlines the nature of those obligations in this area. As a general rule senior public servants should avoid:

- any activities or actions that might diminish the political neutrality of the Public Service
- any adverse public comment on government policies, either in an official or private capacity
- any open acknowledgment of, or public allegiance to, a particular political party[19]

18 See also *The Judge Over Your Shoulder*, Crown Law Office, Wellington.

19 A public employee wishing to stand as a candidate in a general election should disclose that intent to his or her chief executive so that leave may be granted for a period to "commence before nomination day, and in the event of his (sic) nomination as a candidate, shall continue until the first working day after polling day, unless he withdraws his nomination." (See section 52 of the Electoral Act 1993.)

- making representations in a private or personal capacity to members of Parliament or Ministers (except in their capacity as authorised representatives of organisations, such as an employee, or professional body, and then only when that activity has been declared to and approved by the chief executive)
- being appointed in a personal capacity to any position of significant responsibility in a public, professional or voluntary body which is likely to become involved in making representations to the government on policy issues or being openly critical or supportive of the actions of policies of government.

Civil and Political Activities

Such restrictions impose important limitations on the civil and political rights of senior public servants as citizens of New Zealand. Clearly, such moral restrictions are consistent with the importance of the Public Service being able to demonstrate genuine impartiality in a party political sense and to maintain the confidence of successive governments, and governments-in-waiting, that it will serve them faithfully, loyally and well.

It is a reality that Ministers of the Crown generally find it difficult to work with officials who in their personal capacity openly or publicly criticise or support policies of political parties, or adopt partisan positions. The statement made or position adopted by the official may not be forgotten easily and could colour the way that Ministers relate to the official, or to the department employing the official.

Expressing a strong view that might bring the official into favour with a political party may have unintended outcomes. The official may benefit from any alignment of viewpoint at some future date, or the official may find themselves side-lined on certain discussions, or blocked effectively from working on certain issues. Either way the consequences could be to reduce the credibility both of the official, and the official's department and the Public Service generally. These issues all fall into the category of risk management for the public official.

Membership of a Political Party

Whether or not a senior public servant joins a political party as an ordinary fee-paying member (as opposed to becoming involved actively in the activities of the party) is a matter of personal responsibility for the individual in most instances, although there may well be some positions where even membership would be inappropriate. It should be remembered, however, that the fact a senior public servant is a member of a political party will become known – either within the party concerned or more generally. The political impartiality of the public servant concerned may then be called into question.

Membership of External Bodies

Senior officials appointed to external bodies in their official capacity should clarify their status at the outset to determine whether they are regarded as delegates of their Minister or whether they are required to carry out their duties and responsibilities as members of the body concerned, independently of the Minister.

- In the first scenario, officials need to seek a briefing by the Minister as required and act on the basis of any lawful instructions they may receive.
- In the second scenario, officials need to familiarise themselves with the legal obligations of the body concerned and their personal legal obligations and liabilities as a member of it. They should also seek to bring to it the same values and approach to decision making that they would apply in a departmental context as a senior public servant.

Matters of Conscience and Matters of Duty

Public Service organisations attract and need persons of passion, strength of character, personal conviction and commitment. These qualities are the stuff from which matters of conscience most likely derive. All officials will face personal dilemmas. It would be a sterile Public Service if the ethic of neutrality prevailed to the extent that the public servant's only duty was to do without question what he or she was told. Sometimes officials may have to wrestle with their conscience and do what seems proper to them, morally and ethically. There should be room for this to happen.

Dissent

It is possible that senior public servants may find themselves in situations where they feel unable in good conscience to carry out a particular direction, implement a particular policy, or simply keep silent about a particular issue. For example a person with religious or moral objections may not wish to be involved in any policy advisory work on matters that may conflict with strong personal convictions. Usually, such a wish can be accommodated. In more extreme instances the individual may feel that they can no longer work in a department that administers or promotes advice supporting particular moral values.

The Public Service *Code of Conduct* recognises this, emphasises that such dilemmas must be managed so as to avoid conflict with official duties, and advises public servants in situations of this kind to discuss their circumstances and options with colleagues, and their chief executives if necessary.

Matters of conscience are personal issues and involve a personal responsibility to effect a resolution. By their very nature they are not black-and-white.

Clear-cut issues involving illegality, constitutional impropriety or matters which are likely to offend the morality of the community as a whole, are matters of both a personal and collective responsibility and need to be dealt with suitably. They usually engage a public interest and are concerned with the collective interests of government.

It is inherent in their role that senior public servants accept the discipline of complying with otherwise lawful and reasonable directions from the elected politicians and serve faithfully the government of the day – even in cases where this requires action which is contrary to their best judgment or personal views.

If, after careful reflection, senior public servants find themselves unable to accept this discipline, two issues will normally arise:

- whether the situation can be resolved by the person concerned being transferred to other duties or another department, or the task assigned to someone else
- whether the inability has to call into question whether the person can or should continue to be employed as a senior public servant.

Personal Responsibility and Peer Reporting

Matters where illegality (for example, unlawful administrative action or criminal misconduct), gross constitutional impropriety (such as deliberately misleading the Minister, Parliament or the Governor-General) or where fundamental public morality may be involved, need to be confronted vigorously. If there is a responsibility on individual officials to report in good faith and on reasonable grounds instances of maladministration or corruption, there is a concomitant responsibility on senior management to respond appropriately to such reports.

Whistleblowing

Although there is no formal recognition of "whistleblowing" there is no need to wait for legislation as a guide to doing what is right, or what ought to be done in particular circumstances. If illegality, corruption, impropriety, or waywardness is suspected then mechanisms or procedures should be in place to allow persons to bring those matters to the attention of the appropriate people and to know that such information will be acted upon without the need to blow a whistle publicly.

Overseas research studies have shown that "whistleblowers" tend to be highly principled, public-spirited persons who will place what they perceive to be the public interest in a matter ahead of their own situation if they see that as the only way to achieve a desired result.

There are protections for "whistleblowers", or persons who disclose information in the public interest. These protections are to be found at common law, and within the Employment Contracts Act 1991.

Leaking

Whistleblowing can be distinguished from "leaking". In the former the informant is prepared to disclose his or her identity, and is normally motivated in a public-spirited way. Those who leak information usually wish to remain anonymous, and the release is often motivated by partisan considerations. The latter activity is intolerable under any circumstances and may lead to dismissal.

Post Employment Obligations

The Problem for Governments

Stated simply the problem is – should there be any restriction on the scope of permitted activities for those who have held a public office appointment when they cease to be so employed? The answer is problematic, but on balance there is a case for some restrictions.

A principal conflict or difficulty may arise where former employees use information, such as in writing or teaching, or in private business, or as a consultant, or in some other form of employment, for remuneration and / or personal gain and the information would not otherwise have been available to members of the general public.

A serious conflict could also arise where a senior public servant sets themselves up with work or business arrangements whilst in government service, or does favours in return for an expectation of work outside the Public Service. Such behaviour would be entirely inappropriate and intolerable.

Beyond the more obvious cases that might arise the matter of perception is most important. There must also be a perception that no conflict of interest exists in the post employment situation. It is not sufficient to have taken steps to avoid conflicts of interest. It must be seen that no conflict of interest exists.

Post employment applies to both those who leave the Public Service for work outside, and those who retire. More concern will attach to the former category who remain active in the employment market and who increasingly transfer between sectors.

When public employees leave their employment (and senior public employees in particular) they take with them two kinds of information:

- general understanding of the way government and public administration operates

- specific and sometimes confidential or sensitive information about aspects of government policy or about organisations associated with government, or about personalities in government.

There may be some good that derives from former employees using information about the first kind, and there is likely to be some limitation on the extent of time (it may be relatively short) that the second kind remains sensitive, or even confidential.

There will be some information and knowledge acquired in the course of their employment that will be of a privileged nature. That is, it will relate to information about individuals, be acquired on trust, be commercially sensitive, or have a special duty or loyalty attached to it. Matters of national or military security would also fall into this category. However, these exceptions aside, restraints that might be placed on former employees to earn a livelihood, and take advantage of their skills and experience acquired during their employment in public employment, should be the exception rather than the rule.

The State Services Commission has adopted the view that except in certain cases former public employees should otherwise be free or not unduly or unreasonably inhibited in their employment pursuits. The principle is not to restrain unless there are compelling reasons to do so. It is also the view of the courts.[20]

Post Employment Conditions

Chief executives have written into their contracts of employment some restrictions[21] on the paid activities they can engage in for a period after their employment as a chief executive but there are no other formal provisions in this area in New Zealand. For instance, there are no general conditions contained in contracts of employment for senior managers or those who work closely at the political and administrative interface. By contrast, a number of overseas countries do have formal provisions covering this type of situation.

The reasons why restrictive conditions are contained in chief executives' contracts of employment are mainly that:

- public employees not be placed in a position where they could benefit inappropriately, or be seen to benefit inappropriately, from information gained or contacts established in the course of their employment in the Public Service

20 See for instance *Peninsular Real Estate Ltd v Harris* (unrep, DP 293/91, 6/9/91) for an account of the principles identified.

21 A standard provision restricts a chief executive in any employment or activity for up to 12 months where the chief executive is likely, or is perceived as being likely, to "unfairly or improperly benefit from knowledge which has come into the chief executive's possession in the course of the performance of the duties" (under the Contract of Employment) except where prior consent has been obtained.

- the judgment or behaviour of public servants may be influenced by the prospect of future employment with an outside firm or organisation
- outside firms or organisations not derive inappropriate advantage or favourable treatment from the employment of former public servants.

In the absence of more formal requirements in the Public Service it remains a matter of judgment and good sense in particular circumstances. What can be said is that:

- senior public servants should be scrupulous in disclosing any possibility of employment with an organisation or firm they have official dealings with at the earliest possible stage so that any necessary steps can be taken to avoid potential areas of concern or difficulty
- former senior public servants should exercise particular restraint in subsequent dealings with former colleagues to avoid any suggestion that they may be seeking to take undue advantage of established relationships. For their part, serving officers should be conscious of the need to deal with former colleagues on a fair and impartial basis.

Public Comment

The area of comment on Government policy or departmental actions by former senior public servants is less clear cut but still important.

Former senior public servants clearly have important rights to hold and express their opinions. It could even be argued that informed commentators (free of the necessary restraint imposed by their status as serving public servants) have what amounts to a positive moral obligation to contribute to public debate on significant issues of the day. And, former senior public servants who have resigned or retired in part at least because of concern over the current direction of Government policy may feel obliged particularly to express themselves in a public and potentially influential way. Any comment should avoid reference to information obtained in a previous official capacity which was not otherwise available publicly. Former senior public servants should not use their previous status to lend particular force or authority to their statements.

A measure of continued discretion is also appropriate in the interests of preserving the ability of existing public servants and the Public Service as an institution to be accepted by Ministers as impartial, loyal, and discreet. Discretion is also important for another reason. Politicians may not be as concerned about the content of a statement reported publicly as with the fact that the comment was made by a senior public servant. This makes the need to exercise judgment all the more important to avoid bringing the Public Service into disrepute.

The best advice that can now be given is to suggest that former public servants who wish to comment should express themselves in a restrained, constructive and professional way. They should also recognise that contributions from them may become the subject of responses from Ministers, news media comment and partisan political debate. The target or focus of any comment, whether public or private, should be considered carefully.

As a matter of professional courtesy, former senior public servants who are about to express views on Government policy through means such as press statements, submissions to select committees, contributions to seminars or conferences, or published papers and the like may also wish to consider advising their former colleagues and the chief executive (and Minister in some cases) of their intention.

Industrial Disputes

Issues may arise from time to time about what role senior public servants should take during the course of industrial disputes. In essence senior managers have a prior responsibility to manage the government's interests if these exist.

As a general rule, senior public servants will be expected to identify closely with the interests of the employer in industrial disputes or in matters of pay negotiations, and act accordingly. This is not to say that senior public servants are precluded from taking an employee perspective on matters affecting the renegotiation of their own employment conditions or resolving any matters arising in the course of their own employment.

Senior staff may be members of the organisation acting as the bargaining agent for employees involved in a dispute. The union or employee organisation normally recognises the distinctions that need to be made during periods when adversarial or differing positions are adopted by parties to a collective or individual employment agreement and affecting members. Senior public servants do not lose their industrial or employment rights by virtue of their management status.

Information and the News Media

By the nature of their employment, senior public servants frequently become privy to sensitive and privileged information. The Official Information Act 1982 is designed to facilitate the availability of information to enable members of the public to better participate in the decision-making processes of government. But the Act also recognises that there are good grounds for some information to be withheld and that decisions about the release of information should be made by responsible and authorised people. For instance, section 9 (g) provides for "*Other reasons for withholding official information –*." . to "*Maintain the effective conduct of public affairs through –*

(i) The free and frank expression of opinions by or between Ministers of the Crown [or members of an organisation] or officers and employees of any Department or organisation in the course of their duty; or

(ii) The protection of such Ministers of the Crown [or members of organisations], officers, and employees from improper pressure or harassment . . .”

In special circumstances senior officials may wish to take particular news media representatives into their confidence and provide background information on an off-the-record, or not-for-attribution basis. If so, they should make sure – in consultation with their news media advisers – that they understand the rules, conventions and ethical strictures that apply to journalists in such situations and the limitations of these.

Above all, the senior public servant should accept and recognise that they are accountable in their dealings with news media representatives, and that officials have an obligation to provide balanced, factual information in even-handed ways. Journalists are entitled to have access to factual information.

Suggesting to a journalist that particular types of questions should perhaps be asked may seem to provide a safe and more ethically desirable alternative to leaking in cases where a senior public servant or other employee may be concerned about the direction of government policy or decision making. In practice, the ethical considerations are much the same. Under any normal circumstances the practices are equally undesirable.

Summary

- The senior public servant ought to be alert to the need not only to do the right thing, but also appear to do the right thing. Transparency in all transactions should be observed.
- In all aspects of the work of a senior public official the respective roles and relationships between the political and administrative arms of government need to be understood and respected. Where doubts or difficulties arise clarification and counsel should be sought.
- Personal and organisational integrity are crucial elements of good government administration and management practice. It is not sufficient only to be concerned with the instrumental and technical dimensions. The ethical dimension is equally important.
- In matters of conscience the environment needs to be created within which dilemmas can be resolved satisfactorily. The conditions need to be safe for peer reporting and dissent to be expressed, and for appropriate responses to be formulated.
- Subscription to public service ethics for the senior public servant continues on leaving Public Service employment. Some aspects of duty persist beyond the normal term of a contract.

Section Four has been concerned with situations and issues that senior public servants will encounter in their personal and public life. The value of the discussion and comment will be determined not so much in direct guidance, but in providing a base for thinking about and debating predicaments and problems of an ethical nature.

Conclusion

This paper is concerned with principles, conventions and practice. Principles are bases for reasoning; conventions are about accepted or shared behaviours or ways of relating based on consent or agreement; and practice is concerned with actions as distinct from theory – what actually happens! But, the paper goes further than that and ventures into the field of ethics. It is about moral principles at a personal, professional, and organisational or administrative level. Ethics are about what ought to be rather than what might be justified; about right and wrong, and the use of discretion. Ethics derive from a variety of sources – the employment relationship, professional standards and values, constitutional and political conventions, law, the role of the organisation, and from within the individual practitioner. In that respect ethics are situational – not universal.

The aspects of the Public Service which distinguish it from nearly all other employment environments are to be found in:

- the crucial role it has as a link in the democratic system of government
- the inescapable political nature of the work it is expected to perform, yet in a politically impartial manner
- the trust reposed in it and all who hold office within its ranks.

It is true that departments are accountable for the efficient and effective provision of goods and service. At a different level the way they are produced, and the conduct and behaviour of those responsible for their production, contributes in significant ways to the confidence politicians and the public will have in the Public Service. The integrity and judgment displayed by senior managers will be crucial to maintaining confidence that public resources are in good hands.

APPENDIX 1

The New Zealand Public Service
STRIVING FOR EXCELLENCE IN SERVING NEW ZEALAND

Vision

The New Zealand Public Service will help New Zealand governments to achieve a higher quality of life, higher living standards, high employment, social equity and justice, a high quality natural environment and international respect as a member of the community of nations.

Purpose

The New Zealand Public Service, imbued with the spirit of service to the community, exists to advise the Government and implement the Government's policies and decisions to the highest possible standards of quality and with the utmost integrity in accordance with the principles of law and democracy thereby enhancing the well-being and prosperity of all New Zealanders.

Principles and Values

In an increasingly dynamic, diverse and technological world, the New Zealand Public Service should make a vital contribution to efficient and effective government. The New Zealand Public Service will:

Give free and frank advice to the government of the day, and inform and implement its decisions with intelligence, enthusiasm, energy, innovation and common sense

Demonstrate the qualities of leadership, sound judgment, fiscal responsibility and high ethical standards that attract the confidence and respect of the Government and the people of New Zealand

Establish and maintain an equitable and challenging working environment, both now and for the future, that is consistently able to respond to constant change, and trains, develops and motivates every public servant to perform to the highest levels of their ability

Ensure that people with professional management skills and the attributes of leaders are recruited and developed across the Public Service. This is to meet current and future Public Service-wide needs for high quality management and contribute to enhancing New Zealand's management resources overall

Ensure that every public servant demonstrates understanding of the collective interest of government and the special nature of the relationship between Parliament, the Crown and the Public Service in the need for apolitical, objective and professional policy advice and the custodianship of the nation's resources for future generations of New Zealanders

Act at all times within the true spirit of the law and work to maintain the stability and continuity required in a system with democratically elected government.

KO TE TOI O TE RANGI
TE TAUMATA WAIORANGA MŌ AOTEAROA

APPENDIX 2

Reference Material

Legislation

Constitution Act 1986

Electoral Act 1993

Employment Contracts Act 1991

Human Rights Act 1993

New Zealand Bill of Rights Act 1990

Official Information Act 1982

Ombudsman Act 1975

Privacy Act 1993

Public Finance Act 1975

Public Finance Act 1989

State Sector Act 1988

Codes of Conduct

State Services Commission (1990) *Public Service Code of Conduct*, Wellington

Relevant departmental and divisional codes of conduct

General Reference Material

(1994) *Cabinet Office Manual* (incorporating *Cabinet Directions for the Conduct of Crown Legal Business*, CO(93)5)

Crown Law Office (1989) *The Judge Over Your Shoulder: Judicial Review of Administrative Decisions*, Wellington

Standing Orders Relevant to Public Servants

A paper in the guidance series 'Public Service Principles, Conventions and Practice'

STATE SERVICES COMMISSION
Te Komihana O Ngā Tari Kawanatanga

First published in September 1995
by the State Services Commission, Wellington, New Zealand.

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STANDING ORDER	TITLE

PART VIII
SITTING AND ADJOURNMENT OF HOUSE

42. **Sitting days of House** – Unless otherwise ordered the sitting days of the House shall be Tuesday, Wednesday, and Thursday.

43. **Hours of meeting** – Unless otherwise ordered, and subject to the provisions hereinafter contained, the House shall meet at 2 pm and shall (unless previously adjourned) continue to sit until 5.30 pm when the Speaker or the Chairman of Committees shall interrupt the business then proceeding and the sitting shall be suspended until 7.30 pm, and the House shall (unless previously adjourned) then continue to sit until 10.30 pm.

STANDING ORDER	TITLE

PART XIII
ORDER OF BUSINESS

70. **Sittings of House on Tuesdays and Thursdays –** At a Tuesday or Thursday sitting of the House (or on any other day, other than a Wednesday, appointed by the House as a sitting day) the House shall proceed with its business in the following order:

1. Presentation of petitions:
2. Presentation of papers:
3. Questions for oral answer:
4. A debate on a definite matter of urgent public importance:
5. Presentation of select committee reports:
6. The order of the day for the debate on the Address in Reply:
7. Government orders of the day and Government notices of motion:
8. Orders of the day for the consideration of select committee reports:
9. Orders of the day for private bills:
10. Orders of the day for local bills:
11. Orders of the day for private members' bills:
12. Any other orders of the day.

71. **Sittings of the House on Wednesdays –** At a Wednesday sitting of the House the House shall proceed with its business in the following order:

1. Presentation of petitions:
2. Presentation of papers:
3. Questions for oral answer:
4. A debate on a definite matter of urgent public importance:
5. A general debate under Standing Order 95:
6. Presentation of select committee reports on private, local and private members' bills:
7. Orders of the day for private bills:
8. Orders of the day for local bills:
9. Orders of the day for private members' bills:
10. Private members' notices of motion:
11. Orders of the day for consideration of select committee reports:
12. Presentation of select committee reports:
13. Government orders of the day, Government notices of motion and the order of the day for the Address in Reply:
14. Any other orders of the day.

STANDING ORDER	TITLE
	Provided that on each alternate Wednesday presentation of select committee reports, Government orders of the day, Government notices of motion, and the order of the day for the Address in Reply shall be taken immediately after the general debate under Standing Order 95.

STANDING ORDER	TITLE

PART XIV
QUESTIONS TO MINISTERS AND MEMBERS

77. **Questions to Ministers –** Questions may be put to a Minister relating to public affairs with which the Minister is officially connected, or to proceedings in the House or any matter of administration for which the Minister is responsible.

79. **Certain questions not allowed –**

(1) Questions shall be concise and not contain-

(a) Statements of facts and names of persons unless they are strictly necessary to render the question intelligible and can be authenticated:

(b) Arguments, inferences, imputations, epithets, ironical expressions, expressions of opinion or hypothetical matter:

(c) Discreditable references to the House or any member thereof or any offensive or unparliamentary expressions.

(2) Questions shall not seek-

(a) An expression of opinion; or

(b) A legal opinion; or

(c) To ascertain Government policy on a matter too large to be dealt with in the limits of an answer to a question.

(3) Questions shall not refer to debates held in the current calendar year in the same session, proceedings in committee not open to the public that have not been reported to the House, or (subject to Standing Order 172) to a case pending adjudication by a court.

(4) Questions shall not repeat the substance of questions already answered, disallowed, or to which an answer has been refused in the same session, unless in the opinion of the Speaker it is reasonable that the question be asked again.

(5) In any case where it is found that any notice of a question does not comply with the provisions of the Standing Orders, such question shall not be placed upon the Order Paper or, if by inadvertence it appears thereon, it shall be expunged by order of the Speaker:

Provided always that the Speaker may allow any such notice to be placed or to remain upon the Order Paper after it has been revised or amended so as to comply with the Standing Orders.

STANDING ORDER	TITLE

83. **Questions of the day –**

(1) Notwithstanding Standing Order 81*, questions of the day addressed to Ministers for oral answer may be lodged for answer on the same day as notice is given.

(2) Notice of a question of the day shall be given by a member in writing by delivering the notice to the Clerk, between 10 am and 10.30 am on Tuesdays and between 9.30 am and 10 am on any other day, only on the day on which the question is to be answered.

(3) The first six questions of the day lodged on any day may be asked and answered that day before other questions for oral answer addressed to Ministers.

84. **Time for oral questions –**

(1) Oral questions shall be taken on each sitting day after presentation of papers.

(2) No question addressed to a Minister (except an urgent question) shall be asked after 45 minutes have been spent on questions for oral answer.

85. **How question for oral answer asked –** When a question for oral answer is called by the Speaker, the member in whose name it stands upon the Order Paper shall, when rising to ask it, indicate the Minister or member to whom it is addressed and shall read the question to the House, whereupon the Speaker shall call upon the Minister or member to give the reply.

87. **Replies to questions –**

(1) The reply to any question shall be concise and confined to the subject-matter of the question asked, and shall not contain –

(a) Statements of facts and the names of any persons unless they are strictly necessary to answer the question:

(b) Arguments, imputations, epithets, ironical expressions:

(c) Discreditable references to the House or any member thereof of any offensive or unparliamentary expression.

(2) Replies shall not refer to debates held in the current calendar year in the same session, proceedings in committee not open to the public that have not been reported to the House, or (subject to Standard Order 172) to a case pending adjudication by a court.

88. **Supplementary questions –** At the discretion of the Speaker supplementary questions to elucidate an answer may be asked by any member to elucidate or clarify a matter raised in a question or in an answer given to a question.

* Standing Order 81 determines when notices of oral questions shall be given.

STANDING ORDER	TITLE

89. **Questions not reached before expiry of question period –** Any oral questions addressed to Ministers which have not been reached at the expiry of the time provided in Standing Order 84 (2) shall be answered in writing by 5.30 pm that day.

90. **Urgent questions –**

(1) Notwithstanding Standing Order 81, any member desiring to ask a question without notice on the ground of urgency in the public interest shall furnish to the Clerk a copy of such proposed question marked “urgent question”, and shall also furnish a copy to the Minister to whom it is intended to address such question.

(2) After questions for oral answer addressed to Ministers have been taken the Speaker (if the proposed question is one which in the public interest the Speaker considers should be answered immediately) shall state its nature to the House, whereupon such member may forthwith ask such question.

(3) The Speaker may permit the member asking a question under this Standing Order to ask one supplementary question.

91. **Replies to questions for written answer –**

(1) A reply to a question for written answer shall be given by delivering it to the Clerk together with a copy to be supplied to the member who asked the question.

(2) The reply shall be furnished to the Clerk for delivery to the member not later than the fifth working day following the first appearance of the notice of the question on a notice paper.

STANDING ORDER	TITLE

PART XVII
PAPERS

96. **Presentation of papers –**

(1) Papers may be presented to the House by a Minister delivering them to the Clerk before the House meets on any sitting day. Papers delivered to the Clerk by Ministers shall be deemed to be tabled at the moment the House meets.

(2) In respect of papers which have been presented by Ministers that day and which it is desired to print for permanent record in the Appendices to the Journals, the Clerk shall at the time for presentation of papers read out to the House a list of such papers.

STANDING ORDER	TITLE

PART XXIV
RULES OF DEBATE

164. **Quoting documents –** A document relating to public affairs quoted from by a Minister, unless stated to be of a confidential nature, shall, if required by any member, be laid upon the Table.

172. **Matters awaiting judicial decision –**

(1) Subject always to the discretion of the Speaker and to the right of the House to legislate on any matter, matters awaiting or under adjudication in any court of record shall not be referred to-

(a) In any motion (including a motion for leave to introduce a bill); or

(b) In any debate; or

(c) In any question, including a supplementary question, – from the time that the case has been set down for trial or otherwise brought before the court, if it appears to the Speaker that there is a real and substantial danger of prejudice to the trial of the case.

(2) This Standing Order shall have effect,-

(a) In relation to a criminal case, from the moment the law is set in motion by a charge being made:

(b) In relation to cases other than criminal, from the time when proceedings have been initiated by the filing of the appropriate document in the registry or office of the court.

(3) This Standing Order shall cease to have effect in any case when the verdict and sentence have been announced or judgment given.

(4) In any case where notice of appeal is given, this Standing Order shall have effect from the time when the notice is given until the appeal has been decided.

175. **Ministerial statements –**

(1) A statement may be made by a Minister informing the House of some matter of significant public importance which requires to be brought to the House's attention immediately.

(2) A ministerial statement may be made at any time but not so as to interrupt a member who is speaking. The statement shall not exceed five minutes without the leave of the House. Wherever possible a copy of the statement shall be delivered to the Leader of the Opposition before it is made.

STANDING ORDER	TITLE

(3) The Leader of the Opposition may comment for up to five minutes on a ministerial statement. No other member shall be entitled to speak, except that the Minister who made the statement may reply to matters raised. The Minister's reply shall not exceed two minutes.

(4) A ministerial statement, any comment thereon, and a reply, shall be concise and not contain any argument or controversial matter.

STANDING ORDER	TITLE

PART XXVI
PUBLIC BILLS

211. **How initiated –** A Government bill may be presented to the House by a Minister as follows:

(a) On a Tuesday or Thursday (or any other day, other than a Wednesday, appointed by the House as a sitting day), after the conclusion of questions for oral answer:

(b) On a Wednesday on which Government business takes precedence of private members' business, after the conclusion of the general debate provided for in Standing Order 95:

(c) On any other Wednesday, after the later of the resumption of the sitting at 7.30 pm or the conclusion of the general debate provided for in Standing Order 95.

212. **Copies of bill to be laid on Table –**

(1) On receiving advice that a Government bill is to be introduced, the Clerk shall cause copies thereof to be laid upon the Table.

(2) Copies of a bill laid upon the Table under paragraph (1) above shall be for the information of members only, until the Minister moves to introduce the bill.

(3) This Standing Order shall not apply to an Appropriation Bill or an Imprest Supply Bill.

213. **Time limits on debate on introduction –** The debate on the question that a bill be introduced shall not exceed two hours. This time shall be divided equally between the Government and the Opposition and no member shall be restricted as to the number of speeches. The Minister when moving the motion and the Opposition member when first speaking thereto may speak without limit. Other members may speak for 10 minutes, but any member's second or subsequent speech shall not exceed five minutes.

214. **Debate on introduction –** The Minister, when moving the introduction of a bill, shall indicate which select committee it is proposed to nominate to consider the bill and whether it is proposed to limit or extend the committee's order of reference in respect of the bill.

215. **First reading –** When a bill has been introduced it shall be read a first time without any question being put.

STANDING ORDER	TITLE

216. **New Zealand Bill of Rights –**

(1) Whenever a bill contains any provision which appears to the Attorney-General to be inconsistent with any of the rights and freedoms contained in the New Zealand Bill of Rights Act 1990, then,-

(a) In the case of a Government bill, before the question that the bill be introduced is decided; or

(b) In the case of any other bill, within 12 sitting days of the bill's introduction or immediately before its second reading is moved if this is sooner,-

the Attorney-General shall indicate to the House what that provision is and how it appears to be inconsistent with the New Zealand Bill of Rights Act 1990.

(2) Any indication by the Attorney-General to the House under paragraph (1) above may be made by a brief statement alone or partly by a brief statement and partly by laying on the Table a report.

217. **Reference of Government bills and private members' bills to select committees**

(1) Every Government bill and every private member's bill shall stand referred for consideration by a select committee after its first reading.

(2) The Minister or member in charge of a bill shall, immediately after its first reading, move a motion nominating a select committee to consider the bill. Subject to paragraph (3) below, such a motion may limit or extend the committee's order of reference in respect of the bill, and shall be put forthwith without debate.

(3) An amendment to substitute another select committee for the committee nominated in the Minister's motion or to alter the proposal to limit or extend the committee's order of reference in respect of the bill may be moved (but not debated) if such an amendment has been handed in at the Table before the conclusion of the debate on the introduction of the bill.

(4) This Standing Order and Standing Order 214 shall not apply to-

(a) An Appropriation Bill; or

(b) An Imprest Supply Bill; or

(c) Any bill for the passing of which the House has, on an appropriate resolution, accorded urgency.

218. **Bills set down for second reading –** Every bill shall, following the conclusion of the proceedings on the presentation of the report of a select committee on it, or, where the bill is not referred to a select committee, following its first reading, be set down for second reading on the next sitting day:

STANDING ORDER	TITLE

Provided that no private member's bill which proposes the appropriation of any public money may be set down for second reading unless a Message from the Governor-General recommending such appropriation in accordance with Standing Order 308 has been announced, or a Minister has informed the House that such a Message will be forthcoming.

219. **Second reading –** On the order of the day being read for the second reading of a bill, a motion may be made and a question proposed, that the bill be now read a second time.

222. **Time limit of speech on second reading –** Subject to the provisions of these Standing Orders in respect of particular bills, in the debate on the motion for the second reading of a bill the first two members to speak in the debate shall be entitled to speak for up to 20 minutes. No other member shall be entitled to speak for more than 15 minutes:

Provided that the time limit may be waived if the total duration of the debate on the second reading of any bill has been agreed upon by the Whips.

224. **Order of business observed on bill in committee –** Subject to Standing Order 225, the following order shall be observed in considering a bill in committee:

1. Clauses as printed and new clauses in their numerical sequence:
2. Postponed clauses:
3. Schedules and new schedules in their numerical sequence:
4. Preamble:
5. Amendment to Title (where necessary)-

and in reconsidering the bill upon recommittal of the whole bill the same order shall be followed:

Provided that in considering an Appropriation Bill containing the main Estimates the schedules expressing the services and purposes shall be considered before the clauses, and, unless the committee otherwise orders, the Votes in the schedules shall be taken in such order as may be determined by the Leader of the House.

229. **Amendments may be placed on Supplementary Order Paper –** It shall be competent for any member desiring to propose amendments to a bill while going through the committee of the whole House on such bill, to lodge a written copy of such proposed amendments with the Clerk, and such proposed amendments shall thereupon be placed forthwith upon a Supplementary Order Paper, and on such Supplementary Order Paper being circulated each amendment shown thereon shall take precedence over other amendments at the same place, except those with respect to which a written copy has been lodged earlier with the Clerk and those of the member in charge of the bill.

STANDING ORDER	TITLE

234. **Committee may divide bill –**

(1) A committee of the whole House may divide into two or more separate bills any bill which -

(a) Is drafted in Parts; or

(b) Lends itself to division because it comprises more than one subject matter,-

and in respect of which a Supplementary Order Paper notifying the intention to move from division of the bill into separate bills has been circulated.

(2) The Supplementary Order Paper shall show how it is proposed to divide up the bill, setting out the Title, enacting words, and the Short Title clause for each new bill.

(3) A motion to divide a bill into separate bills, as set out on the Supplementary Order Paper, shall be moved after the bill has been fully considered by the committee.

242. **Time limit of speech on third reading –** On a motion for the third reading of a bill no member may speak for more than 10 minutes.

Provided that the time limit may be waived if the total duration of the debate on the third reading of any bill has been agreed upon by the Whips.

243. **Recommittal of bill –**

(1) The order of the day for the third reading of a bill may be read and discharged, and the bill ordered to be recommitted.

(2) There shall be no debate on a motion to recommit a bill other than a brief statement from the mover of the reasons for the proposed recommittal.

246. **Bills passed to be printed fair, authenticated, and presented for Royal assent –** When a bill has been passed it shall be printed fair, by direction of the Clerk, who shall authenticate two prints thereof and shall present them to the Governor-General for the Royal assent.

STANDING ORDER	TITLE

PART XXXI
PUBLIC EXPENDITURE AND TAXATION

315. **Reports by select committees –**

(1) Following the delivery of the Financial Statement, the Estimates shall stand referred to the Finance and Expenditure Committee for examination by that committee or by any select committee to which they may be allocated pursuant to Standing Order 345.

(2) Each select committee must finally report to the House on such Estimates allocated to it for examination (or, in the case of the Finance and Expenditure Committee, retained by it for examination) by 30 September in that year.

316. **Passing of Estimates –**

(1) Twenty hours, divided equally between the Government and the Opposition, shall be allocated each financial year to the passing of the Estimates (other than any supplementary Estimates). This time must be spent within the hours of meeting prescribed in Standing Order 43.

(2) The Government may select any day (other than a Wednesday on which private members business takes precedence) for discussing Estimates. On any day so selected, the Appropriation Bill shall be set down as an order of the day for consideration in committee and take precedence of all other Government orders of the day.

(3) In discussing the Estimates, the question that a Vote stand part of a schedule to the Appropriation Bill (and any question which it is requisite to put to bring such a question to a decision) shall be put forthwith from the Chair whenever, following a speech by the Minister in charge of the Vote under consideration, no member other than a Government member rises desiring to speak.

(4) Any items in the schedules to the Appropriation Bill that have not been agreed to at the expiration of the time allocated to the total debate shall be proposed from the Chair as one question that such items be agreed to and such question shall be decided forthwith without amendment or debate.

320. **Select committee examination –** Following the introduction of any Appropriation Bill containing further Estimates (Supplementary Estimates), those Estimates

STANDING ORDER	TITLE

shall stand referred to the Financial and Expenditure Committee for examination by that committee or by any select committee to which they may be allocated pursuant to Standing Order 345.

321. Consideration of Supplementary Estimates –

(1) The question for the introduction of an Appropriation Bill containing Supplementary Estimates shall be put without amendment or debate.

(2) Five hours shall be allocated to the passing of an Appropriation Bill containing Supplementary Estimates. This time must be spent within the hours of meeting prescribed in Standing Order 43.

(3) If the House is considering Supplementary Estimates in committee at the expiration of the five hours allowed by this Standing Order, any questions outstanding shall be put in the manner described in Standing Order 316(4) together with any amendments already notified on a Supplementary Order Paper.

322. Appropriation Bill (financial review) –

(1) There may be introduced before 31 March in any year an Appropriation Bill containing provisions solely concerned with the sanctioning of expenditure incurred in respect of any previous financial year (hereinafter referred to as an Appropriation Bill (financial review)).

(2) The question for the introduction of an Appropriation Bill (financial review) shall be put without amendment or debate.

(3) All consideration of an Appropriation Bill (financial review) shall take place within the hours of meeting prescribed in Standing Order 43).

323. Debate on Crown's financial position –

(1) On the second reading of an Appropriation Bill (financial review), a debate will be held on the Crown's financial position as reflected in the report from the Finance and Expenditure Committee on the annual financial statements of the Crown for the previous financial year.

(2) The total time allowed for the debate shall not exceed three hours. This time is to be divided equally between the Government and the Opposition.

324. Financial review debate –

(1) Consideration in committee of the Appropriation Bill (financial review) shall be the financial review debate. The financial review debate is a consideration of the performance of departments and Offices of Parliament in the previous financial year.

STANDING ORDER	TITLE

(2) Ten hours shall be allocated each financial year for the financial review debate. This time is to be divided equally between the Government and the Opposition. At the end of the debate, the outstanding questions shall be put in the manner described in Standing Order 316(4) together with any amendments already notified on a Supplementary Order Paper.

325. Selection of departments for debate –

(1) The Government may select any day (other than a Wednesday on which private members' business takes precedence) to hold a financial review debate. On a day so selected, the Appropriation Bill (financial review) shall be set down as an order of the day for consideration in committee and take precedence of all other Government orders of the day.

(2) Before the House meetings on the sitting day preceding the day on which a financial review debate is to be held, the Government shall advise the Leader of the Opposition of how long in total is to be spent on the financial review debate next sitting day and which departments or Offices of Parliament are to be considered on that day.

(3) The Leader of the Opposition is to determine which departments or Offices of Parliament are to be debated and how long is to be spent on each of them. This information is to be advised to the Clerk by 5.30 pm on the sitting day preceding the day on which the financial review debate is to be held and to be included on the Order Paper for the day on which the debate is to be held.

326. Proceedings during financial review debate –

(1) During a financial review debate, the time spent in discussion on each department or Office of Parliament as determined by the Leader of the Opposition shall be divided equally between the Government and the Opposition. Any time not used for discussing a department or Office of Parliament shall not be available for subsequent use.

(2) As each department or Office of Parliament is reached, the Chairman of Committees will propose as the question, that the select committee's report on the financial review of the department or Office of Parliament be noted.

(3) Where a department or Office of Parliament has not been selected for debate by the Leader of the Opposition, the question proposed from the Chair shall be put forthwith without amendment or debate.

(4) Where a department or Office of Parliament has been selected for debate by the Leader of the Opposition, the Chairman of the select committee which reported on it (or, in the Chairman's absence, another member of the select committee) may speak first in the debate. The first two members speaking in the debate shall be entitled to speak for up to ten minutes each.

STANDING ORDER	TITLE

(5) When all departments or Offices of Parliament to be considered on that day have been dealt with, the Chairman of Committees shall report progress and ask for leave to sit again.

328. Allocation of responsibility for conducting financial reviews –

(1) As soon after the commencement of the financial year as it thinks fit, the Finance and Expenditure Committee shall allocate to a select committee (or decide to retain for itself) the task of conducting a financial review of the performance of each individual department and Office of Parliament in the previous financial year.

(2) The annual report of each department and Office of Parliament shall, following its presentation to the House, stand referred to the select committee which is conducting a financial review of the performance of that department or Office of Parliament.

329. Select committees to conduct financial reviews –

(1) Each select committee shall, on or before 31 March in the following year, conduct, and finally report to the House on, a financial review of every department and Office of Parliament for which it is responsible.

(2) The Finance and Expenditure Committee shall, on or before 31 March each year (in addition to any reports it is required to make under paragraph (1) above), make a report to the House on the annual financial statements of the Crown as at the end of the previous financial year.

STANDING ORDER	TITLE

PART XXXIII
SELECT COMMITTEES

345. **Select committees to be appointed –** In addition to any requirements set out elsewhere in these Standing Orders to appoint other committees, the following select committees with the terms of reference specified herein shall be appointed at the commencement of each Parliament:

(1) Commerce Committee,-

(a) To consider any bill, petition or other matter referred by the House or pursuant to these Standing Orders; and such Estimates or review of departmental performance as may be referred by the Finance and Expenditure Committee:

(b) To examine the policy, administration and expenditure of departments and associated non-departmental government bodies related to commerce, communications, customs, energy, regional development and tourism:

(2) Education and Science Committee,-

(a) To consider any bill, petition or other matter referred by the House or pursuant to these Standing Orders; and such Estimates or review of departmental performance as may be referred by the Finance and Expenditure Committee:

(b) To examine the policy, administration and expenditure of departments and associated non-departmental government bodies related to education, science and technology:

(3) Finance and Expenditure Committee,–

(a) To consider any bill, petition or other matter referred by the House or pursuant to these Standing Orders; and any Estimates or review of departmental performance:

(b) To allocate to any other select committee the examination of any Estimates and of any review of departmental performance:

(c) To examine the policy, administration and expenditure of departments and associated non-departmental government bodies related to government finance superannuation, insurance and trustee functions and the auditing of the Crown Bank Account and Departmental Bank Account:

(d) To have responsibility for the overall review of financial management in all government departments and other public bodies:

STANDING ORDER	TITLE

(e) To examine and report on the Crown's annual financial statements and the report of the Controller and Auditor-General on the Crown's annual financial statements:

(4) Foreign Affairs and Defence Committee,-

(a) To consider any bill, petition or other matter referred by the House or pursuant to these Standing Orders; and such Estimates or review of departmental performance as may be referred by the Finance and Expenditure Committee:

(b) To examine the policy, administration and expenditure of departments and associated non-departmental government bodies related to external relations, defence and trade:

(5) Government Administration Committee,-

(a) To consider any bill, petition or other matter referred by the House or pursuant to these Standing Orders; and such Estimates or review of departmental performance as may be referred by the Finance and Expenditure Committee:

(b) To examine the policy, administration and expenditure of departments and associated non-departmental government bodies related to central government advisory services, security intelligence, statistics and services to Parliament:

(c) To have responsibility for the overall review of administration and management in government departments and other government bodies:

(6) Internal Affairs and Local Government Committee,-

(a) To consider any bill, petition or other matter referred by the House of pursuant to these Standing Orders; and such estimates or review of departmental performance as may be referred by the Finance and Expenditure Committee:

(b) To consider local bills:

(c) To examine the policy, administration and expenditure of departments and associated non-departmental government bodies related to internal affairs and local government:

(7) Justice and Law Reform Committee,-

(a) To consider any bill, petition or other matter referred by the House or pursuant to these Standing Orders; and such Estimates or review of departmental performance as may be referred by the Finance and Expenditure Committee:

(b) To consider private bills;

STANDING ORDER	TITLE

(c) To examine the policy, administration and expenditure of departments and associated non-departmental government bodies related to Crown legal services, official information, information privacy, justice, police and serious fraud:

(8) Labour Committee,-

(a) To consider any bill, petition or other matter referred by the House or pursuant to these Standing Orders; and such Estimates or review of departmental performance as may be referred by the Finance and Expenditure Committee:

(b) To examine the policy, administration and expenditure of departments and associated non-departmental government bodies related to employment, immigration and labour:

(9) Maori Affairs Committee,-

(a) To consider any bill, petition or other matter referred by the House or pursuant to these Standing Orders; and such Estimates or review of departmental performance as may be referred by the Finance and Expenditure Committee:

(b) To examine the policy, administration and expenditure of departments and associated non-departmental government bodies related to Maori affairs:

(10) Planning and Development Committee,-

(a) To consider any bill, petition or other matter referred by the House or pursuant to these Standing Orders; and such Estimates or review of departmental performance as may be referred by the Finance and Expenditure Committee:

(b) To examine the policy, administration and expenditure of departments and associated non-departmental government bodies related to conservation, environment, surveying, land information, valuation, and construction and development work:

(11) Primary Production Committee,-

(a) To consider any bill, petition or other matter referred by the House or pursuant to these Standing Orders; and such Estimates or review of departmental performance as may be referred by the Finance and Expenditure Committee:

(b) To examine the policy, administration and expenditure of departments and associated non-departmental government bodies related to agriculture, fishing and forestry:

STANDING ORDER	TITLE

(12) Social Services Committee,-

(a) To consider any bill, petition or other matter referred by the House or pursuant to these Standing Orders; and such Estimates or review of departmental performance as may be referred by the Finance and Expenditure Committee:

(b) To examine the policy, administration and expenditure of departments and associated non-departmental government bodies related to health, housing and social welfare:

(13) Transport Committee,-

(a) To consider any bill, petition or other matter referred by the House or pursuant to these Standing Orders; and such Estimates or review of departmental performance as may be referred by the Finance and Expenditure Committee:

(b) To examine the policy, administration and expenditure of departments and associated non-departmental government bodies related to transport and roading.

346. **Officers of Parliament Committee –**

(1) At the commencement of each Parliament, a select committee, to be known as the Officers of Parliament Committee, shall be appointed, consisting of the Speaker and six other members. The Speaker shall be the Chairman of the committee.

(2) The Officers of Parliament Committee shall –

(a) Recommend to the House in respect of each Office of Parliament an estimate of expenditure or costs to be incurred in respect of classes of outputs and an estimate of the capital contribution to be made for inclusion as a Vote in an Appropriation Bill, and also recommend to the House any alteration to such a Vote:

(b) Consider such Estimates or review of an Office of Parliament's performance as may be referred to it by the Finance and Expenditure Committee:

(c) Recommend to the House an auditor to be appointed by the House to audit the financial statements of each Office of Parliament:

(d) Consider and report to the House on any annual report or other report of an Officer of Parliament referred by the House:

(e) Consider any proposal referred to it by a Minister for the creation of an Officer of Parliament:

(f) Develop a code of practice applicable to all Officers of Parliament.

(3) The Officers of Parliament Committee may allocate to any select committee appointed pursuant to Standing Order 345 any annual report or other report of an Officer of Parliament for consideration and report to the House.

STANDING ORDER	TITLE

350. **Power to send for persons, papers and records –** All select committees shall have power to send for persons, papers and records.

351. **Attendance while evidence being heard –**

(1) The proceedings of all select committees during the hearing of evidence on the bill or other matter which is the subject of investigation by the committee shall be open to the public in accordance with the provisions of this Standing Order.

(2) In respect of the proceedings of a committee which are open to the public under paragraph (1) of this Standing Order,-

(a) Any stranger, witness, or accredited representative of the news media who is guilty of disorderly conduct may be ordered to withdraw from the meeting by the Chairman:

(b) All strangers, witnesses and accredited representatives of the news media may, with the leave of the committee, be excluded from the meeting on the ground that it is desirable that some or all of the evidence to be given should be heard in private.

364. **Proceedings not to be published or divulged –** Subject to Standing Order 365, the proceedings or the report of a select committee or a subcommittee or any summary of such proceedings or report shall be strictly confidential and shall not be published or divulged by any member of the committee or the subcommittee or by any other person, until a report has been presented to the House in respect of such matters.

365. **Exceptions to non-publication of proceedings –** Standing Order 364 does not apply to –

(a) Any part of the proceedings of a committee that are open to the public:

(b) Any evidence presented to a committee (except evidence presented at a meeting of a committee held in private pursuant to Standing Order 351 (2) (b) or secret evidence presented pursuant to Standing Order 367):

(c) Any press release or public statement made by a Chairman of a committee or subcommittee with a view to informing the public of the nature of its inquiry:

(d) The publication or divulging of any proceedings by a committee or a subcommittee to any person for comment for the purpose of assisting the committee or subcommittee in its inquiries

(e) The publication or divulging of any proceedings, report or summary to any person or persons entrusted by the committee or by any

STANDING ORDER	TITLE

member of the committee with the execution of any clerical work or printing, or to the Speaker, a member of the House, or, if it be necessary in the course of their duties, to the Clerk or other officers of the House.

366. **Divulging proceedings a contempt –** Any person divulging the proceedings or the report of a select committee or a subcommittee contrary to Standing Order 364 commits a contempt of the House.

367. **Secret evidence –**

(1) When a select committee considers that information which it wishes to obtain can only be obtained if it can assure the witness or other person in possession of that information that evidence given to it will remain confidential, it may, by leave of the committee, declare such evidence to be secret evidence.

(2) Secret evidence may be delivered into the custody of the Clerk but shall not be disclosed to any other person by the committee or by any member of the committee or by any other person, even after the presentation of the committee's report, unless the House expressly orders such disclosure.

377. **Government responses to select committee reports –**

(1) The Government shall, not more than 90 days after a report from a select committee has been laid upon the Table, present a paper to the House responding to any recommendations contained in the report which are addressed to it.

(2) This Standing Order does not apply in respect of select committee reports on bills, petitions, questions of privilege, Estimates, financial reviews, or reports made pursuant to Standing Order 331.*

(3) If the period of 90 days referred to in this Standing Order expires on a day when Parliament is in recess or the House is adjourned, the paper responding to the recommendations shall be presented no later than the third sitting day following that recess or adjournment.

386. **Conduct of examination –**

(1) The examination of witnesses shall be conducted –

(a) Before the House as the Speaker, with the approval of the House, directs;

* Standing Order 330 provides for the annual report of a State enterprise or public organisation to be reviewed by a select committee within 6 months of the report being tabled.

STANDING ORDER	TITLE

(b) Before a committee of the whole House as the Chairman of Committees, with the approval of the committee, directs; and

(c) Before a select committee as the Chairman, with the approval of the select committee, directs.

(2) The Speaker or the Chairman, and every member through the Speaker or the Chairman, may put questions to any witness.

STANDING ORDER	TITLE

PART XXXIII
PETITIONS

410. **Petitions referred to Government –** In all cases where the House has agreed to the motion of the Chairman of any select committee that its report upon any petition be referred to the Government, the Government shall report to the House not later than 28 days after the commencement of the next ensuing session what action, if any, it has taken to implement any such a recommendation made during the previous session.

STANDING ORDER	TITLE

PART XXXVI
DELEGATED LEGISLATION

412. **Regulations Review Committee –**

(1) At the commencement of each Parliament, a select committee, to be known as the Regulations Review Committee, shall be appointed.

(2) All regulations shall stand referred to the Regulations Review Committee for investigation by the committee.

(3) In addition to the committee's functions under paragraph (2) above,-

(a) Any draft regulations may be referred to the committee by a Minister for the committee, if it sees fit, to report thereon to the Minister.

(b) Any regulation-making power in a bill under consideration by another select committee by the Regulations Review Committee.

(c) The committee may bring any other matter relating to regulations to the notice of the House.

413. **Grounds for drawing attention to regulation –**

(1) In respect of every regulation which stands referred to the Regulations Review Committee, the committee shall determine whether or not to draw the special attention of the House to the regulation on the grounds that the regulation –

(a) Is not in accordance with the general objects and intentions of the statute under which it is made:

(b) Trespasses unduly on personal rights and liberties:

(c) Appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made:

(d) Unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal:

(e) Excludes the jurisdiction of the courts without explicit authorisation in the enabling statute:

(f) Contains matter more appropriate for parliamentary enactment:

(g) Is retrospective where this is not expressly authorised by the empowering statute:

(h) Was not made in compliance with particular notice and consultation procedures prescribed by statute:

(i) For any other reason concerning its form or purport, calls for elucidation.

STANDING ORDER	TITLE

(2) The committee may, in its discretion, call for submissions to assist it in its consideration of any regulation.

414. **Procedure where complaint made concerning regulation –**

(1) In any case where a complaint is made to the Regulations Review Committee or to the Chairman of the committee by some person or organisation aggrieved at the operation of a regulation, the complaint shall be placed before the committee at its next meeting.

(2) Unless the committee decides, by leave, to proceed no further with the complaint, the person or organisation which made the complaint shall be given an opportunity to address the committee on the regulation and the committee may, in its discretion, call for submissions on the regulation and the matters raised in the complaint and on any other related matters.

STANDING ORDER	TITLE

PART XL
STRANGERS

433. **Stranger interrupting business guilty of contempt –** Any stranger who wilfully or vexatiously interrupts the orderly conduct of the business of the House or of any committee thereof shall be held guilty of contempt.

STANDING ORDER	TITLE

PART XLI
PARLIAMENT HOUSE

435. **Control and administration of Parliament House –** The control and administration of the whole of the parliamentary grounds and the buildings and other improvements thereon shall be vested in the Speaker on behalf of the House, whether Parliament is in session or otherwise.

436. **Service of legal process within precincts –**

(1) Any person who, within the precincts of Parliament, serves or causes to be served, or attempts to serve or cause to be served, any summons or process out of any court on any member or officer of the House, without the authority of the House or the Speaker, on any day on which the House or a committee of the House sits or meets (whether or not the House or committee was sitting or meeting at the time of service or attempted service) commits a contempt of the House.

(2) The precincts of Parliament are those areas which, pursuant to these Standing Orders or to any other order of the House, are under the control and administration of the Speaker on behalf of the House.

TABLE OF TIME LIMITS OF SPEECHES

The following table sets out the time limits shown in the Standing Orders for speeches on different proceedings in the House and in committees of the whole House. The number in the margin refers to the particular Standing Order.

IN THE HOUSE

	Subject	Time
S.O. 11	Election of Speaker -	
	Each member	5 minutes
S.O. 24	Address in Reply -	
	Mover and seconder	30 minutes
	Leader of the Opposition and Prime Minister	No limit
	Other members	20 minutes
	Mover in reply	20 minutes
S.O. 93	Motion to take note of definite matter of urgent public importance -	
	Mover	15 minutes
	First member speaking	15 minutes
	Any other member	10 minutes
	Whole debate	2 hours
S.O. 95	General debate on Wednesdays -	
	Each member	10 minutes
	Whole debate	2 hours
S.O 191	Debates not otherwise provided for -	
	Each member	10 minutes
S.O. 210	Introduction of private members' bill, local bills and private bill -	
	Member moving, and member next speaking	15 minutes
	Other members	10 minutes
	Whole debate	2 hours
S.O. 213	Introduction of Government bills -	
	Minister and Opposition member first speaking	No limit
	Other members	10 minutes first speech, 5 minutes subsequent speeches
	Whole debate	2 hours

S.O. 222	Second reading of bill -	
	First two members	20 minutes
	Other members	15 minutes
S.O. 242	Third reading of bill -	
	Each member	10 minutes
S.O. 310	Resolutions relating to tax -	
	Minister in charge	5 minutes (no limit as to number of speeches)
	Other members	Four speeches of 5 minutes
S.O. 311	Imprest Supply Bill -	
	On second reading -	
	Each member	15 minutes
	Whole debate	4 hours
S.O. 314	Financial Statement -	
	Minister delivering, Leader of Opposition on first speaking and Minister or Government member following	No limit
	Other members and Minister in reply	20 minutes
S.O. 323	Appropriation Bill (financial review) -	
	On second reading -	
	Whole debate	3 hours, divided equally between Government and Opposition
S.Os. 375, 376	Report of select committee on bill *and* consideration of select committee report -	
	First two members	10 minutes
	Other members	5 minutes
	Whole debate	1 hour

	Subject	Time
S.O. 409	Report of select committee on petition -	
	If no recommendation -	
	Each member	5 minutes
	Whole debate	1 hour
	If recommendation -	
	Member presenting petition	Brief thanks
	If recommendation and rider -	
	Member presenting petition	5 minutes

EXTENSION OF TIME LIMIT OF SPEECH

S.O. 193	Extension	Not to exceed half of the original period allowed under Standing Orders

IN COMMITTEE OF THE WHOLE HOUSE

Short Title

S.O. 295	Short Title of bill or any amendment thereto -	
	Each member	Three speeches of 5 minutes
S.Os. 295, 316	Estimates -	
	Each member	Two speeches of 5 minutes
	Whole debate	20 hours
S.Os. 295, 321	Supplementary Estimates -	
	Each member	Two speeches of 5 minutes
	Whole debate	5 hours
S.O. 295	Motion to reduce Vote -	
	Each member	Two speeches of 5 minutes

	Subject	Time
S.Os. 324-326, 332-334	Financial review and review of State enterprises and public organisation - On each department or Office of Parliament or each State enterprise or public organisation -	
	Select committee chairman (or other committee member) and next member speaking	10 minutes first speech, 5 minutes subsequent speech
	Other members	Two speeches of 5 minutes
	Each debate	As advised by 5.30 pm preceding day by Leader of the Opposition. Time divided equally between Government and Opposition
	Whole debate	10 hours each financial year, divided equally between Government and Opposition

Other questions

S.O. 295	Any other question before the committee	
	Each member	Four speeches of 5 minutes

Exceptions: These limitations in committee do not apply to a member or Minister in charge of a bill or a Vote.